STATE OF NORTH CAROLINA

COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
23CV029308-910

JOSHUA H. STEIN, in his official capacity as GOVERNOR OF THE STATE OF NORTH CAROLINA,

Plaintiff,

v.

PHILIP E. BERGER, in his official capacity as PRESIDENT PRO TEMPORE OF THE NORTH CAROLINA SENATE; DESTIN C. HALL, in his official capacity as SPEAKER OF THE NORTH CAROLINA HOUSE OF REPRESENTATIVES; and THE STATE OF NORTH CAROLINA,

Defendants.

LEGISLATIVE DEFENDANTS' BRIEF IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

After years of litigation by the Governor and his predecessor seeking to block reforms to the State Board of Elections, the General Assembly availed itself of an option expressly granted to it under our Constitution and transferred the Board of Elections to the State Auditor and gave the Auditor power to appoint the Board's members. Rather than accept those decisions—which were approved by supermajorities in both the House and Senate over former Governor Cooper's veto—the Governor has sued once again, insisting that Senate Bill 382's changes to the State and county boards of election are unconstitutional because they do not give him enough control to ensure the boards carry out *his* "policy preferences." In support of that argument, he continues to rely on the Supreme Court's decisions in *State v. Berger*, 368 N.C. 633, 781 S.E.2d 248 (2016) ("*McCrory*"), *Cooper v. Berger*, 370 N.C. 392, 809 S.E.2d 98 (2018) ("*Cooper I*"), and *Cooper v. Berger*, 371 N.C. 799, 822 S.E.2d 286 (2018) ("*Cooper Confirmation*").

But those decisions do not control here. Indeed, the Supreme Court stressed in each of its prior appointments cases that, "**[a]s in *McCrory*, 'our opinion takes no position on how the separation of powers clause applies to those executive departments that are headed by independently elected members of the Council of State**.'" *Cooper Confirmation*, 371 N.C. at 805 n.4, 822 S.E.2d at 292 n.4 (quoting *McCrory*, 368 N.C. at 646, n.5, 781 S.E.2d at 256 n. 5) (emphasis added); *Cooper I*, 370 N.C. at 407 n.5, 809 S.E.2d at 107 n.5 (same).

The reason the Court refused to extend its decisions to departments headed by other Council of State members is simple: Unlike its federal counterpart, North Carolina's Constitution establishes a *plural executive*. The Governor accordingly is not the only member of the executive branch and does not hold a monopoly on executive power. Instead, the Constitution expressly provides that the executive branch shall include nine "other elective officers," *see* N.C. Const. art. III, §§ 2 and 7(1), and then grants the General Assembly power to assign their duties, stating that "their respective duties shall be prescribed by law." N.C. Const. art. III, § 7(2). Thus, just like each version before it, our current Constitution diffuses power across a multi-member executive branch and grants the People's representatives in the General Assembly power to allocate duties among them.

The Governor's position would effectively write these provisions out of the Constitution. Reading just two clauses in isolation, he argues the Vesting Clause[1] and Take Care Clause[2] mandate that the Governor—and "only" the Governor—hold all executive power and have sufficient control over every executive board and commission to ensure they act in accordance with *his* "views and priorities." But that position is incompatible with our Constitution's text, history, and precedent. (Supp. Compl. ¶¶ 92, 94). Given that "a constitution cannot violate itself." *Leandro v. State*, 346 N.C. 336, 352, 488 S.E.2d 294, 258 (1997), the General Assembly's decisions to

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[1] N.C. Const. art. III, § 1 ("The executive power of the State shall be vested in the Governor.")

[2] N.C. Const. art. III, § 5(4) ("The Governor shall take care that the laws be faithfully executed.")

transfer the Board of Elections to the Department of the Auditor and to assign the Auditor the duty to appoint the board's members cannot be unconstitutional, since they are decisions that the Constitution expressly authorizes the General Assembly to make elsewhere. And while the Governor contends that transferring appointments to the Auditor violates the Separation of Powers Clause in Article I, Section 6, he ignores that the provision only speaks to separation of powers *between the branches*; it does not prohibit the General Assembly from allocating duties among the constitutional officers within the executive branch in accordance with Article III, Section 7(2). *See* N.C. Const. art. I, § 6 (The *legislative, executive, and supreme judicial powers* of the State government shall be forever separate and distinct from each other." (emphasis added)).

The framers of our Constitution made a deliberate decision not to create a unitary executive, but to maintain a plural executive. They did so as a check against the Governor and to prevent accumulation of power in one man. The General Assembly's choice to transfer the Board of Elections, as well as the power to appoint its members, to the Auditor is a natural outgrowth of that decision. While the Governor may disagree with the outcome of that decision—and may even wish our Constitution gave him the type of consolidated powers the federal constitution gives the President—that is not the system the People of North Carolina chose.

Left without a constitutional argument, the Governor attempts to bolster his Supplemental Complaint with political rhetoric and invitations to second-guess the General Assembly's policy determinations based on impermissible criteria. He thus

asserts the Court should overturn Senate Bill 382 because the voters "overwhelmingly chose [him] to be their chief executive," giving him a "clear mandate" to enact his policies. (Supp. Compl. ¶¶ 76, 78, 81). And he similarly urges the Court to hold the bill invalid because the Auditor—himself a lawyer who was *also elected by the voters of this State*—is a . . . "Republican," who the Governor argues (without recognizing the apparent irony) is too partisan and lacks special "expertise" in election law or administration. (Supp. Compl. ¶¶ 66, 67). But those are judgments for the General Assembly to make in its role as representatives of the People. If the Governor disagrees—which he is of course free to do—his relief lies in the legislature, not the courts.

The Governor accordingly cannot show that Senate Bill 382's changes to the State and county boards of elections are unconstitutional beyond a reasonable doubt, and thus his claims are subject to summary judgment.

FACTUAL BACKGROUND

Senate Bill 382's changes to the State and county Boards of Election (Session Law 2024-57), differ substantially from those this panel previously considered connection with Senate Bill 749, which have now been repealed. *See* N.C. Sess. L. 2024-57, § 3.A.3(a).[3]

[3] As the panel will recall, Senate Bill 749 would have increased the Board from five to eight members, split evenly among the political parties, with two members appointed by the President Pro Tempore of the Senate, two appointed by the minority leader of the Senate, two appointed by the Speaker of the House, and two appointed by the minority leader of the House. *See* N.C. Sess. L. 2023-139, § 2.1. On March 11, 2024, the Panel entered a summary judgment order enjoining the challenged portions of Senate Bill 749, which was later appealed.

Senate Bill 382 transfers the Board of Elections to the Department of the State Auditor. *See* N.C. Sess. L. 2024-57, §3A.2(a).[4, 5] It also provides that terms of the existing five-member board shall expire on April 30, 2025, after which time the Board's members will be appointed by the Auditor. *See* N.C. Sess. L. 2024-57, §§ 3A.3(c) (amending N.C. Gen. Stat. § 163-19) and 3A.3(g).

As does current law with the Governor's appointments, Senate Bill 382 limits the State Auditor's discretion in making these appointments. *Id.* § 3A.3(b) (adding subsection (23) to N.C. Gen. Stat. § 147-64.6(c)). Those appointments must meet the following criteria: (1) no more than three members of the State Board may members of the same political party; (2) the appointments must come from a list of nominees submitted by the State party chair of each of the two political parties having the highest number of registered affiliates; and (3) no person may serve more than two full consecutive four-year terms.

Senate Bill 382 also makes corresponding changes to county boards of elections. Under the bill, the State Board of Elections will appoint four members of

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[4] Senate Bill 382 provides that the transfer shall have the elements of a "Type II transfer" under N.C. Gen. Stat. 143A-6. This means that the Board shall be transferred intact to the Department of the State Auditor, but shall exercise its prescribed statutory powers independently. *See* N.C. Gen. Stat. § 143A-6(b). Management functions are transferred to the Department and performed under the direction and supervision of the Auditor. *Id.*

[5] Generally, functions, duties, and responsibilities established by law that are not specifically assigned to any principal agency fall to the Governor under the Executive Organization Act of 1973. *See* N.C. Gen. Stat. § 143B-8.

each county board, two from each major political party. The State Auditor will then appoint the fifth member of the county board and the chair. *Id.* § 3A.3.(f), (h).

The General Assembly passed Senate Bill 382 on November 20, 2024. Six days later, Governor Cooper vetoed the bill, calling it "a sham." *See* The Office of the Governor, Governor Cooper Vetoes One Bill (Nov. 26, 2024), https://governor.nc.gov/news/press-releases/2024/11/26/governor-cooper-vetoes-one-bill (last visited Feb. 25, 2025). Supermajorities in the House and Senate overrode Governor Cooper's veto and the bill became law on December 11, 2024.

On December 20, 2024, Legislative Defendants dismissed their appeal from this Court's prior order enjoining the implementation of Senate Bill 749 as moot. Governor Cooper then moved to file a supplemental complaint challenging Senate Bill 382.

The Governor's Supplemental Complaint seeks a declaration that Sections 3A.3(b), (c), (d), (f), (g), and (h) of Senate Bill 382 violate the Separation of Powers as well as a permanent injunction preventing their implementation. Notably, the Governor does not challenge the decision to transfer the Board of Elections to the Department of the State Auditor. (Supp. Compl. ¶ 96, n.3). While his complaint acknowledges that the Auditor is a constitutional officer and member of the executive branch, the Governor contends that Senate Bill 382 "[r]emoves executive authority over the State Board of Elections and gives it to the State Auditor." (Supp. Compl. ¶ 96.c). This, he claims, is unconstitutional because—according to his view—our Constitution vests executive power "solely in the Governor." (Supp. Compl. ¶ 94).

On February 10, 2025, Judge Paul Ridgeway entered a consent order (i) vacating the Panel's prior March 11, 2024, summary judgment decision and November 20, 2023 preliminary injunction enjoining the challenged provisions of Senate Bill 749 under Rule 60, and thus providing that they "are of no effect"; (2) substituting Governor Stein for former Governor Cooper, and Speaker Hall for former Speaker Moore; (3) granting the Governor's motion to file a supplemental complaint; and (4) holding that the Governor's challenges to Senate Bill 382 present facial challenges and therefore shall be heard by a three-judge panel.[6]

Legislative Defendants have answered the Governor's Supplemental Complaint, and the parties agree that only questions of law remain. Accordingly, this matter is now ripe for summary disposition.

STANDARD OF REVIEW

Because acts of the General Assembly are presumptively constitutional, the standard for maintaining a facial challenge to an act of the General Assembly is uniquely high. The Governor is unable to overcome that presumption and meet his burden here.

Rule 56 authorizes the Court to enter summary judgment where "the pleadings, depositions, and answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is not issue as to any material fact and that any party is entitled to judgment as a matter of law." N.C. Gen. Stat. § 1A-1,

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[6] The Governor's original complaint named "the State of North Carolina" as a defendant. However, on January 28, 2025, the Governor dismissed his claims against the State of North Carolina without prejudice.

Rule 56(c). In responding to a motion for summary judgment, a plaintiff "may not rest on the mere allegations or denials of his pleadings" but must instead "come forward with specific facts" supporting his claim. *Liberty Mut. Ins. Co. v. Pennington*, 356 N.C. 571, 579, 573 S.E.2d 118 (2002).

As the Supreme Court has recently affirmed, this Court must presume that laws passed by the General Assembly are constitutional. *McKinney v. Goins*, No. 109PA22-2, 2025 N.C. LEXIS 65, at *11 (Jan. 31, 2025) (Newby, C.J.); *State v. Strudwick*, 379 N.C. 94, 105, 864 S.E.2d 231, 240 (2021) ("[W]e presume that laws enacted by the General Assembly are constitutional."). And the party challenging a law's constitutionality—here, the Governor—bears the burden of overcoming this presumption of validity. *Cmty. Success Initiative v. Moore*, 384 N.C. 194, 212, 886 S.E.2d 16, 32 (2023). The burden to overcome that presumption is high. The judiciary cannot declare an act invalid unless the plaintiff can show an *"express provision"* of the Constitution "*explicitly*" prohibits that act, "*beyond a reasonable doubt*." *Harper v. Hall*, 384 N.C. 292, 298, 886 S.E.2d 393, 399 (2023) (emphasis added); *Ivarsson v. Off. of Indigent Def. Servs.*, 156 N.C. App. 628, 631, 577 S.E.2d 650, 652 (2003) (quoting *Baker v. Martin*, 330 N.C. 331, 334, 410 S.E.2d 887, 889 (1991).

The Governor's claim involves a facial challenge, which represents the "most difficult challenge to mount successfully." *State v. Bryant*, 359 N.C. 554, 564, 614 S.E.2d 479, 485 (2005). Facial challenges are "seldom" upheld "because it is the role of the legislature, rather than [a] Court, to balance disparate interests and find a workable compromise among them." *Cooper v. Berger*, 371 N.C. 799, 804, 822 S.E.2d

286, 292 (2018) ("*Cooper Confirmation*") (quoting *Beaufort Cty. Bd. of Educ.*, 363 N.C. 500, 502, 681 S.E.2d 278, 280 (2009)). Ultimately, "[a]n individual challenging the facial constitutionality of a legislative act must establish that *no set of circumstances exists* under which the act would be valid." *Bryant*, 359 N.C. at 564, 614 S.E.2d at 486 (emphasis added). In other words, the constitutional violation must be "plain and clear." *McCrory*, 368 N.C. at 639, 781 S.E.2d at 252 (citation omitted). To determine whether a violation is "plain and clear," courts look to the "text of the constitution, the historical context in which the people of North Carolina adopted the applicable constitutional provision, and our precedents." *Cooper I*, 370 N.C. at 413, 809 S.E.2d at 111; *see also McKinney*, No. 109PA22-2, 2025 N.C. LEXIS 65, at *17.

The requirements of this standard protect the separation of powers. "[T]he idea of the judiciary "preventing . . . the legislature, through which the people act, from exercising its power is the most serious of judicial considerations."" *Harper v. Hall*, 384 N.C. 292, 323, 886 S.E.2d 393, 414 (2023) (quoting *McCrory*, 368 N.C. at 650, 781 S.E.2d at 259 (Newby, J., concurring in part and dissenting in part)). The presumption of constitutionality thus serves as "a critical safeguard that preserves the delicate balance between this Court's role as the interpreter of our [c]onstitution and the legislature's role as the voice through which the people exercise their ultimate power." *McKinney*, No. 109PA22-2, 2025 N.C. LEXIS 65, at *14 (citing *Holmes v. Moore*, 384 N.C. 426, 435, 886 S.E.2d 120, 129 (2023).

The Governor cannot meet this burden.

ARGUMENT

The General Assembly's decisions to transfer the Board of Elections to the Department of the State Auditor, to grant the Auditor the duty to appoint the Board's members, and to similarly restructure county boards of commissions, do not violate the Separation of Powers. Instead, they are a legitimate exercise of the General Assembly's plenary power to establish, organize, and reorganize State agencies, as well as its express power to assign the duties of the "other elective officers" who comprise the Council of State.

The Governor's arguments—and in particular his radical assertion that all executive power to must be vested in the Governor and "only" the Governor—run contrary to our Constitutional text, history, and precedent. Thus, he cannot show that Senate Bill 382 is barred by an express provision of the Constitution, much less do so beyond a reasonable doubt.

I. SENATE BILL 382 IS A LEGITIMATE EXERCISE OF THE GENERAL ASSEMBLY'S POWER TO STRUCTURE STATE AGENCIES.

The General Assembly's enactment of Senate Bill 382 rest on both its inherent and express authority to structure State agencies and assign duties to the "other elective officers" who comprise the Council of State.

A. The General Assembly has Both Inherent and Express Power to Organize State Agencies and Assign Duties to Members of the Council of State.

Unlike the federal constitution, "our [State] constitution does not enumerate the powers of the General Assembly." *Cooper Confirmation*, 371 N.C. at 815, 822, S.E.2d at 299 (2018). As a result, "all power not expressly limited by the people in the

constitution remains with the people and 'is exercised through the General Assembly, which functions as the arm of the electorate.'" *Id.* 371 N.C. at 815–16, 822 S.E.2d at 299 (quoting *Pope v. Easley*, 354 N.C. 544, 546, 556 S.E.2d 265, 267 (2001) (per *curiam*)). The General Assembly accordingly "need not identify the constitutional source of its power when it enacts statutes" but may "rely on its general power to legislate, which it retains as an arm of the people." *Id.*

Accordingly, even if there were no express Constitutional provision on point, the General Assembly still would have inherent authority to organize State agencies and thus adopt Senate Bill 382's changes to the State and county boards of election.

But the General Assembly does not have to rely only on its inherent power. It's power to organize government and assign duties to the members of the executive branch is reflected directly in the constitutional text. Article III, Section 5(10), which is entitled "Administrative Reorganization" provides that "[t]he *General Assembly* shall prescribe the functions, powers, and duties of the administrative departments and agencies of the State" and has the authority to "alter them from time to time." N.C. CONST. art. III, § 5(10) (emphasis added). It then sets out procedures for the Governor to make or propose changes, reserves the final authority over these decisions for the General Assembly. *Id.*

The Constitution also makes clear that the General Assembly has the power to allocate duties among the constitutional officers who serve on the Council of State. In addition to Governor, the Constitution creates nine "other elective officers" within the executive branch. *See* N.C. Const. art. III, § 2(1) (establishing the Lieutenant

Governor), § 7(1) (establishing the offices of Secretary of State, Auditor, Treasurer, Superintendent of Public Instruction, Attorney General, Commissioner of Agriculture, Commissioner of Labor, and Commissioner of Insurance). It then grants the General Assembly express authority to assign duties to those officers by providing that "their respective duties shall be prescribed by law." N.C. Const. art. III, § 7(2); *see also id.* § 6 (providing that, in addition to serving as President of the Senate, the Lieutenant Governor "shall perform such additional duties as the General Assembly or Governor may assign him").

As a result, both *McCrory* and *Cooper I* recognize that whether to create, eliminate, or move a board or commission to another department is "a decision committed to the *sole discretion* of the General Assembly." *Cooper I*, 370 N.C. at 409, 809 S.E.2d at 108 (emphasis added); *McCrory*, 368 N.C. at 643-44, 781 S.E.2d at 255-56; *see also id.*, 368 N.C. at 664, 781 S.E.2d at 664 (Newby, J., concurring in part and dissenting in part) (noting "the General Assembly's significant express constitutional authority to assign executive duties to the constitutional officers and organize executive departments"); *State ex rel. Martin v. Melott,* 320 N.C. 518, 524, 359 S.E.2d 783, 787 (1987) (plurality) ("The citizens of this state have the right to distribute the governmental power among the various branches of the government." (citing *Lanier v. Vines*, 274 N.C. 486, 164 S.E2.d 161 (1968))).

B. <u>The General Assembly's Powers Include Authority to Choose Who Appoints Statutory Officers to the Agencies it Creates</u>.

It also is undisputed that the General Assembly's broad constitutional power to structure State agencies includes the power to choose who appoints statutory

officers (as well as the power to reserve those appointments for itself). *See McCrory*, 368 N.C. at 649, 781 S.E.2d at 258 (concluding that the General Assembly has the power to appoint statutory officers); *State ex rel. Cherry v. Burns*, 124 N.C. 761, 765, 33 S.E. 136, 137 (1899) (concluding that the Constitution "leads us to the opinion that the Legislature may fill this [statutory] office" (citations omitted)).

Indeed, the General Assembly's power to determine who appoints statutory officers has been a consistent feature of our State's constitutional structure since its founding. And it is one the People have refused to relinquish. Under the Constitution of 1776—which like each of this State's constitutions, included a separation of powers clause virtually identical to the one found in today's Constitution[7]—the General Assembly had the power to appoint all executive officers, including the Governor and the members of the Council of State. *See* N.C. CONST. 1776, §§ XV, XVI; *see also People ex rel. Nichols v. McKee*, 68 N.C. 429, 431–32 (1873).[8] While the Constitution of 1868 provided for the direct election of the Council of State and granted the Governor exclusive power to appoint both constitutional and statutory officers, the latter provisions were short-lived. Such an expansive shift of the appointment power to the Executive was "not . . . satisfactory to the dominant sentiment of the State." *State ex rel. Salisbury v. Croom*, 167 N.C. 223, 226, 83 S.E. 354, 354–55 (1914). Accordingly,

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7 *See* N.C. CONST. of 1776, Section IV.

8 The Constitution was amended to provide for direct election of the Governor by the People in 1835. N.C. CONST. of 1776, Amends. of 1835, art II, §1. Members of the Council of State were directly elected beginning with the Constitution of 1868. *See* N.C. CONST. 1868, art. III, §§ 1, 14.

just eight years later in 1876, the People amended the appointments clause[9] to return control over the appointment of statutory officers to the General Assembly. As Professor John Orth and Chief Justice Newby explain in their treatise:

> The principal aim of the 1876 amendments was to restore to the General Assembly more of the power it had lost. The elective officers created in 1868 had lessened legislative control over the executive and judicial branches; the General Assembly now reclaimed the power to provide for legislative appointments to executive offices created by statute.

John V. Orth & Paul Martin Newby, *The N.C. State Constitution*, p.25 (2d ed. 2013).

Since 1876, many governors have sought to retake the power to control statutory appointments (as well as to eliminate or reduce the separately elected members of the Council of State). *See* Arch T. Allen, III, *A Study in Separation of Powers: Executive Power in North Carolina*, 77 N.C. L. Rev. 2049, 2061–68 (1999). But the people have never agreed to give them such power. Likewise, when our latest Constitution was drafted, the study commission that prepared the Constitution proposed an amendment which would have provided the Governor with power to appoint and remove the heads of all administrative departments and agencies. *See Report of the North Carolina State Constitution Study Commission 1968*, p. 113 (1968). But it was rejected.[10]

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[9] "[T]he voters on November 7, 1876, approved by a vote of 120,159 to 106,554 - a set of 30 amendments affecting 36 sections of the state constitution." John L. Sanders, *Our Constitution: An Historical Perspective*, p.3, available at: https://www.sosnc.gov/static_forms/publications/North_Carolina_Constitution_Our_Co.pdf

[10] As the Court explained in *McCrory*, the current appointments clause in Article III, Section 5(8) "means the same thing now that it did in 1876." *McCrory,* 368

The General Assembly's constitutional power to assign the duty to appoint statutory officers is an outgrowth of its general power to make laws and establish the policies that govern the executive branch. *See, e.g.*, *Rhyne v. K-Mart Corp.*, 358 N.C. 160, 169–70, 594 S.E.2d 1, 8–9 (2004) ("The legislative branch is without question 'the policy-making agency of our government' . . . ."). Indeed, the ability to structure administrative agencies serves as a primary *check* on the exercise of executive power. Tension between, and within, executive agencies serves as "procedural safeguards" against the use and abuse of executive power. *See Adams v. N. Carolina Dep't of Nat. & Econ. Res.*, 295 N.C. 683, 698, 249 S.E.2d 402, 411 (1978) ("Procedural safeguards tend to encourage adherence to legislative standards by the agency to which power has been delegated."). They are thus an "essential" tool to ensure executive officials carry out the policies reflected in the State's laws. *State ex rel. Comm'r of Ins. v. N.C. Rate Bureau*, 300 N.C. 381, 409, 269 S.E.2d 547, 567 (1980) (noting that controls imposed through the Administrative Procedure Act, including the requirement that agencies submit rules to the Rules Review Commission before enactment, "minimize the potential of unfairness in embodying" too much power "in one person or agency").

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The Governor's challenge to Senate Bill 382 must be judged against this backdrop. Unlike the General Assembly's plenary power to structure and restructure

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N.C. at 644, 781 S.E.2d at 255. Thus, while the clause authorizes the Governor to appoint constitutional officers "whose appointments are not otherwise provided for" with advice and consent of the Senate, it does not prohibit the General Assembly from appointing statutory officers. *Id.*

State government, no provision of the Constitution grants the Governor the power to appoint statutory officers. Instead, the Constitution expressly reserves the power to organize State agencies—including the power to choose who will appoint statutory officers—for the People acting through their representatives in the General Assembly.

II. THE GOVERNOR'S CLAIMS RUN CONTRARY TO CONSTITUTIONAL TEXT, HISTORY, AND PRECEDENT.

To succeed in his challenge, the Governor must show that an *express provision* of the Constitution *explicitly* prohibits Senate Bill 382's changes to State and county boards of election. *Harper*, 384 N.C. at 298, 886 S.E.2d at 399. But none of the provisions he cites in his Supplemental Complaint meet that standard.

A. Senate Bill 382 Does Not Violate the Separation of Powers Clause.

The Governor first cites the Separation of Powers Clause in Article I, Section 6. But that clause does not, in and of itself, provide an independent limit on the General Assembly's power to structure State agencies or to choose who appoints statutory officers. As the Supreme Court has explained, the Separation of Clause "does not establish the various powers" that belong to each branch. *Id.* 384 at 298, 886 S.E.2d at 399. Thus, the clause should "'be considered as general statement of broad, albeit fundamental constitutional principle' and must be considered with the related, more specific provisions of the constitution that outline the practical workings for governance. *Id.* (quoting *State v. Furmage*, 250 N.C. 616, 627, 109 S.E.2d 563, 571 (1959); *McKinney*, No. 109PA22-2, 2025 N.C. LEXIS 65, at *12 (same). "The specific

language used in Articles II, III, and IV confirms that the legislature, but not the executive or judicial branches, wields plenary power." *McKinney*, 109PA22-2, 2025 N.C. LEXIS 65, at *12-13 ("'Nowhere was it stated that the three powers or branches had to be equal. In fact, although the balance occasionally shifted, the preponderant power has always rested with the legislature.'" (quoting John V. Orth & Paul Martin Newby, The North Carolina State Constitution 50 (2d ed. 2013)).

Indeed, as a textual matter, the General Assembly's decision to transfer the State Board of Elections to the Department of the Auditor, and to give the Auditor the power to appoint the Board's members (as well as the fifth member of the county boards), does not implicate the Separation of Powers Clause. The Governor and the Auditor are both executive officers. The Governor's current challenge thus involves an *intramural* dispute regarding the allocation of power *within the executive branch.* The Separation of Powers Clause, however, only speaks to the separation of *powers* between *branches,* not within them. N.C. Const. art. I, 6 ("The *legislative, executive, and supreme judicial powers* of the State government shall be forever separate and distinct from each other." (emphasis added)); *accord Harper* 384 N.C. at 298, 886 S.E.2d at 399 (explaining the clause is intended to protect the people by "keeping *each branch* within its described sphere[]" and merely provides that the "*powers of the branches* are 'separate and distinct'" (emphasis added)).

The Supreme Court's appointment cases recognize this distinction and likewise speak of the division of powers *between the branches*, not just between the General Assembly and the Governor. Thus, in *McCrory,* the Court explained a

violation of the separation of powers only occurs when legislation "unreasonably disrupts a *core power of the executive*." *McCrory*, 368 N.C. at 645, 781 S.E.2d at 256 (emphasis added); *see also Cooper Confirmation*, 371 N.C. at 806, 822 S.E.2d at 293 (same); *Harper*, 384 N.C. at 298, 886 S.E.2d at 399 ("A violation of separation of powers only occurs when one *branch* of government exercises, or prevents the exercise of, a power reserved for another *branch* of government." (emphasis added)).

McCrory, *Cooper I*, and *Cooper Confirmation* are therefore inapposite. None of those cases dealt with boards or commissions within departments headed by other Council of State members. Indeed, the Court stressed each time that, "**[a]s in *McCrory*, 'our opinion takes no position on how the separation of powers clause applies to those executive departments that are headed by independently elected members of the Council of State.'**" *Cooper Confirmation*, 371 N.C. at 805 n.4, 822 S.E.2d at 292 n.4 (quoting *McCrory*, 368 N.C. at 646, n.5, 781 S.E.2d at 256 n. 5) (emphasis added); *Cooper I*, 370 N.C. at 407 n.5, 809 S.E.2d at 107 n.5 (same). The Governor's reliance on those cases is therefore misplaced.

B. Senate Bill 382 Does Not Violate the Vesting Clause or the Take Care Clause.

i. Our Constitution Distributes Power Across a Multi-Member Executive Branch; It Does Not Vest Executive Power Solely in the Governor.

Pressed to show that an express limitation prohibit Senate Bill 382's changes to the Board of Elections, the Governor relies on the sweeping assertion that the Vesting Clause in Article III, Section 1, and the Take Care Clause in Article III, Section 5(4), combine to require that *all* executive power must be vested "*solely*" in

the Governor, and "*only*" in the Governor. (Supp. Compl. ¶¶ 76, 78, 81). Thus, his theory goes, Senate Bill 382 is unconstitutional—even though it grants the executive branch holds all of the appointments to the Board of elections—because it allocates those appointments to the Auditor rather than the Governor.

That assertion would have been news to our State's founders, not to mention the drafters of our current Constitution. While the federal Constitution creates a so-called "unitary executive," under which all executive power vests in the President, *see, e.g.*, *Touby v. United States*, 500 U.S. 160, 168 (1991) ("The Constitution vests all executive power in the President . . . ."), North Carolina's Constitution is significantly different.[11] Indeed, since its founding, North Carolina has always had a plural executive, with executive power disbursed across multiple, independent constitutional officers.[12]

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[11] Indeed, Alexander Hamilton distinguished the unitary executive model established under the federal constitution from the plural executive model prevalent in most of the states. The Federalist No. 70 (Alexander Hamilton) (noting that New York and New Jersey were "the only States which have intrusted the executive authority wholly to single men."). Modern scholars have continued to recognize the difference between the two models. *See* Judge Jeffrey S. Sutton, *Who Decides? States as Laboratories of Constitutional Experimentation* (2021) (explaining that despite "surface similarity," the federal unitary executive differs significantly from state "plural executive" models); Ferrel Guillor, *The Council of State and North Carolina's Long Ballot: A Tradition Hard to Change*, N.C. Insight. N.C. Center for Public Policy Research 40 (June 1988) ("More than most states, and certainly far more than the federal government, North Carolina has a fractionalized executive branch."); Arch T. Allen III, *A Study in Separation of Powers: Executive Power in North Carolina,* 77 N.C. L. Rev. 2049 (1999) ("While subsequent amendments have permitted gubernatorial succession and veto, the governor *still shares* some executive power with the other elected Council of State members." (emphasis added)).

[12] As the Court explained in *Cooper Confirmation*, the historical roots of the Council of State trace back to the advisory councils of the English monarchs, and North Carolina's use of an executive council predates its earliest constitution. 371

While our Constitution provides—as a general matter—that executive power shall be vested in the Governor in Article III, Section 1, and charges the Governor with the duty to "take care that the laws be faithfully" executed in Article III, Section 5(4), it does not stop there. As described above, the Constitution then establishes nine "Other elective officers," including Lieutenant Governor, Secretary of State, Auditor, Treasurer, Superintendent of Public Instruction, Attorney General, Commissioner of Agriculture, Commissioner of Labor, and Commissioner of Insurance—each of whom is independently elected on a statewide basis. *See* N.C. Const. art. III, § 2 (establishing the office of the Lieutenant Governor) and § 7 (establishing the "Other elective offices"). It then expressly charges the General Assembly with authority to assign their duties by providing "their respective duties shall be prescribed by law." N.C. Const. art. III, § 7(2). Accordingly, while these officers form the "Council of State," which has certain prescribed functions under our Constitution,[13] they also serve as independent constitutional officers with duties and functions of their own.

The Governor's own cases recognize this. In *Cooper Confirmation*, Chief Justice Martin explained that while the Governor has a duty to take care that the laws are faithfully executed, "***the Governor is not alone in this task***." 371 N.C. at

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N.C. at 800 n.1 S.E.2d at 290 n.1. (citing The Research Branch, Div. of Archives & History, N.C. Dept. of Cultural Res., *The Council of State in North Carolina: An Historical Research Report* 8 (1986)).

[13] Our current constitution provides that the Governor may only call the General Assembly into special session with the advice and consent of the Council of State.

800, 822 S.E.2d at 290 (emphasis added) (explaining further that "[t]o assist the executive branch in fulfilling its purpose, our constitution requires the General Assembly to 'prescribe the functions, powers, and duties of the administrative departments and agencies of the State" under Article III, § 5(10)).[14]

In short, the General Assembly's decision to transfer the Board of Elections to the Department of the State Auditor and to assign the Auditor the duty to appoint the Board's members are ones the General Assembly was *expressly authorized to make* under Article III, Section 7(2).[15] The Governor's position would effectively read Article III, Section 7(2), as well as the provisions establishing the Auditor and other elective officers as part of the executive branch, out of the constitution. Our Supreme Court has repeatedly admonished that "a constitution cannot be in violation of itself," *Stephenson v. Bartlett*, 355 N.C. 354, 378, 562 S.E.2d 377, 394 (2002) (citing

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[14] *See also McCrory*, 368 N.C. at 656–57, 781 S.E.2d at 263 (Newby, J., dissenting) (explaining that the Governor is required "*share the exercise of executive powers* with the other constitutional executive officers who are separately elected members of the Council of State, while maintaining his supervisory role, notwithstanding possible conflict among these officials.") (emphasis added; citation omitted).

[15] Senate Bill 382's changes to the Board of Elections are hardly an outlier. Only six states—Delaware, Florida, New Jersey, Pennsylvania, Texas, and Virginia—delegate the appointment of elections officials to the Governor. *See* The National Conference of State Legislatures, *Election Administration at State and Local Levels*, https://www.ncsl.org/elections-and-campaigns/election-administration-at-state-and-local-levels (last visited Feb. 13, 2025). While in four states—Maine, New Hampshire, Oklahoma, and Tennessee—the chief election official is selected by the legislature. And seventeen states and Washington, D.C., have a separate board or commission that oversees elections in the state or jurisdiction. In short, there is no right answer. There is only a policy decision to make. And in North Carolina the General Assembly gets to make that decision. *Harper*, 384 N.C. at 300, 886 S.E.2d at 400.

Leandro v. State, 346 N.C. 336, 352, 488 S.E.2d 249, 258 (1997)). Accordingly, the General Assembly's assignment of appointments, and other duties related to elections to the Auditor cannot by itself violate the Constitution. To hold otherwise would render Article III, Section 7(2) a nullity. If the Vesting Clause meant that the only the Governor can hold executive power, there would be no room for the General Assembly to assign duties to other officials. Such an interpretation would violate the well-established principle that all provisions of the Constitution must be read *in pari materia*, and in a manner that gives effect to each provision. *Stephenson v. Bartlett*, 355 N.C. 354, 378, 562 S.E.2d 377, 394 (2002) (citing *In re Peoples,* 296 N.C. 109, 159, 250 S.E.2d 890, 919 (1978)).

History, too, contradicts the Governor's reading of the Vesting Clause and Take Care Clause. Those clauses were first added with the adoption of our State's Reconstruction Constitution in 1868. But that same constitution *also* provided that the executive branch would consist of not only the Governor, but also the other members of the Council of State. 1868 N.C. Const. art. III, § 1 (listing governor as one of eight elected offices in the executive branch). In addition, the 1868 Constitution added, for the first time, provisions (i) requiring that the Council of State be directly elected and (ii) expressly stating that their respective duties "shall be prescribed by law." *See* 1868 N.C. Const., art. III, § 13 ("The respective duties of the [constitutional executive officers] shall be prescribed by law.") Thus, "[w]ith the passage of the Constitution of 1868 'the Council of State became a body of elected officers, *with executive duties of their own*.'" *Cooper Confirmation*, 371 N.C. at 800 n.1 S.E.2d at

290 n.1. (emphasis added) (quoting John V. Orth & Paul Martin Newby, *The North Carolina State Constitution* 124-25 (2d ed. 2013)).

Ultimately, the Governor's assertions that our Constitution requires all executive power to be placed "solely" in the Governor make the mistake of reading the Vesting Clause and Take Care Clause in isolation, and without consideration of the historical context in which they were enacted. He ignores other provisions of the Constitution that also establish nine "other elective officers" in the executive branch, and expressly authorize the General Assembly to assign their duties. The General Assembly's decision to transfer the State Board of Elections to the Auditor represents an exercise of that authority—and is a natural and legitimate outgrowth of our founders decision to establish a plural, rather than unitary, executive.

ii. The Take Care Clause Does Not Give the Governor General Policymaking Authority.

The Governor's claims not only disregard the General Assembly's express authority to assign duties to other members of the Council of State, they also overread the Take Care Clause as well. In his Supplemental Complaint, the Governor asserts that, to fulfill his duties under the Take Care Clause, he must have the power to affirmatively implement executive policy and ensure that *every* board or commission, including the State and county boards of election, act in a manner that reflects his "views and priorities." (Supp. Compl. ¶ 95).

That claim, however, rests on a misreading of the Take Care Clause, as well as a fundamental misunderstanding of the role of the executive branch within our constitutional system.

By its text, the Take Care Clause confers no power on the Governor. Instead, it *limits* his power. The clause subordinates the Governor's power to legislative direction by commanding that he act within, and not exceed, the bounds of the laws passed by the General Assembly. *See* N.C. CONST. art. III, § 5(4) ("Execution of laws. The Governor shall take care that the laws be faithfully executed."). Thus, according to its plain language, the clause requires the Governor to "take care" (not "ensure," as the Governor often suggests) that laws are executed in a manner "faithful," not to *his* prerogatives, but to those of the legislature. In other words, the clause imposes a *duty* of fidelity and a *duty* of care: The Governor must exercise those powers he has been granted, either under the Constitution or by statute, in a manner that is *faithful* to the General Assembly's directives.

The Governor's conception of the Take Care Clause as a source of power thus cannot come from constitutional text. Instead, it comes from his (mis)reading of *McCrory* and *Cooper I*. But those cases do not interpret the clause as broadly as he would like. At most, *McCrory* and *Cooper I* hold that the Governor's duties under the Take Care Clause carry with them "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***." *Cooper I*, 370 N.C. at 415, 809 S.E.2d at 112 (emphasis added). And even then, any such power is only "***interstitial***." 370 N.C. at 416 n.11, 809 S.E.2d at 113 n.11 (emphasis added).

Put simply, the scope of the Governor's duty under the Take Care Clause depends on what the General Assembly has delegated to him. The Governor has no

power to make policy decisions about matters that have not been assigned to him. Further, if a statute delegates decisions to *other* executive officials (such as members of the Council of State), the Governor has no obligation to personally execute the statute—only to use those powers he has in a manner faithful to the laws the General Assembly has enacted.

The Supreme Court has confirmed this understanding of the Take Care Clause. In "*Cooper Appropriations*" case, decided in 2020, the Supreme Court rejected the Governor's claim that the Take Care Clause required that he have power to direct the distribution of federal block grants. *Cooper v. Berger*, 376 N.C. 22, 852 S.E.2d 64 (2020) (Ervin, J.) ("*Cooper Appropriations*"). As the Court explained, the Governor has no power to make "interstitial decisions" regarding questions the General Assembly has not delegated to him. *Id.* 376 N.C. at 46, 852 S.E.2d at 64. Thus, the Court concluded that the General Assembly's decision to direct the distribution of federal block grants did not impermissibly interfere with the Governor's obligations under the Take Care Clause because "the General Assembly has not delegated the authority to determine how the relevant federal block money should be spent." *Id.*

So here too. The General Assembly has chosen to transfer the Board of Elections to the Department of the Auditor—an independent, constitutional officer within the executive branch—and to assign him the duty to appoint the Board's members (as well as the corresponding duties related to county boards). This renders the Board of Elections distinguishable from the boards and commissions at issue in *McCrory*, all of which were housed within cabinet agencies that fell directly under

the control of the Governor and his appointees. As a result, there are no "interstitial decisions" for the Governor to make. Nor has the Governor (or any agency under his control) been delegated decisions that might serve as a vehicle to enact his "policy preferences."

All told, the Governor cannot meet the high bar necessary to mount his challenge to Senate Bill 382. Although he continues to cite the same cases, they are distinguishable from the situation here. There has been no transfer of power away from the executive branch. Indeed, the Auditor, an independently elected member of the executive branch appoints all of the members of the Board of Elections. Nor has the Governor been prevented from carrying out any law or duty that has been assigned to him. As a result, he cannot show that Senate Bill 382's changes to the Board of Elections, and the concomitant changes to the county boards, violate the Constitution. As a result, Legislative Defendants are entitled to judgment as a matter of law.

III. THIS GOVERNOR'S CLAIMS PRESENTS A NONJUSTICIABLE POLITICAL QUESTION.

In addition to the above, Legislative Defendants maintain that (1) the organization of state administrative agencies and departments, including the decision of who appoints the members of a statutory board or commission, and (2) the allocation of duties between and among the independently elected officers within the executive branch, are nonjusticiable political questions. Not only are such matters textually committed to the General Assembly under our Constitution, but they involve questions that cannot be decided without the type of initial policy

determinations that are meant for the political branches and for which there are no judicially manageable standards. *See Harper*, 384 N.C. at 326, 866 S.E.2d at 416 (citing *Baker v. Carr*, 369 U.S. 186, 217 (1962) and *Bacon v. Lee*, 353 N.C. 696, 716-717 (2001)).

Accordingly, Legislative Defendants expressly reserve their arguments that this case presents a political question and that the Court therefore lacks subject matter jurisdiction over the Governor's claims.

CONCLUSION

Senate Bill 382 represents a legitimate exercise of the General Assembly's express constitutional power to structure agencies of State government in order to ensure their accountability to the People. The Governor cannot meet the burden necessary to establish a facial challenge. Legislative Defendants are thus entitled to summary judgment.

This the 25th day of February, 2025.

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CERTIFICATE OF SERVICE

I hereby certify that on February 25, 2025, I caused a copy of the foregoing document to be served upon all parties via email as follows:

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