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.

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

Defendants.

MEMORANDUM IN REPLY TO INTERVENOR-DEFENDANT AUDITOR'S RESPONSE TO PLAINTIFF'S SUMMARY JUDGMENT MOTION

INTRODUCTION

The Auditor opens his brief by arguing that "the General Assembly possesses plenary power to create a completely independent [State Board of Elections], subject to no executive authority." Aud. Resp. 1. In his view, the General Assembly can create executive agencies that are subject to no executive oversight or management whatsoever—a position thoroughly at odds with the text of the Separation of Powers Clause, the Vesting Clause, and the Take Care Clause, not to mention controlling Supreme Court precedent.

The Auditor also concedes that under his view of the Constitution, the General Assembly "could . . . reassign the [State Board and county boards of election] to another Council of State Officer." Aud. Resp. 17 n.5. According to the Auditor, the

General Assembly could assign the State Board of Elections to the State Superintendent of Public Instruction, Commissioner of Agriculture, or State Treasurer. By conceding this, the Auditor admits that, under his view of the Constitution, the General Assembly may control the execution of the election laws by transferring the responsibility to enforce those laws to any preferred executive official.

This is not the law. Our Supreme Court squarely rejected a similar contention in *McCrory*, holding that such a "rule would nullify the separation of powers clause" because it would give the General Assembly "the . . . ability to control the executive branch." *State ex rel. McCrory v. Berger*, 368 N.C. 633, 647 (2016). The positions that the Auditor advances here are, in important ways, more extreme.

Fundamentally, in his effort to defend Senate Bill 382 and the expansion of power that legislation provides him, the Auditor reads the Vesting Clause and the Take Care Clause out of the Constitution—blithely dismissing them as "generic" (at 24), "vague" (at 27), and "nebulous" (at 30). But criticizing these provisions cannot erase them from the Constitution. They have an obvious and plain meaning evident from the text, which is reinforced by history and precedent: the people have vested the Governor with the State's supreme executive authority, and he must have sufficient supervisory authority over other executive officials to ensure faithful execution of the law.

Because the challenged provisions of Senate Bill 382 cannot be reconciled with the text of the Constitution, constitutional history, or controlling precedent, they should be enjoined from taking effect.

ARGUMENT

I. This case is justiciable.

The Auditor devotes much of his brief (Aud. Resp. 2-19) to arguing that this case is non-justiciable, an argument that this Court has already rejected ***in this very case*** because it is wrong as a matter of law and squarely foreclosed by controlling Supreme Court precedent.

A. The Auditor's argument that Article III, § 5(10) makes this case non-justiciable has been rejected by this Court and the Supreme Court.

First, the Auditor argues that Article III, § 5(10) of the Constitution exclusively commits to the General Assembly and Governor the process for organizing the executive branch, rendering any question related to executive organization a non-justiciable political question. Aud. Resp. 2-10. In making this argument, the Auditor relies on the ***dissenting*** opinion in *Cooper v. Berger*, 370 N.C. 392 (2018) ("*Cooper I*"); Aud. Resp. 4 (citing *Cooper I*, 370 N.C. at 438 (Newby, J., dissenting)); *id.* at 5 (citing *Cooper I*, 370 N.C. at 437 (Newby, J., dissenting)).

The Auditor's reliance on the dissenting opinion in *Cooper I* reveals that the ***majority*** considered and rejected his argument. The Court held that the Governor's challenge was justiciable because he was not "challenging the General Assembly's decision to 'prescribe the functions, powers, and duties of the administrative departments and agencies of the State,'" but rather was "challenging the extent . . .

to which the statutory provisions governing the manner in which the [State Board of Elections] is constituted and required to operate . . . impermissibly encroach upon his constitutionally established executive authority to see that the laws are faithfully executed." *Id.* at 409-10. The same is true here: the Governor contends that Senate Bill 382 is unconstitutional because it violates other provisions of the Constitution, including the Take Care Clause. That alone is sufficient to overcome the Auditor's non-justiciability arguments.[1]

Moreover, the Auditor's argument was already raised by Legislative Defendants in this case and rejected by the three-judge panel in its now-vacated summary judgment order. The panel correctly reasoned that it "cannot look past *Cooper I*, the controlling authority for this specific separation of powers issue" and correctly held that "the Governor's claim is justiciable as a matter of law." SJ Order at 5, ¶ 10. Indeed, in light of the controlling Supreme Court precedent, Legislative Defendants appear to have only raised this argument for preservation purposes at this point. *See* Leg. Def. Mem. At 27-28; *see id.* at 28 ("Legislative Defendants

[1] *Cooper I* also resolves the Auditor's claim that the State Board of Elections is "somewhat of a unicorn entity" because it has quasi-judicial and legislative powers. Aud. Resp. 5 n.1. In *Cooper I*, the Supreme Court considered and rejected Legislative Defendants' argument that "the quasi-judicial nature" of the State Board of Elections "'can support its independence from being under the thumb of the executive.'" 370 N.C. at 406 (quoting Legislative Defendants Brief). The Court rejected the fundamental premise of the argument, explaining that the State Board, "which has responsibility for the enforcement of laws governing elections [and] campaign finance … clearly performs primarily executive, rather than legislative or judicial, functions." *Id.* at 415. Following this clear precedent, the panel in this case previously concluded in its now-vacated summary judgment order "that the State Board and the County Boards exercise primarily executive functions." SJ Order at 5, ¶ 11.

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.").[2]

B. The Auditor's argument that the General Assembly has unreviewable, plenary power to organize the executive branch is wrong.

The Auditor alternatively argues that this case is non-justiciable because the General Assembly "wields the plenary power" to reorganize administrative agencies, and that review of its decisions is "not suited for the courts." Aud. Resp. 11. This argument is belied by the text of the Constitution and decades of precedent.

The Auditor appears to argue that the case is non-justiciable in part because, allegedly, there is no "specific constitutional language limiting" the General Assembly's power to organize the executive branch. Aud. Resp. 12. The Auditor is incorrect. Though the Auditor largely ignores the Separation of Powers Clause, Vesting Clause, and Take Care Clause, the Supreme Court has repeatedly relied on those provisions as the basis for its review of the General Assembly's enactments regarding organization of the executive branch. *McCrory*, 368 N.C. at 649 ("[T]he challenged appointment provisions … prevent the Governor from performing his

[2] It also bears noting that the Auditor's recitation of the history of Article III, § 5(10)'s adoption in the 1971 Constitution (Mem. 7-10) contravenes the actual facts. The Governor detailed this history in his response brief to the Legislative Defendants (Gov. Resp. 15-16), fundamentally demonstrating that § 5(10) and § 5(11) were added to the Constitution to increase the Governor's power, restrain the General Assembly, and provide for a more efficient and predictable executive branch under the Governor's control. The rule that Legislative Defendants and the Auditor seek—whereby the General Assembly may transfer executive powers to any agency at any time with no oversight by the Governor—would wholly undermine those goals.

constitutional duty to take care that the laws are faithfully executed. By doing so, these provisions violate the separation of powers clause."); *Cooper v. Berger*, 371 N.C. 799, 801 (2018) ("*Cooper Confirmation*") (holding that the challenged "senatorial confirmation requirement leaves the Governor with enough control to take care that the laws be faithfully executed, and therefore does not violate the separation of powers clause"); *Cooper I*, 370 N.C. at 422 (holding that the challenged provisions "impermissibly interfere with the Governor's ability to faithfully execute the laws"); *State ex rel. Wallace v. Bone*, 304 N.C. 591, 608-09 (1982) ("[W]e conclude that [the challenged statutory provision] violates Section 6 of Article I of the North Carolina Constitution."). In other words, the Supreme Court has repeatedly held that the General Assembly's enactments regarding the organization and structure of executive branch agencies are subject to review under the very same provisions at issue in this case: the Vesting Clause, Take Care Clause, and Separation of Powers Clause.

The Auditor also attempts to make much of the fact that the Constitution mentions other boards, such as the State Board of Education and the Council of State, arguing that because the State Board of Elections is not mentioned, there are no limits on the General Assembly's power to structure it. Aud. Resp. 18. Whether a board is specifically mentioned in the Constitution does not affect the justiciability of claims that the board's structure is unconstitutional. History is replete with precedent that proves the point.

In *Wallace v. Bone*, the Supreme Court held unconstitutional a statute governing appointments to the Environmental Management Commission. *Wallace*, 304 N.C. at 606-07. That commission is not mentioned in the Constitution, and yet the Supreme Court held that the appointment structure enacted by the General Assembly violated the Separation of Powers Clause. *Id.* at 608-09. So, too, in *McCrory*, which concerned the Oil and Gas Commission, Mining Commission, and Coal Ash Commission. 368 N.C. at 636-38. Though the commissions are not mentioned in the constitution, the Court held that the challenged statutes nonetheless prevented the Governor from "performing his constitutional duty to take care that the laws are faithfully executed" and, therefore, "violated the separation of powers clause." *Id.* at 649. And, of course, *Cooper I*, like this case, concerned the State Board of Elections. Far from holding that the case presented a non-justiciable political question, the Court held that the General Assembly had "impermissibly interfere[d] with the Governor's ability to faithfully execute the laws."

None of the boards at issue in *Wallace*, *McCrory*, and *Cooper I* are mentioned specifically in the Constitution, but the Supreme Court nonetheless held that the General Assembly cannot control the execution of the laws enforced by those agencies. As the Supreme Court explained in *McCrory*, the General Assembly violates the Constitution when its "actions … prevent another branch from performing its constitutional duties." 368 N.C. at 645 (citing *Bacon v. Lee*, 353 N.C. 696 (2001)).

The Auditor goes on to contend that the Governor "cannot point to single word anywhere in the Constitution to assert any authority over the Board" and accuses the

Governor of claiming a right "to make policy through executive fiat." Aud. Resp. at 14. This is untrue.

To be clear, the Governor agrees that the General Assembly has the power to assign duties and functions to the agencies of the executive branch. See Gov. Resp. 15 ("Section 5(10) recognizes the General Assembly's power to assign 'functions, powers, and duties of the administrative departments and agencies of the State' and to 'alter them from time to time.'") But, as the Governor has also made clear, the General Assembly's enactments must comply with the rest of the Constitution, including the Vesting Clause and the Take Care Clause, which assign exclusively ***to the Governor*** the responsibility for overseeing the executive branch. As the Supreme Court held in *Cooper I*, "the authority granted to the General Assembly pursuant to Article III, Section 5(10) is subject to other constitutional limitations, including the explicit textual limitation contained in Article III, Section 5(4)." 370 N.C. at 411.

While the Auditor does not address the Take Care Clause as a textual limitation on the General Assembly's power, he does briefly attempt to wrestle with the Vesting Clause, contending that "grammar and common sense" must make it apply to the rest of the Council of State. Aud. Resp. 15. The text, which the Auditor does not quote, provides, in full:

> **Section 1. Executive power.**
> The executive power of the State shall be vested in the Governor.

N.C. Const. art. III, § 1. It is hard to imagine a more declarative, plain statement. *See Harper v. Hall*, 384 N.C. 292, 297 (2023) ("The constitution is interpreted based on its plain language."); *see also* Amicus Brief of Gov. James G. Martin, et al., No. COA 24-440, at 10-13 (N.C. Ct. App. Oct. 8, 2024) (bipartisan amicus brief of all living former Governors discussing the Vesting Clause and explaining the role of the Governor within the executive branch). It is unclear what "grammar" or "common sense" leads the Auditor to the conclusion that this short declarative assignment of power ***to the Governor*** "also vests the other Council of State officers with executive power." Aud. Resp. 15. The Supreme Court's description of the Vesting Clause as "charg[ing]" the Governor "as the constituted head of the executive department" is as true today as it was in the Nineteenth Century when they wrote it. *Winslow v. Morton*, 118 N.C. 486, 24 S.E. 417, 418 (1896).[3]

[3] The Auditor makes much of the Constitution Study Commission's removal of "supreme" from the Vesting Clause in the 1971 Constitution. Aud. Resp. 15. The Supreme Court has repeatedly—and recently—reiterated that the significant, substantive changes adopted in the 1868 Constitution are far more consequential than the primarily editorial and organizational changes adopted in the 1971 Constitution. *See McKinney v. Goins*, 911 S.E.2d 1, 10 n.5 (2025) ("Our precedents have repeatedly cited the [1968 North Carolina State Constitution Study Commission]'s characterization of its edits as non-substantive."). To that end, the structure of the 1868 Constitution is particularly notable because the same clause that established the Governor and seven other independently elected executive offices, also clearly vested the "Supreme executive authority" of the State in the Governor. *See* N.C. 1868 Const. art. 3, § 1. It would have been simple for the 1868 drafters to vest the supreme executive authority across all elected executive officials by moving the Vesting Clause to the end of the list of executive officials—much as the drafters vested the judicial and legislative power in multi-member bodies. But the drafters made a different, clear choice to vest the State's supreme executive authority in the Governor alone.

The reality is that this case is justiciable, as the panel held previously. Binding precedent requires this Court to determine whether the challenged provisions of Senate Bill 382 comply with "other constitutional limitations," including the Vesting Clause and the Take Care Clause. *Cooper I*, 370 N.C. at 411. As shown in the Governor's opening memorandum, response, and below, the challenged provisions do not comply with those limitations and should, therefore, be enjoined.

II. The Auditor's other arguments are unavailing.

In the remainder of his brief, the Auditor argues that this Court should rule on the merits for the Legislative Defendants. But his arguments fail to distinguish controlling Supreme Court precedent, ignore the text of the Constitution, and explore tangents unrelated to Senate Bill 382's unconstitutionality. *See generally* Aud. Resp. 20-33. These arguments are unsuccessful and should be rejected by the Court.

A. *McCrory* and *Cooper I* control.

The Auditor argues at some length that *McCrory* and *Cooper I* do not control the outcome of this case. The primary thrust of his argument is that because Senate Bill 382 "simply shifted the Board appointments from one executive branch officer to another," the Supreme Court's recent decisions about separation of powers do not apply. Aud. Resp. 20. The Auditor is incorrect. *McCrory* and *Cooper I* provide the controlling framework for assessing the constitutional claims at issue in this case.

As explained above, *McCrory* is clear that the General Assembly violates the separation of powers both (1) if it "exercises power that the constitution vests exclusively in another branch" and (2) if it "prevent[s] another branch from performing its constitutional duties." 368 N.C. at 645. When this type of challenge

is raised, the Court "must determine whether the actions of a coordinate branch 'unreasonably disrupt a core power of the executive.'" *Id.* (quoting *Bacon*, 353 N.C. at 717). That is precisely the type of challenge the Governor brings here because Senate Bill 382 prevents him from performing his constitutional duties and disrupts the core powers assigned to him in the Vesting Clause and Take Care Clause.

Cooper I reinforces the holding of *McCrory* in the specific context of the execution of the State's election laws. The Court explained that "[t]he General Assembly cannot . . . consistent with the textual command contained in Article III, Section 5(4) of the North Carolina Constitution, structure an executive branch commission in such a manner that the Governor is unable, within a reasonable period of time, to 'take care that the laws be faithfully executed.'" 370 N.C. at 418. The State Board and county boards are unquestionably "executive branch commissions," so the Governor must have the ability "within a reasonable period of time" to ensure that they faithfully execute the law. But Senate Bill 382 leaves the Governor with no "'control over the views and priorities of the [majority of] officers' and prevents the Governor from having 'the final say on how to execute the laws.'" *Id.* (quoting *McCrory*, 368 N.C. at 647). Accordingly, Senate Bill 382 "impermissibly, facially, and beyond a reasonable doubt interferes with the Governor's ability to ensure that the laws are faithfully executed as required by Article III, Section 5(4) of the North Carolina Constitution." *Id.*

B. The Auditor's remaining arguments are incorrect.

The Auditor concedes that in 2018 the people overwhelmingly rejected the General Assembly's proposal to amend the Constitution so "that the General

Assembly makes appointments to the Board [of Elections]." Aud. Resp. 26. He goes on to argue that the failure of that proposed amendment "does not say that the People want the Board to remain in the control of the Governor." *Id.*

This argument is wrong—but also beside the point. First, the General Assembly's submission of the 2018 Amendment to the people reflected its acknowledgement that the changes it sought to implement to the Board of Elections required a change in the Constitution and could not be implemented by statute. Indeed, the submission of the amendment to the people occurred in the wake of *Cooper I*, which held that the Constitution requires that the Governor must have "'the final say on how to execute'" the State's election laws. 370 N.C. at 418 (quoting *McCrory*, 368 N.C. at 647).

Second, the people's rejection of the General Assembly's proposed amendment reflects—at the very least—the people's preference for the Governor, not the General Assembly, to control the State Board of Elections. Having been prevented from making their preferred appointments to the State Board of Elections, first by the Supreme Court and then by the people, Legislative Defendants now seek to accomplish the same unconstitutional goal by a different means—claiming the power to select any appointer that they choose until their policy preferences are executed. "This rule would nullify the separation of powers clause, at least as it pertained to the General Assembly's ability to control the executive branch." *McCrory*, 368 N.C. at 647.

The Auditor also faults the Governor for allegedly claiming "some inherent authority to oversee the [Board of Elections] by default or history." Aud. Resp. 28. In reality, the Governor claims express authority written into the Vesting Clause and the Take Care Clause of the Constitution, in particular, to oversee the activities of the executive branch. Gov. Mem. 19-23; Gov. Resp. 2-13. The Governor also claims that the General Assembly's power to prescribe duties to the Council of State is constrained by the understood functions of the Council of State offices. Gov. Mem. 24-33; Gov. Resp. 17-20. In other words, the General Assembly may assign to the Auditor various duties and powers relating to the independent review of government programs and finances, but may not assign to the Auditor responsibility for managing the execution of election law, agricultural policy, or road building. Just the same, the General Assembly may assign various duties and powers relating to the execution of agricultural policy to the Commissioner of Agriculture, but it could not assign to the Commissioner of Agriculture the Auditor's power to conduct independent review of government programs and finances.[4]

The Auditor closes his brief by arguing that he is "[w]ell-[e]quipped" to appoint members to the Board. Aud. Resp. 30. He goes on to accuse the Governor of asking

[4] The Auditor incorrectly argues that the Governor seeks to "freez[e] an elected officer's duties in place … for all time." Aud. Resp. 30 n.9. The Governor's actual argument is that the duties prescribed by law to the Council of State must be consistent with the intended role and function of that office within the executive branch. Pursuant to Article III, § 7(2), the General Assembly may prescribe duties and powers consistent with those roles and functions, but may not prescribe duties and powers inconsistent with those roles and functions.

the Court "to decide that the Governor is subjectively better fit to appoint members of the Board than the Auditor." *Id.*

Yet again, the Auditor mischaracterizes the Governor's argument. This case is not about who is better situated to make appointments to the State Board or county boards. This case is about whether the ***constitution permits*** the General Assembly to assign to the Auditor the duty to supervise the execution of the State's election laws and, in doing so, eliminate the Governor's supervisory authority entirely. The fact that Senate Bill 382 would make North Carolina's Auditor the only one in the country responsible for the execution of a state's elections laws and that the Auditor has played no role in the execution of the election laws since the State Board was established under the Governor's control in 1901, reinforce the settled understanding of our Constitution and the role of the Auditor.

The Governor agrees that "[t]he Auditor holds a special place of trust in the State apparatus" in light of his important duties to independently review the activities of state government. Aud. Resp. 32. But that is of no moment in reviewing the constitutionality of Senate Bill 382, which prevents the Governor from fulfilling his constitutional duties and exercising his constitutional powers.

CONCLUSION

For the foregoing reasons, Plaintiff Governor Josh Stein respectfully requests that this Court grant his Motion for Summary Judgment and permanently enjoin the challenged provisions of Senate Bill 382 (Session Law 2024-57).

Respectfully submitted this the 26th day of March, 2025.

/s/ Eric M. David
Jim W. Phillips, Jr.
N.C. State Bar No. 12516
jphillips@brookspierce.com
Eric M. David
N.C. State Bar No. 38118
edavid@brookspierce.com
Daniel F. E. Smith
N.C. State Bar No. 41601
dsmith@brookspierce.com
Amanda S. Hawkins
N.C. State Bar No. 50763
ahawkins@brookspierce.com
BROOKS, PIERCE, MCLENDON, HUMPHREY & LEONARD, L.L.P.
Suite 2000 Renaissance Plaza
230 North Elm Street
Greensboro, NC 27401
(336) 373-8850
(336) 378-1001 (fax)

W. Swain Wood
N.C. State Bar No. 32037
swain.wood@wilmerhale.com
WILMER, CUTLER, PICKERING, HALE & DORR
2100 Pennsylvania Avenue, N.W.
Washington, DC 20037
(202) 663-6885

Attorneys for Joshua H. Stein, Governor of the State of North Carolina

CERTIFICATE OF SERVICE

I hereby certify that on this day a copy of the foregoing document was served on the following parties via email as follows:

WOMBLE BOND DICKINSON (US) LLP
Matthew F. Tilley
matthew.tilley@wbd-us.com
Emmett Whelan
emmett.whelan@wbd-us.com
Mike Ingersoll
mike.ingersoll@wbd-us.com
Attorney for Legislative Defendants

WILMER CUTLER PICKERING HALE AND DORR LLP
W. Swain Wood
swain.wood@wilmerhale.com
Attorney for Plaintiff

NELSON MULLINS RILEY & SCARBOROUGH LLP
D. Martin Warf
martin.warf@nelsonmullins.com
Noah Huffstetler
noah.huffstetler@nelsonmullins.com
Aaron T. Harding
aaron.harding@nelsonmullins.com
Attorneys for Legislative Defendants

WARD AND SMITH, P.A.
W. Ellis Boyle
docket@wardandsmith.com
weboyle@wardandsmith.com
Alex C. Dale
acd@wardandsmith.com
Attorneys for Dave Boliek, State Auditor

WAKE COUNTY SUPERIOR COURT
Kellie Myers
kellie.z.myers@nccourts.org
Lisa Tucker
Lisa.R.Tucker@nccourts.org
Aaron Davison
Aaron.D.Davison@nccourts.org
Byron Frazelle
Samuel.B.Frazelle@nccourts.org

This the 26th day of March, 2025.

/s/ Eric M. David
Eric M. David