

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,

vs.

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,

and

DAVE BOLIEK, in his official  
capacity as NORTH CAROLINA  
STATE AUDITOR,

Intervenor-Defendant.

**LEGISLATIVE DEFENDANTS'  
MOTION TO STAY  
23 APRIL 2025 ORDER**

COME NOW Defendants Philip E. Berger, in his official capacity as President Pro Tempore of the North Carolina Senate; and Destin C. Hall, in his official capacity as Speaker of the North Carolina House of Representatives (collectively, the “Legislative Defendants”), by and through the undersigned counsel and pursuant to N.C. Gen. Stat. §§ 1-294 and 1A-1, Rule 62 and Appellate Rule 8, and hereby move for entry of an order staying this Court’s 23 April 2025 Order while it is on appeal. In support of this motion, Legislative Defendants show the Court as follows:

1. On 23 April 2025, this Court held that Senate Bill 382 “contravenes the plain text of the Constitution . . . by assigning to the State Auditor the sole power to supervise the administration of our state’s election laws.” (23 April 2025 Order, p.16) Accordingly, this Court concluded that “Senate Bill 382’s changes to those boards are thus unconstitutional and must be permanently enjoined.” (23 April 2025 Order, p. 16) Legislative Defendants request that this Court stay its 23 April 2025 Order while the matter is appealed.

2. The purpose of staying this Court’s order is to preserve the status quo while the order is on appeal. *See, e.g., Ridge Cmty. Inv’rs, Inc. v. Berry*, 293 N.C. 688, 701, 239 S.E.2d 566, 574 (1977) (point of an injunction is to preserve the status quo of the parties during litigation). Senate Bill 382, which became Session Law 2024-57, went into effect on 11 December 2024. The Board of Elections thus is already part of the Department of the State Auditor and has been since December. *See* N.C. Sess. Law. 2024-57 § 3A.2(a) (transferring the Board of Elections to the Department of the State Auditor). Thus, the *status quo* prior to 23 April 2025 was the law as reflected in Senate Bill 382. The provisions of that bill, among other things, set expiration dates for the terms of Board of Elections members and provided that new appointments would be made by the Auditor. The General Assembly adopted those provisions pursuant to its plenary power to structure administrative agencies, as well as its express power under Article III, Section 7(2) of the State Constitution to assign duties to the “other elective officers” who serve as members of the Council of State. Allowing this order to take effect while an appeal is pending would result in the

disruption—based on a legal claim that has never been adopted by any of our appellate courts—of the status quo, changing the law from the state in which it has existed for several months, and judicially restraining, for the first time, the General Assembly’s longstanding power to assign duties to members of the Council of State.

3. In considering whether to stay an order and preserve the status quo pending appeal, our appellate courts have adopted a standard similar to that used for preliminary injunctions that preserves the status quo pending trial; courts consider the likelihood of success on appeal and the possibility of irreparable harm or injury without a stay. *See Abbott v. Town of Highlands*, 52 N.C. App. 69, 79, 277 S.E.2d 820, 827 (1981) (“There was some likelihood that plaintiffs would have prevailed on appeal and thus have been irreparably injured. Consequently, we find no abuse of discretion in the judge’s decision to stay the judgment pending appeal.”); *N. Iredell Neighbors for Rural Life v. Iredell Cty.*, 196 N.C. App. 68, 79, 674 S.E.2d 436, 443 (2009) (“While no North Carolina court appears to have articulated the standard which a trial court should use when ruling on a Rule 62(c) motion, we hold the two-pronged test articulated by our Supreme Court in *Berry* [discussing the standard for a preliminary injunction] to be applicable.”).

4. Legislative Defendants submit that there is a likelihood that they will prevail on appeal. Legislative Defendants maintain that the Governor’s position is a contravention of the separation of powers because it disregards the express decision of the citizens of North Carolina to check the accumulation of executive power in one person by authorizing the General Assembly to allocate duties among a multi-

member executive branch. The plain text of the Constitution establishes the Auditor as an independently elected executive branch officer and authorizes the General Assembly to assign his duties. Thus, the decision to assign the duty of appointing the Board of Elections members to the Auditor is one the General Assembly is expressly authorized to make.

5. Unlike the Governor, the General Assembly “need not identify the constitutional source of its power when it enacts statutes” and instead may “rely on its general power to legislate, which it retains as an arm of the people.” *Cooper v. Berger*, 371 N.C. 799, 815–16, 822 S.E.2d 286, 299 (2018) (“*Cooper Confirmation*”) (citation omitted). The General Assembly also has the express authority to organize government and assign duties to the members of the executive branch. N.C. CONST. art. II, § 5(10). Accordingly, updating the Board of Elections’ structure is “committed to the sole discretion of the General Assembly.” *Cooper v. Berger* (“*Cooper I*”), 370 N.C. 392, 409, 809 S.E.2d 98, 108 (2018). Furthermore, the General Assembly has express power to assign duties (i.e., executive functions) to the other independently elected officers that comprise the executive branch. *See* N.C. CONST. art. II, § 7(2).

6. Senate Bill 382 does not violate the Separation of Powers Clause. As matter of plain text, the General Assembly’s decisions to transfer the 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) do not implicate the Separation of Powers Clause. The Governor and the Auditor are both executive branch officers. The Separation of Powers Clause only speaks to the

separation of powers between branches, not within them. N.C. CONST. art. I, (“The legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other.” (emphasis added)); accord *Harper v. Hall*, 384 N.C. 292, 298, 886 S.E.2d 393, 399 (2023) (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)).

7. Senate Bill 382 violates neither the Vesting Clause nor the Take Care Clause. While the Vesting Clause creates a general rule that duties vest in the Governor as matter of default, it is subject to the later, more specific provisions that permit the General Assembly to assign duties to other Council of State members. *Cooper Confirmation*, 371 N.C. at 800, 822 S.E.2d at 290 (explaining that the Governor has a duty of faithful execution, but “the Governor is not alone in this task,” and “[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 II, § 5(10)). The Take Care Clause is not a conferral of power, it is a limit on 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” that laws are executed in manner “faithful,” not to his prerogatives, but to those of the legislature.

8. The Governor making what amounts to a unitary executive power grab would cause irreparable harm to the people of North Carolina that cannot be recouped and which could be tempered by staying the 23 April 2025 Order through appeal. Unlike the federal Constitution, North Carolina's Constitution does not establish a unitary executive. Rather, our government is deliberately structured with a multi-member executive branch. Although they use similar language as their federal counterparts, the Vesting Clause and Take Care Clause of our Constitution apply to a government with very different history and structure. Indeed, our Constitution expressly anticipates that the General Assembly will have the power to assign duties and functions to other members of the executive branch in Article III, § 7(2).

9. Finality of a constitutional question under North Carolina law comes from our appellate courts. Staying this Court's 23 April 2025 Order allows our appellate courts to weigh this Court's order under the status quo this Court and the people of North Carolina enjoyed as recently as yesterday. Should an appellate court conclude—as Judge Womble did in his dissent—that Senate Bill 382 is, in fact, constitutional, the General Assembly will have been wrongly restricted from exercising its constitutional authority to legislate for want of a stay. More specifically, if this decision is overturned on appeal, it will result in an extended period of restriction that cannot be recovered. Therefore, a stay is warranted in order to avoid

an unnecessary and irreparable restriction on the General Assembly's constitutional authority to organize the Board while the appeal of this order is pending.

WHEREFORE, Legislative Defendants respectfully pray that this Court:

- a. rule on this motion without a hearing as the May 1 deadline is fast approaching,
- b. require that any responses be made on an expedited basis, and
- c. grant Legislative Defendants' Motion to Stay this Court's 23 April 2025 Order while on appeal and until further order of this Court or an appellate court.

Respectfully submitted this the 24th day of April, 2025.

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## CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing was served upon the persons indicated below via electronic mail addressed as follows:

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This the 24th day of April, 2025.

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