STATE OF NORTH CAROLINA	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION
COUNTY OF WAKE	FILE NO. 20 CVS 09542

ROY A. COOPER, III, in his official capacity as GOVERNOR OF THE STATE OF NORTH CAROLINA,

Plaintiff,

v.

PHILIP E. BERGER, in his official capacity as PRESIDENT PRO TEMORE OF THE NORTH CAROLINA SENATE; TIMOTHY K. MOORE, in his official capacity as SPEAKER OF THE NORTH CAROLINA HOUSE OF REPRESENTATIVES; and THE STATE OF NORTH CAROLINA,

Defendants.

BRIEF OF *AMICI CURIAE* IN SUPPORT OF PLAINTIFF

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BRIEF OF *AMICI CURIAE* CAPE FEAR RIVER WATCH, CAROLINA WETLANDS ASSOCIATION, CLEANAIRE NC, DEMOCRACY GREEN, HAW RIVER ASSEMBLY, MOUNTAINTRUE, NORTH CAROLINA BLACK ALLIANCE, NORTH CAROLINA COASTAL FEDERATION, SOUND RIVERS, AND WEST END REVITALIZATION ASSOCIATION IN SUPPORT OF PLAINTIFF GOVERNOR ROY A. COOPER

INTRODUCTION AND STATEMENT OF INTEREST

North Carolina's administrative agencies provide an important mechanism for the Governor to faithfully execute the duly promulgated laws of our state by adopting detailed regulations. They do so by engaging in complex rulemaking processes that include conducting thorough studies and incorporating input from the public, and a range of specialists including the regulated community.

Amici are ten nonprofit organizations whose missions center on securing clean air, clean water, thriving ecosystems, and environmental justice for all North Carolinians. *Amici* represent advocacy from the remote wilds of the North Carolina mountains, to the urban cores of our Piedmont cities, to the reaches of our coastal plains. They engage in advocacy before North Carolina's state agencies, including by participating in the rulemaking process to advance policies in line with their interests. *Amici* have advocated or are currently advocating for proposed rules that must be approved by the Rules Review Commission ("RRC") in order to go into effect. Specifically, a*mici* have advocated for passage of a numeric 1,4-dioxane standard for surface waters, a permitting regime for wetlands that the state has an obligation to protect, a statewide E. coli water quality standard, the adoption of rules to enter the state into the Regional Greenhouse Gas Initiative, and the adoption of the Advanced Clean Trucks Rule to reduce polluting emissions into the State's air.

These groups have seen their efforts to protect North Carolina's environment thwarted by RRC objections to proposed rules, and by the chilling effect that

frequent, unfounded objections have on the rulemaking process. Full details of *Amici's* concerns about individual rules are further detailed in their motion to file an amicus brief.

Amici are concerned that an RRC comprised solely of legislative appointees puts an unconstitutional barrier in place that prevents the Governor from fulfilling his or her duty to faithfully execute laws and protect the people of North Carolina through the expertise of his or her administrative agencies. *Amici* support Governor Cooper's request to this Court for a declaratory judgment declaring the current composition of the RRC unconstitutional.

ISSUE PRESENTED

Does an RRC that is composed of members exclusively appointed by the legislature, and that has power to prevent executive rules from being adopted and implemented, prevent the Governor from fulfilling his or her constitutional duty to faithfully execute the laws and thus violate the separation of powers clause in the North Carolina Constitution?

ARGUMENT

I. Rulemaking is essential to the people of North Carolina

The Governor of North Carolina has a constitutional obligation to ensure the laws are faithfully executed. N.C. Const. art. III, § 5. There is nothing more fundamental to that duty than rulemaking. Without careful rulemaking, laws cannot be executed.

"Since the beginning of the Republic," agencies have made rules. *City of Arlington v. F.C.C.,* 569 U.S. 290, 305 n.4 (2013). Such administrative rules may sometimes "take 'legislative' and 'judicial' forms, but they are exercises of—indeed, under our constitutional structure they *must be* exercises of —the 'executive Power.'" *Id.*; N.C. Const. art. III, § 11.

Executive rulemaking is essential because it allows an expert body—an administrative agency with expert staff—to implement the will of constituents as represented through their elected legislators. 2 Am. Jur. 2d *Administrative Law* § 127. Since legislatures cannot realistically foresee every potential circumstance affected by sweeping laws, administrative rulemaking offers a practical mechanism for agencies to fill in the gaps consistent with the statutory scheme. *Id.* Rulemaking generally allows the legislature to "engage the expertise and assistance of administrative agencies to effectuate the beneficial purpose of legislation." 73 C.J.S. Public Administrative Law and Procedure § 97 (2022). Moreover, rulemaking plays an information-serving role in allowing members of the regulated community to efficiently comply with the law and avoid adverse enforcement actions.

Courts have consistently confirmed the importance of rulemaking as a means of implementing laws. For example, in *Mistretta v. United States*, the U.S. Supreme Court upheld a federal constitutional challenge to the U.S. Sentencing Commission, explaining that "in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives." 488 U.S. 361, 372 (1989); *accord*

Bd. of Trustees of Jud. Form Ret. Sys. v. Att'y Gen., 132 S.W.3d 770, 781 (Ky. 2003) ("given the realities of modern rule-making, Congress has neither the time nor the expertise to do it all; it must have help.") (citing *Mistretta*, 488 U.S. at 372).

The North Carolina Supreme Court has explained that "the problems which a modern legislature must confront are of such complexity" that agencies must be allowed rulemaking authority. *Adams v. N.C. Dep't of Nat. & Econ. Res.*, 249 S.E.2d 402, 410 (N.C. 1978). *See also Hope—A Women's Cancer Ctr., P.A. v. State*, 693 S.E.2d 673, 677 (N.C. Ct. App. 2010) (citing *Adams* extensively in finding a statute's general policy goals to offer sufficient guidance for administrative agency rulemaking).

Administrative rules are consistently used to execute laws pertaining to deeply important issues such as establishing specific standards for safety, public health, and sustainable use of resources. Such rules seek to effectuate laws enacted by the General Assembly in the most effective way possible, balancing complex scientific issues, real world substantive and procedural challenges, resource constraints, and government efficiencies.

The Governor relies on the subject matter expertise of executive-branch agencies and departments to faithfully execute state policy related to the environment. For example, the Environmental Management Commission ("EMC") is charged with executing the state's obligations under federal and state environmental protection laws; the members of the EMC are selected based on their expertise in relevant areas, and they are aided in that work by the scientific experts

at the Department of Environmental Quality ("DEQ"). In a recent exercise of that authority, the EMC completed thorough scientific studies and community engagement on water quality standards to set limits for the contaminant and likely lethal carcinogen 1,4-dioxane. As part of that work, it accepted extensive comments from both entities who would be regulated by the rule as well as advocacy groups such as the Haw River Assembly, Sound Rivers, and MountainTrue before adopting a numeric water quality standard for the contaminant.

Likewise, the executive branch has expertise, in the EMC and DEQ, to study issues like *E. coli*-contaminated human and animal fecal wastewater in our rivers and lakes, which cause severe gastrointestinal issues when ingested[1] and present a particular danger to children attempting to enjoy our state's tainted waterways. The EMC is in the process of developing proposed *E. coli* standards to protect human health, as required by statute, and those standards will undergo public review to become final proposed rules. N.C. Gen. Stat. §§ 143-211(c).

Similarly, North Carolina administrative agencies are required to develop rules that address harmful air pollutants that affect human health and exacerbate climate change. N.C. Sess. L. 2021-165; N.C. Gen. Stat. § 62-110.9. Air quality and respiratory diseases scored the highest on the N.C. Department of Health and Human Services Climate-Health Scorecard, noting North Carolina's childhood

[1] *E. coli (Escherichia coli): Symptoms*, CTRS. FOR DISEASE CONTROL & PREVENTION (Feb. 2, 2021), https://www.cdc.gov/ecoli/ecoli-symptoms.html.

asthma rates are already higher than the national averages.[2] Near-surface ozone pollutants[3] trigger a variety of respiratory diseases including asthma, bronchitis, emphysema, and lung infections that, while dangerous on their own, also put people at risk for secondary complications from other diseases like COVID-19.[4] Air quality is strongly tied to social determinants of health, causing marginalized racial and economic groups to experience the health impacts of extreme heat, drought, allergens, and energy burden more severely and at higher rates.[5] Rules to curb air pollution are essential to addressing critical health impacts like childhood asthma and other respiratory illnesses, often disproportionately felt by predominantly low-income communities and communities of color.

In theory and practice, rules and the agencies that create them exist to serve the fundamental purposes of effective government. The executive branch must do the highly technical and time-intensive work of setting forth specific regulations to implement legislation that the legislative branch simply cannot do in the legislation itself.

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[2] DIV. OF PUB. HEALTH, N.C. DEP'T OF HEALTH & HUM. SERVS., NORTH CAROLINA CLIMATE AND HEALTH PROFILE 9 (2015), http://epi.publichealth.nc.gov/oee/climate/ClimateAndHealthProfile.pdf.

[3] *Health Effects of Ozone Pollution*, U.S. EPA (June 14, 2022), https://www.epa.gov/ground-level-ozone-pollution/health-effects-ozone-pollution.

[4] Lisa Friedman, *New Research Links Air Pollution to Higher Coronavirus Death Rates*, N.Y. TIMES (Apr. 7, 2020), https://nyti.ms/2UROU3Y.

[5] NORTH CAROLINA CLIMATE RISK ASSESSMENT AND RESILIENCE PLAN 4-4 (June 2020), https://files.nc.gov/ncdeq/climate-change/resilience-plan/2020-Climate-Risk-Assessment-and-Resilience-Plan.pdf.

II. **The RRC is an illegal block to Rulemaking in North Carolina**

The N.C. Supreme Court has cautioned that "the separation of powers clause requires that, as the three branches of government carry out their duties, one branch will not prevent another branch from performing its core functions." *McCrory v. Berger*, 781 S.E.2d 248, 250 (N.C. 2016) (discussing N.C. Const. art. I, § 6, and citing *Hart v. State*, 774 S.E.2d 281, 285 (N.C. 2015)). The North Carolina General Assembly, however, does just that through the RRC.

The legislature appoints every single commissioner of the RRC, and the Governor has extremely circumscribed powers to remove or supervise members. *See* N.C. Gen. Stat. §§ 143B-13(d), 30.1, 120-121. No rule, except emergency rules, can become final before being approved by the RRC. N.C. Gen. Stat. §§ 150B-21.8, 150B-21.12. The RRC thus acts as a legislative gatekeeper to the Governor's faithful execution of the laws.

In exercising this gatekeeping role, the RRC is authorized to decide "whether a rule meets all of the following criteria:

> (1) It is within the authority delegated to the agency by the General Assembly.
> (2) It is clear and unambiguous.
> (3) It is reasonably necessary to implement or interpret an enactment of the General Assembly, or of Congress, or a regulation of a federal agency. The Commission shall consider the cumulative effect of all rules adopted by the agency related to the specific purpose for which the rule is proposed.
> (4) It was adopted in accordance with Part 2 of this Article."

N.C. Gen. Stat. § 150B-21.9(a).

The RRC is required to "restrict its review to determination of the standards set forth in this subsection" and must not "consider questions relating to the quality or efficacy of the rule," *id.* The RRC, however, often exceeds its purview by purporting to exercise the limited discretion that exists within these four criteria, when in reality it is basing its decisions on factors outside of those criteria, and because there is no immediate check on the RRC's judgment, the RRC uses this tactic to delay, and even block, any rules it chooses to.

For example, the RRC is currently blocking passage of a new water quality standard for 1,4 dioxane from going into effect, threatening the health and welfare of North Carolinians. On April 21, 2022, the RRC failed to approve the proposed 1,4-dioxane standard (as part of a proposed modification to rules 15A N.C. Admin. Code 02B.0208, .0212, .0214, .0215, .0216, and .0218 (2022)) due to a tied vote, at which point it moved the item to the May 2022 agenda. RRC staff recommended rejection of the rules on the basis that they were not adopted in accordance with the cost analysis requirements of the Administrative Procedure Act ("APA"). *See* N.C. Gen. Stat. § 150B-21.4. In a written opinion purporting to exercise discretion that it does not have, an RRC Staff Attorney stated (erroneously), that "while RRC generally will not substantively review a fiscal note, it is warranted in this instance." [6] Not only is substantive review of a fiscal note by the RRC not

[6] N.C. Rules Rev. Comm'n, Staff Opinion on Rules 15A N.C. Admin. Code 02B .0208, .0212, .0214, .0215, .0216, and .0218 1 (2022), https://files.nc.gov/ncoah/documents/Rules/RRC/04212022-Environmental-Management-Commission-Staff-Opinion.pdf.

warranted, but it is *not allowed*. As Assistant State Budget Officer Anca Grozav noted in a May 12, 2022, letter to RRC staff, "The APA permits the Rules Review Commission to object to a rule in relation to a fiscal note only in circumstances where an agency fails to prepare or obtain OSBM [Office of State Budget and Management] approval of the fiscal note (§ 150B- 21.4(b1))."[7] In this case, DEQ met that requirement, leaving the RRC no discretion to usurp the statutorily defined role of OSBM to determine whether agencies' fiscal notes satisfy the provisions of the APA. RRC staff doubled down ahead of the May 2022 RRC meeting, again recommending rejection of the 1,4-dioxane rules on the same grounds.[8] The Commission rejected the rule on May 19, 2022. The RRC has thus far prevented the rule from going into effect.

The RRC is also currently blocking passage of permanent rules to provide a standalone permitting mechanism for authorizing impacts to North Carolina wetlands. In May 2022, the RRC rejected permanent rules based, in large part, on the RRC's contention that DEQ does not have the authority to promulgate the rules under the so-called Hardison Amendment, which prohibits agencies from adopting rules for the protection of the environment that are more restrictive than a federal rule pertaining to the same subject matter. N.C. Gen. Stat. § 150B-19.3(a). This contention was entirely arbitrary as the RRC had already concluded in May 2021

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[7] Letter from Anca Grozav, Assistant State Budget Officer, Off. of State Budget & Mgmt., to Jeanette Doran, Chair, Rules Rev. Comm'n (May 12, 2022), https://www.oah.nc.gov/media/13224/open.

[8] N.C. Rules Rev. Comm'n, Staff Opinion on Rules 15A N.C. Admin. Code 02B.0208, .0212, .0214, .0215, .0216, and .0218 1–2 (May 20, 2022), https://www.oah.nc.gov/media/13299/open.

that DEQ has delegated authority to promulgate such rules.[9] The baseless objection has the effect of preventing Governor Cooper from fulfilling his constitutional role to faithfully execute the laws of our state and protect North Carolina's treasured wetlands.

Because of these and other recent actions by the RRC, *amici* are concerned that a number of future rulemakings. Several *amici* are interested in DEQ's current effort to develop a statewide *E. coli* water quality standard pursuant to its obligation to promulgate rules protecting the state's water quality. *See* N.C. Gen. Stat. §§ 143-211 to 143-215.74M, 143B-282(a)(2). This standard would go through EMC rulemaking and will require RRC approval to go into effect. In July 2021, the EMC granted the petition of two *amici* to adopt rules to establish the necessary framework for North Carolina to join the Regional Greenhouse Gas Initiative—a cooperative effort among eastern states to cap and reduce carbon dioxide emissions from the electric power sector. Promulgating such rules is within the EMC's authority and duty to control air pollution. *See* N.C. Gen. Stat. §§ 143-215.105 to 215.114C, 143B-282(a)(2). This rulemaking would require RRC approval to go into effect. Finally, several *amici* are pressing for the adoption of the Advanced Clean Trucks Rule, a set of standards that would require manufacturers of medium- and heavy-duty vehicles to ensure that zero-emission vehicles—rather than heavily

[9] *See* N.C. Rules Rev. Comm'n, List of Approved Temporary Rules (May 20, 2021), https://www.oah.nc.gov/media/12949/open (listing Env't Mgmt. Comm'n Rules 15 NCAC 02H .1301, .1401–05 as approved).

polluting diesel trucks—make up an increasing percentage of sales of these vehicles by 2035. The Rule falls within the EMC's authority and mandate to adopt rules for air quality and emission control standards. *See* N.C. Gen. Stat. §§ 143-215.105 to 215.114C, 143B-282(a)(2). This rulemaking would require RRC approval to go into effect. *Amici* are concerned that these efforts will either be slowed down by the RRC or may not move forward at all due to the hurdle to rulemaking caused by the legislatively appointed RRC exceeding its authority and blocking executive action.

III. **The structure of the RRC violates separation of powers principles set out in recent case law**

By actively working to prevent the Governor from faithfully executing the State's laws via administrative rulemaking, the current formation of the RRC—comprised entirely of commissioners selected and appointed by the legislature—violates our Constitution. In *McCrory*, the North Carolina Supreme Court rejected a structure where the legislative branch "exerted too much control over commissions that have final executive authority" and thus "prevented the Governor from performing his express constitutional duty to take care that the laws are faithfully executed." *McCrory v. Berger*, 781 S.E.2d at 256. The Court made clear the impact that appointment authority has on control of a body, noting that "the degree of control that the Governor has over . . . commissions depends on his ability to appoint the commissioners, to supervise their day-to-day activities, and to remove them from office." *Id.* And the Court went on to explain:

> When the General Assembly appoints executive officers that the Governor has little power to remove, it can appoint them essentially

> without the Governor's influence. That leaves the Governor with little control over the views and priorities of the officers that the General Assembly appoints. When those officers form a majority on a commission that has the final say on how to execute the laws, the General Assembly, not the Governor, can exert most of the control over the executive policy that is implemented in any area of the law that the commission regulates. As a result, the Governor cannot take care that the laws are faithfully executed in that area.

Id.

Here, where the General Assembly appoints every single commissioner, and the Governor has extremely circumscribed powers to remove or supervise members, the problem is exacerbated. The end result is not a collaborative approach between branches to ensure that laws are faithfully executed. Rather, the result is an improper legislative impediment to executive rulemaking, interfering with the Governor's duty to faithfully execute laws the General Assembly has passed.

In *Cooper v. Berger*, the North Carolina Supreme Court made clear that the constitution demands that the Governor need not simply be able to have power to preclude others from "forcing him or her to execute laws in a manner to which he or she objects," but also requires the Governor to "have the ability to affirmatively implement the policy decisions that executive branch agencies subject to his or her control are allowed, through delegation from the General Assembly, to make." 370 N.C. 392, 809 S.E.2d 98 (N.C. 2018). An RRC comprised of legislative appointees with the power to block rules promulgated by such executive branch agencies is a clear affront to this holding.

Once rulemaking authority is delegated to an executive branch agency, the execution of that authority rests solely with the executive branch. *See, e.g., Mo.*

Coal. for Env't v. Joint Comm'n on Admin. Rules, 948 S.W.2d 125, 134 (Mo. 1997); *see also Bowsher v. Synar*, 478 U.S. 714, 733 (1986) (once the legislature "makes its choice in enacting legislation, its participation ends"). If the legislature wants to be more specific about any of the laws it has passed, it must do so via the required constitutional practice of bicameral action and gubernatorial approval. N.C. Const. art II § 22. And indeed, the legislature frequently does so. *See, e.g.,* (N.C. Sess. L. 2013-395 and N.C. Sess. L. 2017-10 directing the EMC to make hyper-specific changes to the Jordan Lake Rules).

Similarly, Section 150B-21.3(b1) of the North Carolina General Statutes specifically contemplates a scheme where the General Assembly can pass a bill to disapprove a rule adopted by an executive branch agency. Under that section, when ten or more persons object to a rule that has wound its way through the rulemaking process, the legislature is notified and can act to repeal the rule through "a bill enacted into law" by both houses of the legislature and presented to the Governor for approval or veto. *Id.*; *e.g.,* N.C. Sess. L. 2021-176 (disapproving 15A N.C. Admin. Code 10B.0201 (2022), previously adopted by the N.C. Wildlife Resources Commission).

What the legislature may <u>not</u> do is make an end-run around the constitutionally prescribed process for changing the law through a separate, unelected body that has no gubernatorial check. When the legislatively appointed RRC blocks a rule, it is effectively–and impermissibly–exercising a legislative power to impede the executive's exercise of its powers, but without the required

bicameralism and presentment that are hallmarks of the legislative process, N.C. Const. art. II, § 22, and thereby violating the separation of powers clause. N.C. Const. art. I, § 6. "The separation of powers clause plainly and clearly does not allow the General Assembly to take this much control over the execution of the laws from the Governor and lodge it with itself." *McCrory*, 781 S.E.2d at 257 (declaring schemes where the legislature appointed over half the members of bodies with control over executive policies unconstitutional).

Moreover, to the extent there are concerns about the legality of any of the rules that are implemented, our constitutional structure already provides a check for that: the judiciary. Rules promulgated by executive agencies are subject to judicial review. *N.C. Acupuncture Licensing Bd. v. N.C. Bd. of Physical Therapy Examiners*, 821 S.E.2d 376, 379–80 (N.C. 2018) (reviewing regulation for validity given statute and legislative intent); *see also Thomas v. N.C. Dep't of Hum. Res.*, 478 S.E.2d 816, 822–23 (N.C. Ct. App. 1996), *aff'd*, 485 S.E.2d 295 (N.C. 1997) (voiding regulation that conflicted with enabling statute); *State ex rel. Utils. Comm'n v. N.C. Sustainable Energy Ass'n*, 803 S.E.2d 430, 433 (N.C. Ct. App. 2017) (holding that an agency "misread the plain language" of applicable statute and reversing its decision).

There may be wisdom in a body that ensures, in a straightforward, ministerial way, that rules are necessary to implement laws on the books and are clear on their face. But such a responsibility is necessarily executive in nature and cannot be performed by a legislatively controlled body.

Other states make this clear. Where legislatures in other states have attempted schemes to hold veto power over executive rulemaking, those schemes have been held to violate separation of powers. For example, The Supreme Court of New Jersey explained that an exercise of legislative power that "effectively amend[s] or repeal[s] existing laws without the participation by the Governor" "offends the separation of powers … and contravenes the Presentment Clause requirement that changes in legislative policy be effected by a majority vote of both houses of the Legislature and approval by the Governor or, after executive veto, by a two-thirds vote of both houses." *Gen. Assemb. v. Byrne*, 448 A.2d 438, 439 (N.J. 1982).

Likewise, the Missouri Supreme Court held that a subcommittee of legislators could not prevent executive agencies from properly promulgating and enforcing regulations. *Mo. Coal. for Env't v. Joint Comm'n on Admin. Rules*, 948 S.W.2d 125, 129 (Mo. 1997), *as modified on denial of reh'g* (Feb. 25, 1997). The Missouri Supreme Court explained that the statutory scheme which allowed legislators to veto executive rules prevented executive efforts to protect public and environmental health against harmful noise and air pollution. *See id.* at 128.

Likewise, the Supreme Court of Kentucky rejected the authority of the state Legislative Research Commission ("LRC")—an arm of the legislative branch—to prevent administrative regulations from becoming effective. *See Legislative Rsch. Comm'n By & Through Prather v. Brown*, 664 S.W.2d 907, 911 (Ky. 1984). The LRC had effectively granted one of its subcommittees the authority to prevent any

rule from taking effect unless the General Assembly was in session and approved the rule via joint resolution. *Id.* at 918. The Supreme Court of Kentucky stated that the scheme had "the effect of creating a legislative veto of the actions of the executive branch," which violated the separation of powers doctrine. *Id.* at 918, 919.

Other state courts have similarly struck down legislative regulatory review mechanisms on constitutional grounds. *See, e.g.*, *State ex rel. Meadows v. Hechler*, 462 S.E.2d 586, 593 (W. Va. 1995) (striking legislature's ability to block rules by neglecting to approve them in rules review subcommittee for "impermissibly encroach[ing]" on executive duties); *State ex rel. Stephan v. Kan. House of Reps.*, 687 P.2d 622, 634, 638 (Kan. 1984) (finding statute authorizing legislature to block rules via joint resolution unconstitutional under separation of powers doctrine and presentment requirements).

By contrast, legal, constitutional structures to streamline rulemaking and ensure it is done well do exist. Several states have bodies that perform this task but do so in a purely advisory way.[10] In some cases, objections to rules are not binding on the agency but simply become part of the administrative record. *See* Fla. Stat. Ann. § 120.545 (2021) (rule withdrawn only if agency fails to respond to committee objection; committee cannot block a rule itself but merely note its objections to the legislature which can then consider passing legislation to address

[10] *See* THE COUNCIL OF STATE GOV'TS, 53 THE BOOK OF THE STATES 99–102 tbl. 3.26 (2021), https://issuu.com/csg.publications/stacks/46495f12f95847e6935d331969ed650a.

the rule); Neb. Rev. Stat. §§ 84-907.10(4), 84-908 (Governor charged with approval of rules; objection by a legislator or legislative committee does not prohibit rule promulgation). And indeed, North Carolina's RRC operated in such a fashion from its inception in 1985 until 1996. N.C. Sess. L. 1985-1028 § 32. (This North Carolina law, which was in place from 1985-1996, provided that rules would become effective even with RRC objection).

IV. The current structure of the RRC is dysfunctional and must change

While the RRC has existed in this same unconstitutional structure for more than twenty-five years,[11] the current situation where our legislature is controlled entirely by one political party, while the Governor is from a different party, combined with the hyper-partisan tensions within state government mean that the unconstitutional structure has become dysfunctional and harmful to North Carolina.

It is a matter of law that when the executive and legislative branches are led by different parties, they are presumed to be at odds. *Cooper v. Berger*, 809 S.E.2d at 112 n.12 (noting that while the court was "unable to conclude with absolute certainty that persons chosen by the chair of the opposing political party will invariably and in all instances act to thwart the Governor's policy preferences at every turn" the court was unwilling to "turn a blind eye to the functions

[11] SL 1995-507 § 27.8 changed the law to the current situation where only rules approved, and not simply reviewed, by the RRC become effective.

appropriately performed by the leader of an opposition party in our system of government"). As such, it is natural that any body comprised of members appointed solely by the leaders of the majority party in the legislature is likely to be hostile to an executive led by the opposing party.

And indeed, it has become plain to *amici* that the RRC is currently being weaponized by the General Assembly to limit the ways in which the Governor can "faithfully execute the laws" of North Carolina. Leaders in the General Assembly have admitted that they see the RRC as a legislative limit on executive function. In a press release issued by the Senate President Pro Tempore, Phil Berger, Senate Deputy President Pro Tempore Ralph Hise described the RRC as a "check on executive authority."[12] The press release went on to accuse the Governor of a "power grab" by seeking to restore the constitutionally mandated separation of powers with the present lawsuit. In a similar vein, a Rules Review Commissioner noted to a reporter that "the charge I had on being appointed to the commission was, are there rules that are creating high unemployment in our state, and are there rules that are killing jobs? . . . We've gotta have rules, I don't have any question about that, but what can we do economically regarding rules to help the state?"[13]

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[12] Sen. Berger Press Shop, *Sen. Hise Responds to Latest Cooper Lawsuit to Consolidate Power*, MEDIUM (Aug. 28, 2020), https://bergerpress.medium.com/sen-hise-responds-to-latest-cooper-lawsuit-to-consolidate-power-2d4e60fc921.

[13] Laura Leslie, *New Rules Review Commissioners Test the Waters*, WRAL: N.C. CAPITOL (Aug. 18, 2011), https://www.wral.com/news/state/nccapitol/blogpost/10017455/.

Such statements demonstrate that the legislature views the RRC as a way to prevent the Governor from implementing rules. And the Commission has demonstrated, in its rejection of rules over the past several years, that it accepts this charge. In addition to the blocking of rules on 1,4 dioxane and wetlands permits discussed above, the RRC has repeatedly blocked other rules, including a rule from the Department of Public Safety regarding temporary State law enforcement personnel to cities and counties, [Complaint at ¶34], and rules from an expert agency within the Department of Health & Human Services ensuring forensic evaluators working in criminal trials are employed by established mental health organizations, [Complaint at ¶¶35–39].

Moreover, staff at the RRC do not simply limit themselves to the duty of reviewing rules to ensure their compliance with the law, but rather are engaged in a variety of schemes to expand their capacity to review and veto rules. For example, RRC staff have spent significant time researching and advocating for a change in the law which would require "scientific standards" to go through the rulemaking process. Currently, "scientific standards" are expressly excluded from the definition of "Rules" and changes to scientific standards were not required to go through the

Rules Review process. The RRC staff has lobbied the legislature to change the law so that scientific standards would now come under their purview.[14]

Amici all work to protect the health and welfare of North Carolinians. They rely on executive agencies to be able to promulgate and implement laws according to their expertise, taking into account current scientific, economic, and technological realities. Rulemaking in North Carolina has become dysfunctional, and a change to the composition of the RRC is essential for our State.

CONCLUSION

For the forgoing reasons, *amici* urge the Court to grant the motion for summary judgment of the Plaintiff, Governor Cooper, and issue a declaratory judgment that the current composition of the RRC under N.C. Gen. Stat. § 143B-30.1(a) is unconstitutional.

[14] *See* Email from William W. Peaslee to Donald R. van der Vaart (Mar. 15, 2022). (Exhibit 1) (RRC Counsel providing Chief Administrative Law Judge and Director of the Office of Administrative Hearings with draft legislation to make scientific standards subject to the rule making process); and Email exchange between Christine Cline, William W. Peaslee, and Donald R. van der Vaart (Mar. 9-15, 2022). (Exhibit 2) (Discussion between RRC Counsel, the Director of the Office of Administrative Hearings, and an Office of Administrative Hearings Law Clerk about how to make scientific standards subject to the rulemaking process.).

Respectfully submitted this the 12th August, 2022.

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CERTIFICATE OF SERVICE

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This the 12th day of August, 2022.

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