STATE OF NORTH CAROLINA COUNTY OF WAKE	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION FILE NO.: 23CV029308-910
JOSUHA H. STEIN, in his official capacity as GOVERNOR OF THE STATE OF NORTH CAROLINA, Plaintiffs, v. DESTIN C. HALL, in his official capacity as SPEAKER OF THE NORTH CAROLINA HOUSE OF REPRESENTATIVES; PHILIP E. BERGER, in his official capacity as PRESIDENT PRO TEMPORE OF THE NORTH CAROLINA SENATE; and DAVE BOLIEK, in his official capacity as AUDITOR, Defendants.	**INTERVENOR-DEFENDANT AUDITOR'S RESPONSE TO PLAINTIFF'S SUMMARY JUDGMENT MOTION**

Why do Governors think they own the State Board of Elections ("Board")? This belief runs afoul of the North Carolina Constitution, which provides for an exclusive constitutional, extrajudicial mechanism to resolve disputes over the organization of agencies. The express language of Article III, Section 5(10) of the Constitution makes this a nonjusticiable political question. Further, the General Assembly possesses plenary power to create a completely independent Board, subject to no executive authority. Our Constitution reserves the power to the People, acting through the General Assembly, to decide a matter when the Constitution does not expressly prohibit it. Accordingly, the Board's organization, duties, and functions involve policy

questions that belong to the General Assembly and are nonjusticiable by the judicial branch. The Constitution does not countenance a Governor's personal preferences. The Constitution does not address the Board in any way. This Court should decline the Governor's invitation to wade into these politically charged, policy-infested waters.

Regardless, even if this Court decides to examine the merits of this claim, no precedent allows the Court to grant the Governor's request to interfere in the General Assembly's overt authority to shift the Board from one constitutionally-created, popularly-elected Council of State officer to another, all within the executive branch. The Constitution says nothing about the Board at all, much less if it has to reside where it currently does. It certainly does not give the Governor any connection to or authority over the Board. Indeed, if the Court examines the General Assembly's policy choice, the Auditor is less political than the partisan Governor for the limited executive controls contemplated in the new law. Regardless, the General Assembly acted well within its constitutional authority, so the Court should reject the Governor's wishful pleadings.

I. The Governor's Claim Is Nonjusticiable Because the Constitution Provides a Remedy That Fully Resolves This Type of Dispute Within Other Branches.

The People, through the Constitution, decided who organizes the executive branch, and the process to challenge it exists outside of the judicial branch. In

bringing this challenge then, the Governor asks this Court to weigh in on a nonjusticiable political question.

A. Courts Cannot Ignore the Constitution's Balance of Power.

The Constitution unambiguously speaks about the process the Governor must follow if he disagrees with how the General Assembly structures executive branch departments or agencies. N.C. Const., art. III § 5(10). The People, through the Constitution, struck a careful balance between the two branches to establish which branch has what authority to structure and organize internal governance of agencies and departments in the executive branch. The Governor seeks to avoid his subordinate role in that balance by completely ignoring it. The Court cannot blindly ignore that constitutional instruction manual.

The political question doctrine "excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of [the General Assembly] or the confines of the Executive Branch." *Bacon v. Lee*, 353 N.C. 696, 717 (2001). Indeed, if a court wades into territory committed to the province of another branch, the judicial branch itself runs afoul of the Constitution's Separation of Powers Clause. *See id* at 721.

So, when a "textually demonstrable constitutional commitment of the issue to a coordinate political department" exists, the issue is inherently a political question, and courts must decline to hear it. *Id.* at 717; *accord Harper v. Hall*, 384 N.C. 292,

327 (2023); *see, e.g.*, *Harbury v. Hayden*, 522 F.3d 413, 418 (D.C. Cir. 2008) (Kavanaugh, J.) (political question doctrine bars courts from deciding "issues textually and exclusively committed by the Constitution to one or both of the other branches"). That means that courts cannot "interject" themselves into an inter-branch "balance" of power that the Constitution already settled. *Cooper v. Berger*, 370 N.C. 392, 438 (2018) ("*Cooper I*") (Newby, J., dissenting); *see also Nixon v. United States*, 506 U.S. 224, 229 (1993) (holding review of Senate impeachment trials nonjusticiable because the U.S. Constitution delegated responsibility for those trials to the Senate alone).

B. The Constitution Has Finely Tuned the Balance of Power Here.

The Constitution unmistakably gives ultimate authority over the organization and structure of the executive branch to the General Assembly. *Adams v. N.C. Dep't of Nat. & Econ. Res.*, 295 N.C. 683, 696-97 (1978). The Constitution expressly prescribes an extra-judicial process, a veritable start-to-finish constitutional remedy, for the Governor to contest any General Assembly action to organize or change administrative departments or agencies in the executive branch. Put simply, the Constitution contains a plain textual "commitment" with respect to who has authority over the organization of the executive branch. Under the political question doctrine, this Court can neither ignore nor second-guess that plain-text remedy.

As always, the Court must start with the pertinent text. Article III, Section 5(10) is unambiguous. Titled "Administrative reorganization," it directs the General

Assembly to "prescribe the functions, powers, and duties of the administrative departments and agencies of the State," and permits the General Assembly to "alter them from time to time." N.C. Const. art. III, § 5(10). That provision "specifically assigns to the General Assembly authority over the administrative [departments and agencies] it legislatively creates," *Cooper I*, 370 N.C. at 437 (Newby, J., dissenting), including the Board, *see* N.C. Gen. Stat. §§ 163-22, -30; *see also* N.C. Const. art. III, § 11 ("[A]ll administrative departments, agencies, and offices of the State and their respective functions, powers, and duties shall be allocated *by law* . . ." (emphasis added)).[1]

However, that is not the end of this story. The Governor actually has his own constitutionally-prescribed role in any reorganization decisions. Section 5(10) allows him to simply submit his changes "in the allocation of offices and agencies and in the

[1] In fact, the General Assembly has even *broader* authority over the State and County Boards of Elections under Article III, Section 11—adopted simultaneously with Section 5(10)—than the ordinary, baseline authority granted over "administrative departments and agencies of the State" under Section 5(10). Section 11 notes that "[r]egulatory [or] quasi-judicial . . . agencies may, but need not, be allocated within a principal department." N.C. Const. art. III, § 11. The Board is *at least* a quasi-judicial body: it resolves disputes through hearings. *See, e.g.*, N.C. Gen Stat. §§ 163-84 to -90.3 (procedures for hearing voter challenges); *see generally* N.C. Gen. Stat. Ch. 163, art. III & IV (governing state and county election processes). Thus, the General Assembly exercises even broader discretion over the Board under Section 11 than the default authority it has under Section 5(10). Given the *sui generis* nature of the Board, operating as somewhat of a unicorn entity that exercises its statutory powers, duties, functions, and authority independently from whatever elected officials appoint its members, the General Assembly has particular and substantial power to unilaterally structure and organize the Board, without the argument that "it traditionally falls under one of the Governor's cabinet departments" found in *State ex rel. McCrory v. Berger*, 368 N.C. 633, 646 & n.5 (2016).

allocation of those functions, powers, and duties as he considers necessary for efficient administration" in the form of an executive order. N.C. Const. art. III, § 5(10). He must submit any such executive order to the General Assembly not later than the sixtieth day of the General Assembly's session. *Id.* Whatever the Governor's executive order contemplates then reorganizes the executive branch as the Governor prefers, absent further action by the General Assembly.

But the Constitution gives the General Assembly a final chance to change the Governor's policy preferences. If the General Assembly wants to override the changes in the Governor's executive order, it must "specifically disapprove[] by resolution of either house." *Id.* Or, the General Assembly can take a lesser action to "specifically modif[y] [the Governor's executive order] by joint resolution of both houses." *Id.*

That three-step process explains, from start to finish, how the Constitution structured the interplay between the legislative and executive branches on this topic:

Step 1) Article III specifically allows the General Assembly to create and structure administrative entities;

Step 2) If the Governor disagrees with the General Assembly's tinkering, he can directly change it by filing an executive order within 60 days of the start of session (indeed, the Governor's personal preferences in his executive order then become law unless and until the General Assembly takes further action to block or modify them); and

Step 3) The General Assembly can revoke the executive order by majority vote of one chamber or modify it by majority vote of both chambers.

Accordingly, the issue presented in this case is a nonjusticiable political question because it is clearly committed to the General Assembly and the Governor by the text of the Constitution, not the judicial branch.

The Governor must follow that process if he disagrees with the General Assembly exercising its express authority under the Constitution using **Step 1** to organize administrative departments and agencies.

The Governor did not follow the constitutional process, however. He failed to even try to engage in **Step 2**. He never even submitted an executive order at all, much less within the allotted time frame. The session began on January 8, 2025. N.C. Gen. Assembly, *Legislative Calendar, January 2025* (last visited Mar. 12, 2025), https://tinyurl.com/ry2v3akd. The 60 days expired on March 9, 2025. Thus, the constitutional process is done, and the Governor has waived any ability to complain about what the General Assembly did here. The fact that the Governor failed to utilize his constitutionally-assigned role in this process does not empower the judicial branch to step in and answer a question that is textually committed to another branch of government.

C. The Constitution's Amendment History is in Accord.

The fates of two separately proposed amendments submitted to the General Assembly by the 1968 State Constitution Study Commission drive home the point that the Governor must comply with his full constitutional remedy provided in Article III, Section 5(10) if he seeks to change the General Assembly's constitutional

prerogative to organize administrative agencies and departments. The first, Proposed Amendment 5, would have made "significant substantive changes" to the Governor's intra-branch supervisory power by dramatically expanding his control over other executive officers. *State ex rel. McCrory v. Berger*, 368 N.C. 633, 643 (2016). It would have allowed the Governor to "appoint and . . . remove the heads of *all* administrative departments and agencies of the State." *Report of the North Carolina State Constitution Study Comm'n 1968*, p.113 (1968) (emphasis added) (hereinafter "Report"). It also would have cut the number of the constitutionally-created Council of State elected executive branch officers in half, instead letting the Governor fill those previously elected positions by appointment. *Id.* at 117. In short, Proposed Amendment 5 would have substantially consolidated power over the executive branch and placed it in the hands of the Governor.[2]

The second, Proposed Amendment 8, added Sections 5(10) and 11 to Article III to the Constitution for the first time. As detailed above, those sections clarified and

[2] In justification of that proposal, the Commission offered reasoning strikingly similar to some of the arguments offered by the Governor today. The Commission explained that the constitutionally-created Council of State elected executive officers were not directly "subject to supervision by the Governor," and thus, if the elected executive officers chose "not to cooperate with him," that might "handicap[]" his "ability to coordinate the activities of state government and to mount a comprehensive response to the problems of the day." Report at 118; *cf.* Gov. Br. at 19 ("By stripping the Governor of control over the State Board and county boards, the General Assembly has interfered with his constitutional obligation to take care that the State's election laws are faithfully executed."). The People never ratified or enacted the Governor's version.

reaffirmed the General Assembly's power over the organization and structure of the executive branch and explained the mechanism for the General Assembly to override any attempted modification by the Governor in **Step 3**. Even though this gave the Governor some role to play in the process in **Step 2**, the Commission made clear that Proposed Amendment 8 did not "deprive[]" the General Assembly "of any of its present authority over the structure and organization of state government"; it still "retain[ed] the power to make changes on its own initiative." *Id.* at 131.

Proposed Amendment 5 failed. It received an unfavorable report from the House Committee on Constitutional Amendments, and the General Assembly declined to submit it to the People. *McCrory*, 368 N.C. at 644. But the General Assembly passed Proposed Amendment 8. *See* N.C. Sess. L. 1969-932 § 1. Interestingly, in doing so, the General Assembly modified the Commission's version of Proposed Amendment 8 to strengthen its hand at the expense of the Governor's by adding the 60-day time limit from the start of a session and allowing a majority vote by just one chamber to reject a Governor's executive order changing the General Assembly's actions. *Compare id. with* Report at 128. The People ratified the modified version of Proposed Amendment 8, enacting the current version of Article III, Sections 5(10) and 11. *See* N.C. Sess. L. 1969-932 § 1.

That saga crystallizes two truths. First, by seeking to expand the Governor's authority over the other members of the executive branch via Proposed Amendment 5, the Commission recognized that he did not already wield that intra-executive

branch authority the Governor now claims to possess. And since that proposed amendment did not succeed, the Governor never gained that authority. Second, by ratifying the General Assembly's strengthened version of Amendment 8, the People reaffirmed that the General Assembly—not the Governor—has the final say over the structure and organization of the executive branch. The Governor must channel whatever disagreements he has with the General Assembly on that point via a specifically delineated, three-step constitutional process. The Governor does not have—and has never had—unfettered power to prevent an intra-executive branch transfer like he claims to now.

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Article III, Section 5(10) unambiguously provides the mechanism to resolve disputes between the General Assembly and the Governor regarding reorganization of administrative departments and agencies. The Governor did not avail himself of that remedy: he never issued an executive order within 60 days of the start of session. But, even if he had, the General Assembly retains the final word by choosing to act, or not, to disapprove it by one chamber or modify it by both. Instead of complying with the complete constitutional remedy spelled out in the express text, the Governor ran immediately to the courts. Allowing him to ignore and bypass Section 5(10) would render the Constitution nugatory, destroying the delicate balance that the People struck between the branches. Thus, the Governor's challenge poses a nonjusticiable political question, and the Court should, respectfully, dismiss it.

II. The Governor's Claim Is Nonjusticiable Because the General Assembly Wields Plenary Power in Its Policy-Making Role, and the Constitution Grants the General Assembly Express Power Over the Board's Organization.

The Governor's claim is nonjusticiable for yet another reason. Not only does the express text of the Constitution allow the General Assembly to reorganize the Board—the General Assembly also wields the plenary power to do so. Thus, the question presented involves a policy decision that is not suited for the courts.

A. The Legislature Has Plenary Power Over the Board's Structure.

"All political power is vested in and derived from the people," N.C. Const. art. I, § 2, and the People's power resides in the General Assembly, *id.* art. II, § 1. The General Assembly is, therefore, "the 'policy-making agency' because it is a far more appropriate forum than the courts for implementing policy-based changes to our laws." *Rhyne v. K-Mart Corp.*, 358 N.C. 160, 169 (2004). Because it wields the People's power, the General Assembly exercises plenary power that is "limited only by the express text of the constitution." *Harper*, 384 N.C. at 323 (citing *Baker v. Martin*, 330 N.C. 331, 338-39 (1991)). Therefore, an act of the General Assembly is constitutional unless it violates an express provision of the Constitution. *McCrory*, 368 N.C. at 639; *see McKinney v. Goins*, 911 S.E.2d 1, 7-8 (2025). Where an act of the General Assembly does not run afoul of an express provision of the Constitution, it involves a "policy determination of a kind clearly for nonjudicial discretion," and is nonjusticiable. *Harper*, 384 N.C. at 325 (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)). The Governor's challenge presents just this kind of policy determination.

The Constitution has never contained any language about the creation or existence of the Board that purports to limit the General Assembly's authority over it. Rather, as detailed above, the Constitution expressly contemplates that the General Assembly has authority over the organization, duties, and functions of executive departments and agencies. *See* N.C. Const. art. III, §§ 5(10), 11; *see also* N.C. Const. art. III, § 7(2) (providing that the General Assembly shall prescribe the "respective duties" of the elected Council of State officers "by law"). These provisions prescribe a duty, but they do not limit the General Assembly's authority in exercising that duty. Thus, to the extent that the General Assembly exercises power on behalf of the People to create the Board, it exercises plenary power, unconstrained by any specific constitutional language limiting that act.

Indeed, the Board is purely a creature of statute, *see* N.C. Gen. Stat. § 163-19(a), and exists solely at the discretion of the General Assembly. The General Assembly is the voice of the People. The People giveth, the People taketh away, and everything in between, unless expressly prohibited or provided otherwise in the Constitution. Under this construct, the General Assembly decided to create the Board in 1901. N.C. Sess. L. 1901-89, § 5, https://tinyurl.com/4e9dxysk; *see id.* § 6 (creating the County Boards of Elections). Elections existed in North Carolina for well over a century before the General Assembly first created the Board. The Board simply sprang forth, fully formed, from the General Assembly's mind 125 years after the first

Constitution. No traditional precedent exists for the Board at the time of the first Constitution in 1776 or the second in 1868.

It follows then that, unlike the constitutionally-created State Board of Education, N.C. Const. Art. IX, § (4), the Board need not exist at all. The General Assembly can abolish the Board entirely if it so desires, or reorganize it however it sees fit. Doing so would be the will of the People, unfettered by express constitutional limitation precluding such action. *Cf. id.* (establishing the State Board of Education); *id.* art. III, § 8 (establishing the Council of State). Accordingly, questions relating to the Board's organization, functions, and duties are policy issues belonging to the General Assembly's plenary authority and falling outside the purview of the judicial branch's limited role of judicial review. *See Harper*, 384 N.C. at 350 ("If a court engages in policy questions that are better suited for the legislative branch, that court usurps the role of the legislature by deferring to its own preferences instead of the discretion of the people's chosen representatives.").

B. The Governor Does Not Have That Plenary Power.

The Governor may wish he had the authority to dictate what the General Assembly does with the Board, but those ephemeral desires find no tether in the words of the Constitution. Unlike the General Assembly, the Governor does not wield plenary power. *See McKinney*, 911 S.E.2d at 8 (noting that the constitution "confirms that the legislature, but not the executive or judicial branches, wields plenary power"). The Governor's insistence that he has inherent, or even plenary authority to

make policy through executive fiat has no basis in the Constitution, and the Court can and should ignore his unsupported opinions as both wrong and irrelevant. *See* Gov. Br. at 11-14, 28, 31.

Rather, the Governor's only guaranteed authority comes from express language written in the Constitution. *See McKinney*, 911 S.E.2d at 8. Or, as the Governor himself states it: "The General Assembly cannot ignore the powers and duties *expressly vested* in the Governor alone." Gov. Br. at 3 (emphasis added). To wit:

- The Governor must reside in Raleigh. N.C. Const. art. III, § 5(1).
- The Governor must provide a budget to the General Assembly but has no capacity to force the General Assembly to accept that budget. *Id.* § 5(3). Indeed, the express language requires the Governor to administer "the budget as enacted by the General Assembly." *Id.*
- "The Governor shall be Commander in Chief of the military forces of the State except when they are in federal service. *Id.* § 5(5). The Governor "may call out those forces to execute the law, suppress riots and insurrections, and repel invasion." *Id.* art XII, § 1.
- The Governor may grant clemency in non-impeachment settings as he deems fit without interference from the General Assembly. *Id.* art. III, § 5(6); *News & Observer Publ'g Co. v. Easley*, 182 N.C. App. 14, 21 (2007).
- The Governor has the express ability to veto certain bills. *Id.* art. II, § 22(1).

None of these express words describing the constitutionally-created duties of the Governor mention the Board. Indeed, the Constitution never makes any mention of the Board at all, in any iteration from 1776, 1868, or 1971. The Governor cannot point to a single word anywhere in any Constitution to assert any authority over the Board. That means he has no constitutional authority over it.

To sidestep the lack of express, constitutional authority, the Governor claims "[o]ur Constitution exclusively vests the executive power of the State in the Governor," and that therefore he has the "supreme" executive authority. Gov. Br. 11 (cleaned up); *see id.* at 3, 10, 12, 15, 17-18, 28, 33. That is wrong for a whole host of reasons.[3]

Although it is true that the Vesting Clause only applies directly to the Governor, it defies grammar and common sense to suggest that the Constitution does not also vest the other Council of State officers with executive power. Indeed, interpreting the Vesting the Clause as depriving Council of State officers of any executive authority of their own would conflict with Article III, Section 7(2), which contemplates that the General Assembly will assign executive duties to the Council of State officers. What other powers or duties would those officers exert if not executive? And what is more, the 1971 Constitution *removed and omitted* the word "supreme" from the Vesting Clause. N.C. Const. art III, § 1. The Governor cannot avoid that important revision by tucking it away in a footnote. *See* Gov. Br. at 15 n.6.

The fact that the Governor does not hold all executive power is confirmed by the Auditor's current ability to audit the Governor. N.C. Gen. Stat. § 147-64.6(c)(3). If the Governor had all executive power, surely he would not tolerate the insult of an

[3] To the extent the Governor relies on the *McCrory v. Berger* and *Cooper v. Berger* cases to support justiciability, the Auditor intends to make a good faith legal argument to overturn those as related to the political question and justiciability issues, but the Auditor submits that the issues in this case should be resolved without needing to overturn those decisions.

inferior auditing his actions. Finally, the Governor misrepresents the Supreme Court's dicta in *Cooper v. Berger*, 371 N.C. 799 (2018) ("*Cooper Confirmation*"), pointing out that the Council of State had its "historical roots" in "the advisory councils of the English monarchs." *Id.* at 800 n.1. He leaves out the rest of that paragraph where the Court explained that following the passage of the 1868 Constitution, "the Council of State became a body of directly elected officers, with executive duties of their own." *Id.* As the Court made clear, the Council of State no longer exists to merely "advise" the Governor.

At bottom, the Governor contends that he must control every board or commission that exists anywhere under the executive branch by appointing a majority of its members, but that contention is easily refuted by reviewing a few examples (more exist) where that is simply not true.[4] As in all of these examples, the Governor does not appoint the majority, and sometimes none, of the members of these executive branch boards and commissions. This belies his argument at its core: the executive branch has many cooks in the kitchen, not a unitary chef. Boiled down to a

[4] *See, e.g.*, (1) the Tobacco Trust Fund Commission, 18 members: six from the Governor and 12 from the General Assembly, N.C. Gen. Stat. § 143-717; (2) the North Carolina Forensic Science Advisory Board within the Department of Justice, 15 members: the State Crime Laboratory Director and 14 from the Attorney General, *id.* § 114-61; (3) the North Carolina Agricultural Finance Authority within the Department of Agriculture and Consumer Services, 10 members: Agriculture Commissioner, three from the Governor, six from the General Assembly, *id.* § 122D-4; and (4) the Board of Trustees of the State Health Plan for Teachers and State Employees, 9 members: State Treasurer and two he appoints, two from the Governor, and four from the General Assembly, *id.* § 135-48.20.

constitutional calculation, the zero-sum math for the General Assembly's authority is simple: not specifically prohibited by express words = allowed. *See Cooper Confirmation*, 371 N.C. at 815 ("[U]nlike the powers of Congress in the federal model, the General Assembly has the power to legislate on all matters unless the constitution prohibits it from doing so."); *accord Harper*, 384 N.C. at 323. The General Assembly, not the Governor, has the authority to create the Board and dictate where it resides in the overall scheme of the executive branch.

The Governor complains that the General Assembly could simply switch the Board around in the future as if that somehow means the Governor should be empowered to control it. It is true that the General Assembly has that power; the General Assembly could speak again for the People and make that choice in the future.[5] This is exactly why this is a nonjusticiable political question. The Governor wrongly concludes that this somehow gives rise for him to exercise authority over the Board. It does not.

[5] He is likewise—at least largely—correct that the General Assembly can generally reassign duties within the executive branch. *See* Gov. Br. 27. It could, for instance, reassign the Board to another Council of State officer. But the Governor's examples are inapposite; they are designed to create red herrings with shock value, but they do not apply to this case. To wit, transferring the Department of Adult Correction to the Labor Commissioner might interfere with the Governor's control over his own cabinet. But this case does not present any such issue: the Board has never been a part of the Governor's cabinet.

C. The Constitution Places No Bounds on the Board.

The People, when ratifying and enacting the Constitutions over the past 250 years, did include specific references to certain boards. The State Board of Education has its composition and mission spelled out in detail. N.C. Const. art. IX, §§ 4 & 5. The Constitution describes the Board of Public Welfare. *Id.* art. XI, § 4. The Constitution provides for the existence of the Council of State itself, which includes both the Governor and the Auditor. *Id.* art. III, § 8. The Council of State has specific duties provided for in the Constitution. *Id.* §§ 3(4) & 5(7).

Thus, the concept of constitutionally-created boards exists with specifically articulated membership, chains of command, and purposes. No such constitutionally-enabling language exists for the Board. The Board existed for 70 years when the People ratified the most recent Constitution. The People could have acted to enshrine the Board's composition, selection, and duties in the Constitution then, but they did not. When given a chance to ratify a constitutional amendment enshrining the composition and selection of the Board in 2018, the People voted against constitutionalizing the Board. *See* N.C. Sess. L. 2018-133. So, the Governor's attempt to constitutionalize the historical context of the Board fails to find purchase in the only place it would actually matter: the words of the Constitution. *See* Gov. Br. at 28-32.

As the Supreme Court recently affirmed, the General Assembly can take any act not prohibited or expressly reserved for another actor by the words of the

Constitution. *McKinney*, 911 S.E.2d at 7 ("The legislature alone may determine the policy of the State, and its will is supreme, except where limited by constitutional inhibition." (cleaned up)). It thus has the plenary authority to do what it wishes with the Board. That should end the inquiry into these political questions.

D. Article III Also Gives the Legislature Express Authority.

While the plenary power held by the General Assembly provides enough foundation to reject the Governor's challenge, the Constitution, as previously noted, also *expressly* grants the General Assembly the authority over the "functions, powers, and duties of the administrative departments and agencies of the State." N.C. Const. art. III, § 5(10); *see id.* § 11. Put simply, the Constitution—both implicitly and expressly—"commits th[e] specific power" to create the Board, place it where it wishes, and direct who appoints its members "to the legislative branch." *Cooper I*, 370 N.C. at 427 (Newby, J., dissenting). Thus, pursuant to the separation of power principle, the Governor does not also possess that power.

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Despite all of these reasons, the Governor tempts this Court to answer his bootstrapped political questions that the Constitution reserved to the General Assembly. The Court should decline the Governor's invitation to grab the rope on his side in this game of constitutional tug of war, instead exercising appropriate judicial modesty, in deference to the plain text of the Constitution.

III. Even if the Court Considers the Merits of the Governor's Challenge, Moving the Board from One Constitutionally-Elected Officer to Another Within the Executive Branch Could Never Violate Separation of Powers Principles Because It Does Not Pit Different Branches Against Each Other.

The Governor's argument that Senate Bill 382 violates the Separation of Powers Clause fails because the separation of powers principle in Article I, Section 6 applies to separation of powers between the *branches*, not between officers and agencies *within* a single branch. *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."). The Governor points to a number of sources that he thinks show that Senate Bill 382 is nevertheless unconstitutional. But he is wrong. Those sources say nothing about the General Assembly effecting an *intra-* (as opposed to *inter-*) branch reorganization.

While the Auditor respectfully disagrees with the holdings in *McCrory* and *Cooper I* and intends to argue that the Supreme Court should overturn them if the opportunity presents itself, this case is entirely different in any event. Here, the General Assembly never asserted control over an executive agency housed within a principle department over which the Governor has oversight by appointing the members to a commission. Instead, the General Assembly simply shifted the Board appointments from one executive branch officer to another: Governor to Auditor.

This presents a crucial difference between this case, on the one hand, and *McCrory* and *Cooper I*, on the other. The General Assembly did not give itself the

power to make the appointments or to take any other action that changed the way the Board operates as an independent agency. If some executive branch officer must appoint members to the Board, why not the Auditor? Indeed, the Board never "belonged" to the Governor—a more partisan actor—because the Board is, by design, independent. So, the Governor never had any claim to the Board, before or after this law passed.

A. *McCrory* Does Not Control.

In *McCrory*, the General Assembly created three commissions: the Oil and Gas Commission, the Mining Commission, and the Coal Ash Commission. *McCrory*, 368 N.C. at 636-38. Each existed within one of the Governor's enumerated departments in either the Department of Natural Resources (now called "DEQ") or the Department of Public Safety. *Id.* Each dealt with issues that directly implicated separate decisions made by the Governor's cabinet, namely the Secretary of Environmental Quality. They could create, change, and enforce regulatory mechanisms that the Secretary had previously controlled. *Id.* at 645-46. The Governor appointed a minority of the members on each commission, with the General Assembly appointing a majority of the members. *Id.*

The Supreme Court held that the power of these commissions should fall under the Governor's control via his Secretary. *Id.* at 646. In essence, the Supreme Court held that if the General Assembly placed these commissions under the Governor to exercise the traditional executive power that still resided under the Governor in DEQ,

the Governor had to exercise that power by appointing a majority of the members of his choice. *Id.* 647-48. The Court found that the General Assembly violated the *inter-branch* separation of powers by appointing a majority of the members of commissions housed under the Governor's existing and continuing departments when those commissions could dictate or nullify the Governor's prerogatives from DEQ without his control. The case, in other words, turned on a legislative-branch-versus-executive-branch power that existed under the Governor, before and after. Here, Senate Bill 382 bears little resemblance with that arrangement, so *McCrory* does not apply.

In contrast, the Governor has no inherent authority surrounding elections or the Board. The Board did not exist for the first 125 years or so after the Constitutions of 1776 or 1868. There is no, and never has been any, cabinet secretary position under the Governor for a "Department of Elections" or anything like it. The Board has never been included in the enumerated list of gubernatorial departments found in N.C. Gen. Stat. §§ 143B-2, -6. The Board has always been independent of the elected officials who created it, by design and for very good reason. The Board is intended to be, unlike any other entity in state government, nonpartisan and independent.

This stands in stark contrast to the commissions that essentially carved out and superseded the prior and remaining gubernatorial authority under DEQ. *McCrory*, 368 N.C. at 636-38. To the extent that the General Assembly could not appoint a majority of three commissions that existed under and interacted directly with the Governor's express legal authority to manage DEQ, that has nothing to do

with this situation. The General Assembly will not appoint members of the Board. The Board does not exist under the Governor or interact with any other remaining gubernatorial authority or departments. The General Assembly is giving the Board and its concomitant appointments to the Auditor, an independent, constitutionally-created Council of State, executive branch officer. The *McCrory* Court recognized that this case posed an entirely different question, noting that it took "no position on how the separation of powers clause applies to . . . executive departments that are headed by the independently elected members of the Council of State." *Id.* at 646 n.5. If the holding in *McCrory* disapproving of the General Assembly taking power directly from the Governor for itself survives, it has no application here.

B. *Cooper I* Does Not Control.

For similar reasons, the ruling in *Cooper I* does not support the Governor's argument. In *Cooper I*, the General Assembly abolished the prior Board and constituted a new, combined State Board of Elections and Ethics Compliance. 370 N.C. at 395-400. In this reorganization, the Governor appointed half of the eight members of the new State Board of Elections from a list of candidates provided by the opposite political party. The Governor made a similar claim to the one he made in the *McCrory* case: that this undermined his control over the entity unless he appointed a majority of his preferred candidates.

The *Cooper I* Court held that the General Assembly had authority to take this action under Article III, Section 5(10), but only to the extent that it did not conflict

with different, express provisions, Article I, Section 6 and Article III, Section 5(4). Even though the Constitution says nothing about either the Board or gubernatorial appointments to it, that Court held that the generic language from the Separation of Powers and Take Care Clauses empowered the Governor to pick a majority of the members of that version of the Board. *Id.* at 414. It reasoned that the Board performed an executive function, so it required executive control. *Id.* at 415.

Regardless of the Auditor's primary position that *Cooper I* was wrongly decided, it does not control this Court's decision. As the Supreme Court has recognized for years, a branch runs only afoul of the Separation of Powers Clause when, relevant here, "the actions of one branch prevent *another branch* from performing its constitutional duties." *Cooper v. Berger*, 376 N.C. 22, 44 (2020) (emphasis added) (quoting *McCrory*, 368 N.C. at 645). Senate Bill 382 does not do that. This case does not present a situation where the General Assembly cut the executive branch officer out and did not allow the responsible executive branch officer to appoint a majority of the members of the Board.[6]

Instead, the General Assembly exercised its constitutional power, recognized with approval by the *Cooper I* Court, to organize the Board and allow an executive branch officer to appoint members within the established constitutional guardrails.[7]

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[6] Even if it did, the Auditor would raise the issue, not the Governor. He is not.

[7] For this same reason, *Cooper I* does not foreclose the Auditor's position in Part I, *supra*, that Article III, Section 5(10) provides the exclusive remedy to resolve these types of disputes. *See Cooper I*, 370 N.C. at 411 n.7 (discussing that issue). The *Cooper I* Court premised its reasoning in footnote 7 on the idea that that case concerned the

Cooper I, 370 N.C. at 409 (the General Assembly's decisions regarding the organization of an executive agency are "committed to the sole discretion of the General Assembly"). And again, just like in *McCrory*, the *Cooper I* Court took "no position on how the separation of powers clause applies to those executive departments that are headed" by elected officials. *Id.* at 407 n.4. Here, the Auditor, a constitutionally-created, popularly-elected, executive branch officer appoints all of the members to the Board, so no *Cooper I* problem.[8]

In short, to the extent *McCrory* and *Cooper I* say anything, they say *nothing* about whether the General Assembly has broad authority to reorganize the executive branch. Thus, no "test" or "standard" those cases established applies here because it

executive branch's ability—as a whole—to control the new Bipartisan Board. *See id.* If not, the General Assembly ran into other constitutional provisions, like the Take Care Clause. But despite how the Governor casts his claims, that is not the case here, where the issue is whether the General Assembly can effect an *intra-branch* reorganization. Thus, Section 5(10) is not similarly constrained as in that scenario.

[8] The Governor misplaces his reliance on *State ex rel. Wallace v. Bone*, 304 N.C. 591 (1982), for the same reason. Even more so than *McCrory* and *Cooper I*, *Wallace* involved an overt encroachment by the *legislative branch* into the province of the executive branch by appointing sitting members from the General Assembly to an executive commission that ostensibly remained under the Governor's control. *Id.* at 608. Here on the other hand, the General Assembly is not changing the substance of the Board *at all*—it is merely transferring it, unchanged and intact, to another executive officer. If the Governor could have done it under the old version, the Auditor can do it now. The rules of who the Auditor may appoint to the Board specifically exclude any elected official, to include a sitting member of the General Assembly. Thus, while *Wallace* created a separation of powers invasion of legislators on an executive branch officer's board, no *Wallace* problem exists here.

could only apply when the legislative branch interferes with the executive branch's control over its duties. That did not happen here, so no application.

C. The Governor's Remaining Citations Support the Auditor.

The Governor also includes a smattering of citations from these and other cases that he claims recognize that *his office specifically* has certain powers with which the legislature cannot interfere. Gov. Br. at 24-25. But context shows that the Governor improperly relies on those quotations. Those cases involved *inter-branch* interference, so the Court simply referred to the "Governor" because that was the official *within the executive branch* whose duties were affected. Substitute executive branch officer for them, and the Auditor survives this threshold here.

Nor does the Proposed November 2018 Constitutional Amendment support the Governor. *See* Gov. Br. 16. If the failure to ratify this Proposed Amendment says anything, it says that the People did not vote to enshrine in the Constitution that the General Assembly makes appointments to the Board. It does not say that the People want the Board to remain in the control of the Governor. The People never voted on that issue because it was not presented to them. In any event, Senate Bill 382 says nothing about the General Assembly nominating members of the Board. The People, by their vote, did not strip away any preexisting authority from the General Assembly or give any power to the Governor. The failure to enact the Proposed November 2018 Constitutional Amendment adds nothing to this dispute.

The Governor cites to a few other cases to claim that the General Assembly has no power to effect an intra-executive branch reorganization. *See* Gov. Br. at 25-26. Those cases say no such thing. The first, *North Carolina State Board of Education v. State*, 371 N.C. 170 (N.C. 2018), actually *undermines* his point. The Supreme Court recognized that—even if our Constitution delegated some authority to a constitutionally-created board like the State Board of Education—the General Assembly could still shift authority over day-to-day operations to another constitutionally-elected executive branch officer, the Superintendent of Public Instruction. *Id.* at 185-86. And further, the Board of Education tried and failed to challenge the General Assembly's actions based on an *explicit mandate* in the Constitution. *Id.* (Constitution authorized the Board to "supervise and administer" the public school system). Here the Governor can only point to vague language in the Take Care and Vesting Clauses.

The second case, *Martin v. Thornburg*, 320 N.C. 533 (1987), is no more helpful to the Governor. That case says absolutely nothing about the General Assembly's ability to administratively reorganize the duties of the executive branch. *See generally id.* Indeed, it clarifies that a constitutionally-created Council of State executive branch officer (the Attorney General), can exercise the duties entrusted to him under a law passed by the General Assembly, separate from the Governor's authority within his own statutorily assigned duties. *Id.* at 546. In other words, if no specific constitutional provision expressly gives the Governor a certain power, the

General Assembly can give that power to the other executive branch officer by statute. By the same logic, the General Assembly can give the Auditor the statutory power to appoint the Board because the Constitution does not specifically carve that authority out exclusively for the Governor.

Finally, *State v. Comacho*, 329 N.C. 589 (1991), again, offers no support. The District Attorney had the express constitutional authority to "determine whether to request—and thus permit—the prosecution of any individual case." *Id.* at 594. In other words, the Court held that the judicial branch could not tell an executive branch officer how to exercise his substantive authority, derived from express constitutional textual authority. *Id.* Senate Bill 382 does nothing like that. It simply *reorganizes* certain duties assigned within the executive branch. It does not even dictate how the assigned executive branch officer should carry out those duties.

IV. The Governor Cannot Hijack Legal Duties the General Assembly Assigns to the Auditor.

Although the Governor claims to have been bestowed with some inherent authority to oversee the Board by default or history, that is simply not the case. And, despite the Governor's meager attempts to argue otherwise, the Auditor is well-equipped as a practical matter to appoint members of the Board.

A. The Governor Cannot Usurp the Council of State's Duties.

The Governor is not the Auditor's boss. He has no authority to usurp legal duties the General Assembly assigns the Auditor. As an independent, constitutionally-created, popularly-elected executive branch officer, the Auditor—

just like the Governor—has the right to execute laws and legal duties assigned to him by statute by the General Assembly by way of the Constitution. N.C. Const., art. III § 7(2); *see Cooper I*, 370 N.C. at 415 (the Governor has the "ability to implement [his] policy decisions" only to the extent the "executive branch agencies subject to his or her control *are allowed, through delegation from the General Assembly*" (emphasis added)).

As described in Part II, *supra*, the Governor actually does have some express constitutional powers grounded in the words of the Constitution. So if the converse applied where the Auditor tried to exercise the Governor's expressly authorized and articulated constitutional power of clemency, then the Governor could possibly invoke the specific words in the Constitution to attempt to thwart the Auditor. N.C. Const., art. III § 5(6). Nothing like that exists here to support the Governor's attempt to hijack the statutorily-granted authority to the Auditor.

This Court should reject the Governor's theory because it has no reasonable endpoint. As the Governor would have it, he could usurp any of the other constitutionally-created, popularly-elected Council of State officers' duties prescribed to them by law. He could preside as the president of the Senate even though the Constitution expressly gives that power to the Lieutenant Governor. N.C. Const., art. III § 6. He could be the administrative officer of the State Board of Education, even though the Constitution assigns the Superintendent of Public Instruction to that role. N.C. Const., art. IX § 4(2). The Governor can no more arrogate those express

constitutional roles to himself than the General Assembly could give the Governor's express constitutional authority to clemency or the veto to the Treasurer. *See* N.C. Const. art. II, § 22 (Governor veto); *id.* art. III, § 5(6) (Governor clemency).

Once again, the Governor attempts to ground this behavior in the nebulous words of the Take Care and Vesting Clauses. He reads into the Constitution that these two clauses give him "supreme" executive power over all other executive branch officers. However, a cursory review giving a plain meaning to the actual words in those clauses shows they give the Governor express power over neither the Auditor nor the Board.

B. The Auditor is Well-Equipped to Appoint Members to the Board.

The Governor claims it does not make sense for the Auditor to appoint the Board because the Auditor has not historically held a role in election administration. *E.g.*, Gov. Br. 29-32. But that is a nonjusticiable policy argument at its core; it asks this Court to decide that the Governor is a subjectively better fit to appoint members of the Board than the Auditor.[9]

In any event, it is not accurate. The Governor's cabinet and departments have no inherent connection to elections, other than the fact that the Governor is elected

[9] The Governor's suggestion that the General Assembly cannot transfer the Board to the Auditor because it would upset voters' expectations also holds no water. *See* Gov. Br. 27-28. If that were the case, the General Assembly could never, for instance, assign additional duties to an elected officer like the Treasurer. The voters technically did not "elect" that officer to accomplish those new responsibilities. Yet freezing an elected officer's duties in place like that for all time would undeniably run counter to the General Assembly's power to "prescribe the functions, powers, and duties of the

in a partisan fashion. But so is the Auditor. Further, nothing about the Board inherently brings it within the Governor's domain of expertise. The Board does not implicate prisons or state law enforcement officers or environmental permitting or tax collection or any other traditional executive agency or cabinet function.

The Governor claims that the Auditor has no specific history or expertise in elections, but he should pick the mote out of his own eye first. He may have run for election before and even been elected as the Attorney General, but that does not give him any experience running the Board. The Governor has held public office for over a decade before taking office, but, on information and belief, has never once served on the State Board of Elections or any County Board of Elections. He has no better claim to the Board through some historical resume of being elected than does the Auditor.

And to the extent that whichever executive branch officer is "in charge" here merely selects the Board's members from a list provided by the two political parties,

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administrative departments and agencies of the State and [to] alter them from time to time." N.C. Const. art. III, § 5(10). To the extent the Governor's actual position is that the General Assembly *can* assign elected executive officers new duties, but only those that fall within some vague "purpose of [that] office when [it] was created," Gov. Br. 28, the Governor attempts to tack on words to the Constitution. Nowhere in Article III does the Constitution say those officers' duties must be thematically linked to their title. In fact, elsewhere, the Constitution *does* prescribe some duties of certain elected officers like the Superintendent of Public Instruction, underscoring how divorced from the constitutional text the Governor's argument is. *See* N.C. Const. art. IX, § 4 (Superintendent "shall be the secretary and chief administrative officer of the State Board of Education"). The People know how to constitutionally assign a specific duty to a Council of State officer—they did so for the Superintendent, the Governor, and Lieutenant Governor. But that does not mean that the other Council of State officers have no legal duties. *Id.* art. III, § 7(2).

why is he better suited, as the Governor, for that limited task than the Auditor is? In pointing his finger against the Auditor, the wolf's paw emerges from the fleece. If both of them run for state-wide election under the structure provided by the Board, what assurances can the Governor offer that he is somehow more pure than any other elected official? Asking the question answers itself. A choice must be made, and the Governor wants to exercise partisan influence that he thinks favors him.

If anything, the General Assembly chose wisely in shifting the Board's selection process to the Auditor. The Auditor holds a special place of trust in the State apparatus. He takes a separate oath, that he "will well and truly execute the trust reposed in me as auditor, without favor or partiality, according to law, to the best of my knowledge and ability; so help me, God." N.C. Gen. Stat. § 11-11. That latter portion—"without favor or partiality . . . so help me, God"—shows that the Auditor serves as a more independent actor related to partisan interests than the Governor. And in any event, Senate Bill 382 simply grants the Auditor the authority to (among other things not relevant here), appoint members of the independent Board. It does not even grant the Auditor management responsibility over the Board.

Who will watch the watchmen? The Board is independent, by design. The Board's reason to exist is to ensure that partisan actors do not meddle in the affairs of elections. The Board should act to keep politics out of the most political of all events, popular elections. The Auditor is well-positioned to do so. That office was established to be independent and impartial, and its duties specifically include inspection and

oversight. *See* N.C. Gen. Stat § 147-64.6 ("It is the policy of the General Assembly to provide for the auditing and investigation of State agencies by the *impartial, independent* State Auditor (emphasis added)); *see also id.* -64.8 (providing that the Auditor shall be independent); *id.* -64.11 (allowing the Auditor to audit his own office). No entity like that exists within the Governor's cabinet; and certainly that does not describe the Governor himself.

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The Governor does not have "supreme" authority over the whole executive branch. The Constitution—both implicitly and expressly—spreads executive branch authority over ten officers and conveys the power to organize that branch to the General Assembly. Senate Bill 382 does exactly that. This law presents a simple, uncontroversial, intra-branch restructuring. It alters nothing between the legislative branch and the executive branch, leaving the appointments and whatever minimal oversight exists over the independent Board wholly within the executive branch. Threatening to hamstring the General Assembly's constitutional power to structure and organize the Board, the Governor asks this Court to weigh in on nonjusticiable political questions. Respectfully, it should decline.

Even if the Court found a justiciable issue, the Governor's challenge collapses under scrutiny. The Governor does not hold all executive branch authority as the unitary executive in North Carolina. The Auditor simply, and respectfully, asks this Court to recognize that fact.

Conclusion

For all these reasons, the Court should deny the Governor's Motion for Summary Judgment, grant summary judgment in favor of the Defendants, and dismiss all of the Governor's claims.

This the 12th day of March 2025.

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*This email address must be used in order to effectuate service under Rule 5 of the North Carolina Rules of Civil Procedure.

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CERTIFICATE OF SERVICE

I hereby certify that on 12th day of March 2025 I have electronically filed the forgoing INTERVENOR-DEFENDANT AUDITOR'S RESPONSE TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT with the Clerk of the Court using the Odyssey system which will send notification of such filing to the following:

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