NO. 114P25 TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

****

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

Plaintiff-Petitioner,

v.

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;

Defendant-Respondents,

and

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

Intervenor-Defendant-Respondent.

From the Court of Appeals
P25-298
(Appeal Not Yet Docketed)

From Wake County
Case No. 23CV029308-910

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GOVERNOR JOSHUA H. STEIN'S PETITION FOR WRIT OF CERTIORARI AND WRIT OF SUPERSEDEAS

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INDEX

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes and Rules

Other Authorities

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TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

Plaintiff-Petitioner Governor Joshua H. Stein respectfully petitions the Supreme Court of North Carolina to issue a writ of certiorari and writ of supersedeas pursuant to North Carolina General Statutes Section 7A-32 and Rules 21 and 23(b) of the Rules of Appellate Procedure to stay, review, and reverse the Court of Appeals 30 April 2025 Order allowing certain challenged provisions of Senate Bill 382 (Session Law 2024-57) to take effect, despite the judgment of a duly constituted three-judge panel that those provisions are unconstitutional beyond a reasonable doubt. *See* **Petition Exhibit A** (COA Order); **Petition Exhibit B** (trial court judgment).

The Court of Appeals erred by allowing the challenged provisions of Senate Bill 382, which a three-judge panel held violated our Constitution, to take effect without briefing or argument. The Court of Appeals apparently concluded that the statute's empowerment of the State Auditor to appoint members to the State Board starting May 1 presented sufficient exigency to justify permitting the unconstitutional provisions to take effect pending appeal. But May 1 has no practical significance. The next statewide elections are far off. There will be plenty of time for the Auditor's appointments down the road, should the courts ultimately resolve Legislative Defendants' appeal in their favor.

Because of that, this Court should act to restore the panel's injunction, which preserves the status quo. In considering whether to grant equitable relief, the relevant status quo is the "*last peaceable*" state of affairs between the parties before their dispute arose. *State v. Fayetteville St. Christian Sch.*, 299 N.C. 731, 732–33 (1980). Here, the last peaceable status quo is the one the State has enjoyed since 1901: a five-member bipartisan State Board of Elections appointed by the Governor. *See* N.C. Gen. Stat. § 163-19(b) (2024); 1901 Session Law Ch. 89 at p. 244 § 5.

By contrast, the Court of Appeals' Order upends the status quo entirely. If this Court allows that Order to stand, it will immediately end the terms of the State Board's current members and empower the State Auditor, for the first time in our state's history, to appoint an entirely new slate of executive actors. *See* Session Law 2024-57, § 3A.3(g); *id.* § 3A.3.(c) (showing pre-Senate Bill 382 text of N.C.G.S. § 163-19). And if the panel's decision is ultimately upheld on appeal, the need to unwind the changes wrought by letting the bill go into effect would cause even further disruption.

Legislative Defendants have provided no compelling explanation as to why the trial court's ruling is incorrect. Legislative Defendants emphasize that Senate Bill 382 is "presumptively valid unless or until the Governor can show it is [un]constitutional beyond a reasonable doubt." Court of Appeals Petition at 11 (available on e-filing site). But the trial court—after full merits

briefing and oral argument—already held that the Governor made that showing.

For purposes of this petition, then, *a different presumption applies*: this Court must "presum[e] that the judgment entered below is correct." *W. Conference of Original Free Will Baptists of N.C. v. Creech*, 256 N.C. 128, 140 (1962) (cleaned up). Legislative Defendants' regurgitated arguments, which the trial court correctly recognized were foreclosed by rulings from this Court, are nowhere near enough to rebut that presumption, especially at this early stage.

Fundamentally, the Court of Appeals' Order has upended the status quo on an expedited basis, without full briefing or oral argument, without a compelling argument on the merits, and without Legislative Defendants' showing any exigency that required such drastic action.

A statute that has already been held unconstitutional "beyond a reasonable doubt" should not take effect when no elections are imminent and when Legislative Defendants have made no showing of exigency or need. Especially so here, where the trial court's decision, made after extensive briefing and argument, is correct and consistent with the constitutional text, history, and precedent. Accordingly, this Court should grant a temporary stay, writ of supersedeas, and writ of certiorari to the Governor to avoid causing irreparable harm and upending the status quo.

In support of this petition, the Governor shows the following:

FACTS AND PROCEDURAL HISTORY

A. A three-judge panel enjoins the General Assembly's attempt to give itself appointment authority over the State Board and county boards.

This case began in October 2023, days after the General Assembly overrode then-Governor Cooper's veto to enact Senate Bill 749 (Session Law 2023-139). In short, Senate Bill 749 would have replaced the five-member State Board of Elections appointed by the Governor with an eight-member State Board appointed entirely by the legislature. Session Law 2023-139 § 2.1. In addition, it would have created county boards with four members that would also have been appointed entirely by the legislature. *Id.* §§ 2.3, 4.1. Legislative leaders would also have had the authority to designate the chair of the State Board, as well as its executive director, in certain circumstances. *Id.* §§ 2.1, 2.5.

The Governor filed his Verified Complaint in this action days after Senate Bill 749 was enacted, and the matter was transferred to a three-judge panel.

Following a hearing, the panel preliminarily enjoined the challenged provisions of Senate Bill 749 before they took effect. Legislative Defendants did not appeal that order or seek any immediate relief from it.

The Governor then moved for summary judgment, while Legislative Defendants moved to dismiss and for judgment on the pleadings. The panel ruled unanimously in the Governor's favor, permanently enjoining Senate Bill 749's changes to the State Board and county boards. *See* Summary Judgment Order (Mar. 11, 2024).

Legislative Defendants then appealed. Again, Legislative Defendants did not seek injunctive relief staying the trial court's order pending appeal.

On May 29, 2024, Legislative Defendants filed a Petition for Discretionary Review Prior to Determination by the Court of Appeals. This Court denied Legislative Defendants' petition on August 23, 2024. *See Cooper v. Berger*, No. 131P24, Order (Aug. 23, 2024).

B. Legislative Defendants introduce and enact Senate Bill 382.

Just weeks after the November 2024 elections, and after Legislative Defendants' appeal was fully briefed and awaiting argument before the Court of Appeals, the General Assembly enacted Senate Bill 382 in December 2024 over the Governor's veto. In relevant part, that legislation repealed the challenged provisions of Senate Bill 749 and adopted yet another structure for the State Board of Elections.

Before Senate Bill 382 was enacted, the Governor appointed the members of the State Board from a list of four nominees submitted by the state

party chairs of each of the two largest political parties in the State. N.C. Gen. Stat. § 163-19(b) (2024). The Governor similarly filled vacancies from a list of nominees from the chair of the political party of the departing member. *Id.* § 163-19(c). The Governor was also empowered to summarily remove any member who failed to attend meetings of the State Board. *Id.* § 163-20(d).

Then-Governor Cooper appointed the current members of the State Board to four-year terms in May 2023. *Id.* § 163-19(b); *see also Governor Cooper Announces State Boards and Commissions Appointments* (May 8, 2023), *available at*: https://governor.nc.gov/news/press-releases/2023/05/08/governor-cooper-announces-state-boards-and-commissions-appointments (last accessed April 28, 2025).

Senate Bill 382 would change this appointment structure. First, it ends the terms of the current board members on April 30, 2025 and, in large measure, replaces the Governor with the State Auditor in supervising the execution of the relevant statutes. Specifically, Senate Bill 382 transfers the Governor's authority to appoint members of the State Board to the State Auditor starting May 1, 2025. Session Law 2024-57 § 3A.3.(c) (amending N.C. Gen. Stat. § 163-19(b)). It also transfers to the State Auditor the Governor's authority to fill vacancies or remove members who fail to attend State Board meetings. *Id.* § 3A.3.(d) (amending N.C. Gen. Stat. § 163-20(d)).

Senate Bill 382 adopts much the same approach with respect to county boards of elections. Before Senate Bill 382 was enacted, county boards were composed of five members appointed to two-year terms in June of odd-numbered years. N.C. Gen Stat. § 163-30(a) (2024). The State Board itself appointed four members, two each from lists of three nominees provided by the two political parties receiving the most votes in the previous election. *Id.* §§ 163-30(a), (c). The Governor appointed the chair of each county board. *Id.* § 163-30(a). The State Board could remove any county board member for cause and fill the vacancy created by that removal, selecting from a list of two nominees provided by the political party of the departing member. *Id.* §§ 163-22(c), 163-30(d).

Just as Senate Bill 382 would change the State Board, it would change the county boards by transferring the Governor's powers to the State Auditor. The State Auditor would appoint the chair of each county board instead of the Governor. Session Law 2024-57 § 3A.3.(f) (amending N.C. Gen. Stat. § 163-30(a)). And the State Auditor, not the Governor, would now indirectly control the composition of county boards through the Auditor's power to appoint, supervise, and remove all members of the State Board.

C. The three-judge panel held the challenged provisions of Senate Bill 382 unconstitutional.

Following the enactment of Senate Bill 382, Legislative Defendants moved to dismiss their appeal. The Court of Appeals granted the motion on 23 December 2024. That same day, the Governor moved for leave to file a supplemental complaint. After a hearing on a joint motion by all parties, the Wake County Superior Court entered an order that vacated the three-judge panel's prior summary judgment and preliminary injunction orders, permitted the supplemental complaint, set a summary judgment schedule, and confirmed that the claims in the supplemental complaint should be heard by a three-judge panel.

Legislative Defendants and the Governor submitted substantial opening and response briefs to the three-judge panel. The State Auditor was permitted to intervene as a defendant with the consent of the parties and also submitted a brief to which the Governor replied. The court held a hearing on 14 April 2025, at which all parties presented extensive argument.

The panel then issued a 16-page decision on 23 April 2025, which thoroughly addressed the parties' arguments before concluding that "beyond a reasonable doubt, Senate Bill 382 contravenes the plain text of the Constitution, constitutional history and context, and binding Supreme Court precedent by assigning to the State Auditor the sole power to supervise the

administration of our state's election laws." *See* **Petition Exhibit B** at 16, ¶ 36. On that basis, the panel held that "Senate Bill 382's changes" to the State Board and county elections boards are "unconstitutional and must be permanently enjoined." *Id.*

Judge Womble dissented. He agreed "with the majority that the claims and arguments at issue in this case are justiciable." *Id.* at 19 (Womble, J., dissenting). However, in his view, "Senate Bill 382 neither impedes [the Governor's] ability to take care that the laws will be faithfully executed nor violates the separation of powers clause." *Id.* at 21.

D. Legislative Defendants persuaded the Court of Appeals to allow the unconstitutional law to take effect.

On Thursday, 24 April 2025, Legislative Defendants noticed an appeal from the trial court's judgment and filed a motion asking the trial court to stay its judgment. On Friday, 25 April 2025, the State Auditor noticed an appeal.

Late on Friday, 25 April 2025, Legislative Defendants filed a petition for writ of supersedeas and motion for temporary stay or expedited consideration. *See Stein v. Berger*, COA P25-298 (available on e-filing site).

On Monday, 28 April 2025, the Governor filed a notice of intent to respond to Legislative Defendants' petition by Wednesday, 30 April 2025. *See id.* On Tuesday, 29 April 2025, the Auditor filed his "Response in Support of

Legislative Leader Defendants." This morning, the Governor filed his opposition to Legislative Defendants' petition.

At 3:54 p.m., the Court of Appeals, without merits briefing or oral argument, issued an order allowing the statute declared unconstitutional by the trial court to take effect. *See* **Petition Exhibit A**.

REASONS WHY THE WRITS OF CERTIORARI AND SUPERSEDEAS SHOULD ISSUE

This Court should grant the Governor's petitions for a writ of supersedeas and writ of certiorari and stay, review, and reverse the Court of Appeals' erroneous and destabilizing Order. The Order, which allows an unconstitutional law to take effect during the pendency of an appeal Legislative Defendants are unlikely to win, upends the status quo and causes irreparable harm. In those circumstances, a writ of supersedeas and writ of certiorari should issue.

I. Failing to stay the Court of Appeals 30 April 2025 Order would cause irreparable harm and destroy the last peaceable status quo among the parties.

A. The requested writ would destroy the status quo.

The Court of Appeals' Order turns the purpose of injunctive relief on its head. As this Court has held, "[t]he injunction is generally framed so as to restrain the defendant from permitting his previous act to operate, or to restore conditions that existed before the wrong complained of was committed."

Anderson v. Waynesville, 203 N.C. 37, 46 (1932). In other words, the goal is to preserve "the last peaceable status quo between the parties. . . ." *State v. Fayetteville St. Christian Sch.*, 299 N.C. 731, 732–33 (1980). Injunctions issue to preserve the relief sought by the plaintiff, not to permit the defendant to consummate the legal injury complained of. *See, e.g.*, *Fayetteville St.*, 299 N.C. at 732–33; *Craver v. Craver*, 298 N.C. 231, 237-38 (1979); *Anderson*, 203 N.C. at 46.

Here, the last peaceable status quo is the executive agency structure that has existed since 1901, with a five-member bipartisan State Board of Elections appointed by the Governor. *See* N.C. Gen. Stat. § 163-19(b) (2024); 1901 Session Law Ch. 89 at p.244 § 5. If the Court of Appeals' Order remains in effect, it will upend the composition of that agency, as well as the composition of county boards of elections soon thereafter.

Legislative Defendants contend that because Senate Bill 382 was enacted into law, "[i]t thus reflects the current state of the law and must be treated as presumptively valid . . . until the Governor can show it is unconstitutional beyond a reasonable doubt." COA Petition at 11 (available on e-filing site). But the Governor has already shown that the law is unconstitutional beyond a reasonable doubt. The panel majority held that "***beyond a reasonable doubt***, Senate Bill 382 contravenes the plain text of the Constitution, constitutional history and context, and binding Supreme

Court precedent by assigning to the State Auditor the sole power to supervise the administration of our state's election laws." *See* **Petition Exhibit B** at 16, ¶ 36 (emphasis added).

The trial court, with the benefit of thorough briefing from the Governor, Legislative Defendants, and the State Auditor and having heard extensive oral argument, ruled in the Governor's favor. That judgment—as a matter of established, controlling precedent—cannot be lightly disregarded and reversed on an expedited basis. "[I]n injunction cases . . . ***there is a presumption that the judgment entered below is correct***, and the burden is upon appellant to assign and show error." *W. Conference of Original Free Will Baptists of N.C. v. Creech*, 256 N.C. 128, 140 (1962) (cleaned up) (emphasis added); *see also, e.g.*, *Town of Apex v. Rubin*, 277 N.C. App. 357, 370 (2021) ("We must presume the preliminary injunction was proper, and [Defendant-Appellant] bears the burden of showing error to rebut the presumption.").

B. Legislative Defendants will suffer no harm if the trial court's judgment remains in effect.

On the other side of the harm analysis, Legislative Defendants have not shown—and cannot show—any injury, much less great and irreparable injury, from preventing implementation of the challenged provisions of Senate Bill 382 while this case is resolved. The five current members of the State Board were appointed by the Governor in 2023 to four-year terms in the same manner that

our state has employed to select the State Board for nearly 125 years. Indeed, all of North Carolina's living former Governors—two Republicans and three Democrats—wrote in an amicus brief to the Court of Appeals just a few months ago that "[f]or nearly 125 years, our Board of Elections, with its members appointed and supervised by the Governor, has faithfully ensured time and time again that our elections are lawful and accurate." Amicus Brief of Governor James G. Martin et al., No. 24-406 (N.C. Ct. App. Oct. 29, 2024). Allowing those members to continue their service to North Carolina in a year without statewide elections would not cause any harm. Terminating them on the basis of an expedited petition process would, in contrast, cause irreparable harm.

Legislative Defendants asserted to the Court of Appeals that the case presents "a matter of significant urgency" because "[e]very day the panel's injunction extends past [May 1] thwarts the People's will and the laws they have enacted to Govern [the Board of Elections'] structure." *See* Legislative Defendants' COA Pet. 2 (available on e-filing site). This argument is wrong for at least three reasons.

First, it is the General Assembly, not the judicial panel, that has thwarted the People's will by violating the Constitution. "The constitution is our foundational social contract and an agreement among the people regarding fundamental principles." *Harper v. Hall*, 384 N.C. 292, 297 (2023); *see also*

Cooper v. Berger ("*Cooper Confirmation*"), 371 N.C. 799, 804 (2018) ("Separating the powers of the government preserves individual liberty by safeguarding against the tyranny that may arise from the accumulation of power in one person or one body.").

The General Assembly cannot by statute reassign duties that are established in the Constitution. As this Court has held, "in respect to offices created and provided for by the Constitution, the people in convention assembled alone can alter, change their tenure, duties, or emoluments, or abolish them." *N.C. State Board of Ed. v. State*, 371 N.C. 170, 180 (2018) (cleaned up); *see also* Thomas M. Cooley, *A Treatise on the Constitutional Limitations Which Rest upon the Legislative Power of the States of the American Union* 114-115 (2d ed. 1871) ("[S]uch powers as are specially conferred by the constitution upon the governor, or upon any other specified officer, the legislature cannot authorize to be performed by any other officer or authority; and from those duties which the constitution requires of him he cannot be excused by law.").

Second, the People have actually spoken recently and clearly about the structure of the State Board of Elections, resoundingly rejecting changes that the legislature proposed in 2018. Back then, the General Assembly proposed a constitutional amendment to create a new State Board of Ethics and Elections Enforcement to replace the existing Board. The Governor would

have appointed four members recommended by the Democratic and Republican Senate leaders and four members recommended by the Democratic and Republican House leaders. Session Law 2018-133. The voters soundly rejected that amendment by a vote of 2,199,787 against (62%) and 1,371,446 for (38%). *See* North Carolina State Board of Elections, 11/06/2018 Official General Election Results – Statewide, available at: https://er.ncsbe.gov/?election_dt=11/06/2018&county_id=0&office=REF&contest=1422.[1]

Third, the "urgency" now alleged by Legislative Defendants is belied by their failure to seek injunctive relief at any prior point in this case. A three-judge panel permanently enjoined the first elections law challenged in this case in March 2024. At that time, despite the presidential election on the horizon, Legislative Defendants made no attempt to stay the decision, instead opting to leave the three-judge panel's injunction in place while they proceeded with an appeal. If that injunction posed no irreparable harm, notwithstanding the upcoming 2024 election, it is difficult to see how this injunction, entered more than eighteen months before the next statewide election, risks any such harm. *See, e.g.*, *N. Iredell Neighbors for Rural Life v. Iredell Cty.*, 196 N.C. App. 68,

[1] The Court may take judicial notice of the results of the election. *State v. Swink*, 151 N.C. 726 (1909) (taking judicial notice of holding of election and resulting referendum vote in favor of new law); *see also In re Peoples*, 296 N.C. 109, 142 (1978) (taking judicial notice of records of the North Carolina State Board of Elections); *see also* N.C. R. Evid. 201(b).

79 (2009) (no irreparable harm when "some two months elapsed without any contention by plaintiffs of an urgent threat of irreparable harm"); *Quince Orchard Valley Citizens Ass'n v. Hodel*, 872 F.2d 75,80 (4th Cir. 1989) ("Although a particular period of delay may not rise to the level of laches and thereby bar a permanent injunction, it may still indicate an absence of the kind of irreparable harm required to support a preliminary injunction.").

Fundamentally, the true import of Legislative Defendants' arguments to the Court of Appeals is that their laws should never be enjoined, even temporarily. But the judgment and permanent injunction issued by the panel below is plainly within the province of the judicial branch where, as here, a court concludes that an enactment of the General Assembly has violated the Constitution "beyond a reasonable doubt." *See, e.g.*, *Thomas v. N.C. Dep't of Human Res.*, 124 N.C. 698, 709 (1996) ("An order of this Court proclaiming a statute unconstitutional applies not only to the named litigants, it voids the statute entirely as if it no longer existed."); *Malloy v. Cooper*, 162 N.C. App. 504, 511 (2004) (permanently enjoining enforcement of statute).

II. Legislative Defendants are not likely to succeed on the merits.

Legislative Defendants' merits arguments offer little more than a rehash of arguments that were considered and rejected by the panel below. Accordingly, the Governor is likely to succeed in affirming the trial court's

judgment on appeal, making it even more crucial that the relief obtained in the trial court remains in place.

A. The panel majority correctly applied the plain text of the Vesting Clause and the Take Care Clause.

Legislative Defendants accuse the panel majority of finding "a hidden meaning" in the Vesting Clause and concluding that it "secretly establish[es] a unitary executive." COA Petition at 14. The panel did no such thing. Their only mention of the Vesting Clause was to say that "the Constitution prevents the legislature from unreasonably disturbing the vesting of 'the executive power' in the Governor." Summary Judgment Order 13 ¶ 28. This is hardly a controversial reading of the Vesting Clause, which states that "The executive power of the State shall be vested in the Governor." N.C. CONST. art. III, § 1.[2] This Court explained more than a century ago with regards to the original Vesting Clause that appeared in the 1868 Constitution that it "charges [the Governor] ***as the constituted head of the executive department (article 3, § 1)***" and gives him "the duty of seeing that [the laws are] carried into effect." *Winslow v. Morton*, 118 N.C. 486, 24 S.E. 417, 418 (1896) (emphasis added).

Legislative Defendants have little to say about the Take Care Clause, which charges the Governor alone to "take care that the laws be faithfully

[2] The panel majority also noted that the 1868 Constitution "vested [the Governor] with 'the Supreme executive power of the State.'" **Petition Exhibit B** at 14 ¶ 30 (quoting 1868 N.C. CONST. art. III, § 1).

executed." N.C. CONST. art. III, § 5(4). In a footnote they suggest that the Clause "serves as a limit, not a power" that "obligates the Governor to exercise those powers delegated to him in a manner consistent with the laws enacted by the General Assembly." *See* COA Pet. 16 n.4. This self-serving argument is wrong for at least four reasons.

First, it is contrary to the plain text of the Constitution. *See Harper v. Hall*, 384 N.C. 292, 297 (2023) ("The constitution is interpreted based on its plain language. The people used that plain language to express their intended meaning of the text when they adopted it."). The Governor is already required—in a separate provision of the Constitution—to take an oath to support the Constitution and the laws enacted by the General Assembly and to "faithfully perform [his] duties" as Governor. N.C. CONST. art III, § 4; *see also* 1868 N.C. CONST. art III, § 4. Including a second, independent provision in the Constitution to remind the Governor of that same duty to follow the law would render one of those provisions superfluous—but the Constitution cannot be read to render any of its provisions mere surplusage. *See Cooper Confirmation*, 371 N.C. at 814; *Stone v. State*, 191 N.C. App. 402, 409-10 (2008).

Second, Legislative Defendants' argument defies common sense. If the Take Care Clause were just a limit on the Governor, as the General Assembly suggests, there would be no reason for that clause to apply to the Governor

alone, as opposed to all of the "[o]ther elective officers" provided for in the Constitution. N.C. CONST. art. III, § 7. Surely Legislative Defendants believe that the Auditor, Treasurer, and other members of the Council of State are "obligate[d] . . . to exercise those powers delegated to [them] in a manner consistent with the laws enacted by the General Assembly." COA Pet. 16 n.4. Why, then, does the Take Care Clause apply only to the Governor?

Third, Legislative Defendants' argument yet again ignores history and context. As noted above, the Take Care Clause was added to the Constitution in 1868, at the same time that other independently elected executive officers were added. 1868 N.C. CONST. art. III, §§ 1, 7. Given that the obligation to take care was assigned only to the Governor, and not to the other executive offices established in Article III, the Take Care Clause is best understood to place a unique responsibility on the Governor.

The best way to understand that unique responsibility, moreover, is to look to the nearly identical provision in the federal constitution. *Compare* U.S. CONST. art. II, § 3 (President "shall take Care that the Laws be faithfully executed") *with* 1868 N.C. CONST. art. III, § 7 (Governor "shall take care that the laws be faithfully executed") and N.C. CONST., art. III, § 5(4) (same). While the federal "take care" language, adopted in 1789, did not exist at the time of North Carolina's 1776 Constitution, it would have been well known to the framers of North Carolina's 1868 Constitution. *See State ex rel. McCrory v.*

Berger, 368 N.C. 633, 645 (2016) (noting addition of Take Care Clause after 1776).

The meaning of the federal Take Care Clause is clear: The duty of faithful execution assigned to the country's chief executive requires that the chief executive have the power necessary to supervise executive officials and to ensure faithful execution. As James Madison explained: "If the duty to see the laws faithfully executed be required at the hands of the executive magistrate, it would seem that it was generally intended he should have that species of power which is necessary to accomplish that end." *Proceedings and Debates of the House of Representatives of the United States, at the First Session of the First Congress*, March 4, 1789, 1 Annals of Cong. 95-96 at 496 (Gales ed. 1834). In other words, well before he became President, Madison understood that imposing the duty to take care that the laws be faithfully executed necessarily carried with it the power to effectuate that command.

This understanding of the federal Take Care Clause is evident in case law. Chief Justice Taft, in the U.S. Supreme Court's seminal *Myers* decision, traced the history of the Take Care Clause at considerable length and wrote that:

> As [the president] is charged specifically to take care that [the laws] be faithfully executed, the reasonable implication, even in the absence of express words, was that as part of his executive power he should select those who were to act for him under his direction in the execution of the laws. The

> further implication must be, in the absence of any express limitation [in the Constitution] respecting removals, that as his selection of administrative officers is essential to the execution of the laws by him, so must be his power of removing those for whom he cannot be responsible.

Myers v. United States, 272 U.S. 52, 117 (1926); *see also id.* at 122 ("[W]hen the grant of the executive power is enforced by the express mandate to take care that the laws be faithfully executed, it emphasizes the necessity for including within the executive power as conferred the exclusive power of removal.").

Chief Justice Taft thus recognized that the very existence of the Take Care Clause in the federal constitution requires that the President have the power to effectuate its command—namely, the power to supervise inferior executive officials to ensure their faithful execution of the law. The duty to take care would be meaningless if the executive lacked the authority to carry it out. Chief Justice Roberts succinctly reaffirmed this understanding more recently, explaining that "[t]he President cannot 'take Care that the Laws be faithfully executed' if he cannot oversee the faithfulness of the officers who execute them." *Free Enterprise Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 484 (2010).

North Carolina's Take Care Clause is similar in its meaning. *See Hill v. Atlantic & N.C. R.R. Co.*, 143 N.C. 539, 55 S.E. 854, 870 (1906) ("Identity of language necessarily implies identity of meaning, and every principle of logic and fair construction requires us so to decide."). The Court should give effect

to the provision as it would have been understood in 1868: as a responsibility placed upon the Governor that necessarily carries with it the power to fulfill its dictates. *See McKinney v. Goins*, 387 N.C. 35, 45 (2025) ("Our goal here is to isolate the provision's meaning at the time of its ratification." (internal quotation marks omitted)). There can be little doubt that the framers of our 1868 Constitution understood the Take Care Clause they copied word-for-word from the U.S. Constitution in the same way that James Madison, Chief Justice Taft, and Chief Justice Roberts have understood that text. Ultimately, it establishes the Governor's responsibility to oversee the execution of the laws passed by the General Assembly and confirms that he must have the power to do so.

Finally, existing precedent from this Court removes any question as to this understanding of the Take Care Clause's meaning. Chief Justice Martin's unanimous decision in *Cooper Confirmation* explains that "[o]ur constitution gives the Governor the ***power and the duty*** to 'take care that the laws be faithfully executed.'" *Cooper Confirmation*, 371 N.C. at 806 (emphasis added). Far from describing the Take Care Clause as a mere limitation on the Governor's ability to act, this Court unanimously recognized that the clause necessarily includes both "duty" and "power." *Id.* Similarly, in *McCrory*, the Court held that the challenged statute was unconstitutional because "it has prevented the Governor from performing his express constitutional duty to

take care that the laws are faithfully executed." 368 N.C. at 636. This holding would be nonsensical if the Take Care Clause were merely a limit on gubernatorial power, as the Legislative Defendants argue.

Fundamentally, in *McCrory*, *Cooper I*, and *Cooper Confirmation*, this Court recognized that the Take Care Clause imposes limits on the ***legislative*** power, and they specifically analyzed the challenged legislation to determine whether it unduly interfered with the Governor's duty to take care that the laws be faithfully executed. *McCrory*, 368 N.C. at 649 ("[T]he challenged appointment provisions . . . prevent the Governor from performing his constitutional duty to take care that the laws are faithfully executed. By doing so, these provisions violate the separation of powers clause."); *Cooper Confirmation*, 371 N.C. at 801 (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 v. Berger*, 370 N.C. 392, 422 (2018) ("*Cooper I*") (holding that the challenged provisions "impermissibly interfere with the Governor's ability to faithfully execute the laws"). In doing so, the Court recognized that the Take Care Clause imposes a substantive limit on the General Assembly's power to allocate executive responsibility and requires the Governor to have "the final say on how to execute the laws." *McCrory*, 368 N.C. at 647. Senate Bill 382 is unconstitutional because it prevents the

Governor from having *any* say on how to execute the election laws, let alone "the final say." *Id.*

B. Legislative Defendants' remaining merits arguments fail.

In their Court of Appeals' petition, Legislative Defendants halfheartedly argued the same mish-mash of arguments that they made to the three-judge panel below. For the reasons set forth below, Legislative Defendants' arguments entirely lack merit and were appropriately rejected by the three-judge panel.

1. Legislative Defendants accused the trial court of ignoring Section 7(2) of Article III, which says of our State's "other elective officers" that their "respective duties shall be prescribed by law." *See* Pet. 15. Again, Legislative Defendants ignore the actual decision of the trial court majority, which correctly says that "in assigning those duties" to Council of State members, "the legislature cannot violate other constitutional provisions. For example, the legislature could not reassign the power to serve as 'Commander in Chief . . .' or the power to grant 'reprieves, commutations, and pardons,' powers that—like the power of faithful execution—are assigned to the Governor alone." **Petition Exhibit B** at 13, ¶ 27.

This is undoubtedly correct. The authority to assign duties to the Council of State does not negate the Governor's constitutionally assigned role as chief executive and his obligation to supervise the activities of the entire

executive to take care that the laws are faithfully executed. N.C. CONST. art. III, §§ 1, 5(4). The existence of Section 7(2) does not enable the General Assembly to read the Vesting or Take Care Clauses out of the Constitution or to ignore that these clauses assign powers and duties to the Governor exclusively. As Chief Justice Martin wrote in the opening words of his opinion for a unanimous court in *Cooper Confirmation*, "[t]he Governor is our state's chief executive. He or she bears ***the ultimate responsibility*** of ensuring that our laws are properly enforced." 371 N.C. at 799 (emphasis added).

The General Assembly's authority to assign duties to other executive officials is limited because it "is subject to other constitutional limitations, including the explicit textual limitation contained in Article III, Section 5(4)." *Cooper I*, 370 N.C. at 411. As this Court explained with respect to legislative appointees, "[w]e . . . do not deny that the General Assembly may generally appoint statutory officers to administrative commissions. We merely deny that it may appoint them in every instance and under all circumstances." *McCrory*, 368 N.C. at 648. The constraints on legislative appointments that are found in the Constitution, such as the Vesting Clause and the Take Care Clause, also apply to legislative delegation of duties to executive officers.

2. Controlling precedent dispenses with Legislative Defendants' argument (COA Pet. 16-18) that this case presents no separation of powers concern because Senate Bill 382 allocates responsibility for execution of the

State's election laws to another executive official instead of the General Assembly. As this Court held in *McCrory*, "the challenged appointment provisions . . . prevent the Governor from performing his constitutional duty to take care that the laws are faithfully executed. ***By doing so, these provisions violate the separation of powers clause***." 368 N.C. at 649 (emphasis added); *see also Cooper Confirmation*, 371 N.C. at 801 (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"). While the General Assembly plainly violates the separation of powers by itself attempting to exercise a power assigned to another branch, it also violates the separation of powers "when [its] actions . . . prevent another branch from performing its constitutional duties," as it has done here. *McCrory*, 368 N.C. at 645.

This Court has squarely rejected the argument that legislative control alone is required to find a separation of powers violation. Such an "argument rests upon an overly narrow reading of *McCrory*, which focuses upon the practical ability of the Governor to ensure that the laws are faithfully executed rather than upon (1) the exact manner in which his or her ability to do so is impermissibly limited or (2) whether the impermissible interference stems from (a) direct legislative supervision or control or from (b) the operation of some other statutory provision." *Cooper I*, 370 N.C. at 416.

3. Finally, the Court should reject the General Assembly's exhortation (COA Petition at 19) to ignore the decisions in *McCrory*, *Cooper I*, and *Cooper Confirmation* because of the text of a footnote. That footnote says that this Court's "opinion takes no position on how the separation of powers clause applies to those executive departments that are headed by independently elected members of the Council of State." *McCrory*, 368 N.C. at 646 n.5; *see also Cooper Confirmation*, 371 N.C. at 805, n.4; *Cooper I*, 370 N.C. at 407 n.5. The common sense understanding of that sentence is that this Court was taking no position on a future separation of powers claim brought by a member of the Council of State against the General Assembly. It certainly does not mean, as the Legislative Defendants claim, that those cases "explicitly do not apply here." (COA Petition at 18).

McCrory, *Cooper Confirmation*, and *Cooper I* are very clear about the Governor's role in state government and how to adjudicate separation of powers disputes between the Governor and the General Assembly, which implicate constitutional provisions unique to the Governor like the Vesting Clause and the Take Care Clause. But those cases did not delve into how the separation of powers would apply in disputes between a Council of State member and the General Assembly, which do not implicate the Vesting Clause and the Take Care Clause, but instead implicate the provisions of Article III, Section 7.

With respect to separation of powers disputes between the Governor and the General Assembly, the lines drawn by this Court are clear. "[T]he relevant issue in a separation-of-powers dispute is whether, based upon a case-by-case analysis of the extent to which the Governor is entitled to appoint, supervise, and remove the relevant executive officials, the challenged legislation impermissibly interferes with the Governor's ability to execute the laws in any manner." *Cooper I*, 370 N.C. at 417. To survive judicial scrutiny, a law must give the Governor "'enough control over' the executive officers 'to perform his constitutional duty' under the take care clause." *Cooper Confirmation*, 371 N.C. at 806 (quoting *McCrory*, 368 N.C. at 646).

Senate Bill 382, if it takes effect even temporarily, will deprive the Governor entirely of any ability to appoint, supervise, and remove the relevant executive officials, leaving the Governor with no ability to ensure that the State's election laws are faithfully executed. Accordingly, the panel below correctly held Senate Bill 382 unconstitutional.

ATTACHMENTS

Attached to this petition for consideration by the Court are true and accurate copies of the Court of Appeals' 30 April 2025 Order (**Exhibit A**), sought to be reviewed, and the trial court's 23 April 2025 judgment that the Court of Appeals has effectively overturned (**Exhibit B**). Other documents

that the Court may wish to consider are available on the e-filing site under COA docket P25-298.

Wherefore, Plaintiff-Petitioner Governor Joshua H. Stein respectfully prays that this Court: (a) issue its writ of supersedeas to the North Carolina Court of Appeals staying enforcement of the Court of Appeals' 30 April 2025 Order during the pendency of this action; and (b) issue a writ of certiorari to the Court of Appeals to permit review upon the issue stated as follows:

> 1. Should the Court of Appeals 30 April 2025 Order be vacated because it destroys the last peaceable status quo among the parties and effectively reverses all relief ordered by the trial court without a record being docketed, merits briefs filed, and the case heard in the normal course of the appellate process?

and that the Governor have such other relief as the Court may deem proper.

Respectfully submitted this the 30th day of April, 2025.

Electronically Submitted
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N.C. R. App. P. 33(b) Certification: I certify that all of the attorneys listed below have authorized me to list their names on this document as if they had personally signed it.

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

VERIFICATION

The undersigned attorney for petitioner, after being duly sworn, says:

The contents of the foregoing petition are true to my personal knowledge, except those matters stated upon information and belief and, as to those matters, I believe them to be true based on my personal knowledge.

I verify that Exhibits A and B are true and accurate copies of, respectively, the Court of Appeals' 30 April 2025 Order and the trial court panel's 23 April 2025 judgment.

This the 30th day of April, 2025.

Daniel F. E. Smith, *Attorney for Plaintiff-Petitioner Joshua H. Stein in his official capacity of Governor of the State of North Carolina*

Guilford County, North Carolina

Sworn to and subscribed before me this day by Daniel F. E. Smith.

Date: 4.30.2025

Marsha K. Hardin (signature), Notary Public

Marsha K Hardin (printed or typed name), Notary Public

My commission expires: 9.23.2026 (Official Seal)

NOTARY PUBLIC
MARSHA K. HARDIN
GUILFORD COUNTY, NC

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:

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This the 30th day of April, 2025.

Electronically Submitted
Daniel F. E. Smith

PETITION EXHIBIT A

North Carolina Court of Appeals

EUGENE H. SOAR, Clerk

Phone: (919) 831-3600
Web: https://www.nccourts.gov

Court of Appeals Building
One West Morgan Street
Raleigh, NC 27601

Mailing Address:
P. O. Box 2779
Raleigh, NC 27602

No. P25-298

JOSHUA H. STEIN, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF NORTH CAROLINA

v.

PHILIP E. BERGER, IN HIS OFFICIAL CAPACITY AS PRESIDENT PRO TEMPORE OF THE NORTH CAROLINA SENATE; DESTIN C. HALL, IN HIS OFFICIAL CAPACITY AS SPEAKER OF THE NORTH CAROLINA HOUSE OF REPRESENTATIVES; AND THE STATE OF NORTH CAROLINA

AND

DAVE BOLIEK, IN HIS OFFICIAL CAPACITY AS NORTH CAROLINA STATE AUDITOR

From Wake
(23CV029308-910)

O R D E R

The following order was entered:

By unanimous vote, the petition for writ of supersedeas and motion for temporary stay filed in this cause by defendant-appellants 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, on 25 April 2025 are decided as follows: The petition for writ of supersedeas is allowed. The "Order Granting Plaintiff's Motion for Summary Judgment" entered on 23 April 2025 is hereby stayed pending disposition of defendant-appellants' appeal or until further order of this Court.

The motion for temporary stay is dismissed as moot.

By order of the Court, sitting as a three-judge panel, this the 30th of April 2025.

WITNESS my hand and the seal of the North Carolina Court of Appeals, this the 30th day of April 2025.

Eugene H. Soar
Clerk, North Carolina Court of Appeals

Copy to:
Mr. Matthew F. Tilley, Attorney at Law, For Berger, Philip E., et al - (By Email)
Mr. Emmett Whelan, Attorney at Law - (By Email)
Mr. Noah H. Huffstetler, III, Attorney at Law - (By Email)
Mr. Jim W. Phillips, Jr., Attorney at Law, For Stein, Joshua H. - (By Email)
Mr. Eric M. David, Attorney at Law, For Stein, Joshua H. - (By Email)
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Mr. W. Ellis Boyle, Attorney at Law, For Boliek, Dave - (By Email)
Mr. Alex C. Dale, Attorney at Law, For Boliek, Dave - (By Email)
Mr. Michael A. Ingersoll, Attorney at Law - (By Email)
Mr. D. Martin Warf, Attorney at Law, For Berger, Philip E., et al - (By Email)
Aaron T. Harding - (By Email)
W. Swain Wood, For Stein, Joshua H. - (By Email)
The Honorable Clerk of Superior Court, Wake County

PETITION EXHIBIT B

NORTH CAROLINA

WAKE COUNTY

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,

and

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

Intervenor-Defendant.

ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

This matter is before the Court on Plaintiff Governor Joshua H. Stein's Motion for Summary Judgment and Motion for a Temporary Restraining Order and Preliminary Injunction, and Defendants Philip E. Berger and Destin C. Hall's ("Legislative Defendants") Motion for Summary Judgment. Intervenor-Defendant Dave Boliek (the "Auditor") joined in Legislative Defendants' motion. Having reviewed and considered the motions, the pleadings and other filings in this matter, all other evidence submitted by the parties, and the arguments of counsel, the Court

grants Plaintiff's Motion for Summary Judgment, denies Legislative Defendants' Motion for Summary Judgment, and denies as moot Plaintiff's Motion for Temporary Restraining Order and Preliminary Injunction.

SUMMARY OF UNDISPUTED FACTS

1. On October 10, 2023, over then-Governor Roy Cooper's veto, the General Assembly enacted Session Law 2023-139 ("Senate Bill 749"). The Governor filed this lawsuit on October 17, 2023, alleging that the law's changes to the State Board of Elections and county boards were unconstitutional.

2. Senate Bill 749 would have increased the total number of State Board members from five to eight and assigned no appointment powers to the Governor. Instead, the members of the State Board would all have been appointed by the General Assembly, which would also have been responsible for filling all vacancies upon recommendation from the initial appointing authority. In the event of deadlock, the President Pro Tempore of the Senate or the Speaker of the House would have appointed the Chair of the State Board and the Executive Director of the State Board.

3. Prior to Senate Bill 749, the Governor appointed all members of the five-member State Board from a list of eight nominees, with four nominees submitted by each of the two majority political parties. No more than three members of the five-member board could be from the same party. Any vacancy on the State Board was filled by the Governor from a list of three nominees selected by the party of the vacating member.

4. Senate Bill 749 also modified the structure of the 100 county boards so that they each would have had only four members, all appointed by members of the General Assembly. The appointed board members were to select the chair; if they were unable to do so within fifteen days of their first meeting in July, then the President Pro Tempore or the Speaker of the House would have been responsible for the selection of a chair. Any vacancy would have been filled by either the President Pro Tempore or by the Speaker of the House.

5. Prior to Senate Bill 749, each county board consisted of five members. Four members were appointed by the State Board, with two members each from the two major political parties in the state. The Governor appointed the chair. In the event of a vacancy, the State Board filled the vacant seat.

6. The case was transferred to the undersigned Three-Judge Panel ("Panel") for a determination of the facial validity of Senate Bill 749. Plaintiff moved for summary judgment, and Defendants moved to dismiss. After a hearing, the Panel granted Plaintiff's Motion for Summary Judgment, held that the law was facially unconstitutional, and enjoined the law.

7. Defendants appealed. While the appeal was pending, the General Assembly enacted Session Law 2024-57 ("Senate Bill 382") over Governor Cooper's veto. Senate Bill 382 repealed Senate Bill 749's changes and made a new set of changes to the way in which members of the State Board and county boards would be selected.

8. Senate Bill 382 transfers the State Board to the Office of the State Auditor, removes all of the Governor's appointment and removal powers for the State Board and county boards, and assigns to the Auditor the power to: (a) appoint all members of the State Board; (b) fill vacancies or remove members who fail to attend State Board meetings; and (c) direct and supervise "budgeting functions" for the State Board.

9. With respect to the county boards, Senate Bill 382 maintains the current five-member structure, with four members appointed by the State Board, but it assigns to the Auditor—and takes from the Governor—the power to appoint county board chairs.

10. Following passage of Senate Bill 382, Legislative Defendants moved to dismiss their appeal related to Senate Bill 749. The Court of Appeals granted the motion on December 23, 2024.

11. That same day, the Governor moved for leave to file a supplemental complaint in this case. After a hearing on a joint motion by all parties, Wake County Superior Court Judge Paul Ridgeway entered an order vacating the prior summary judgment and preliminary injunction orders and permitting the supplemental complaint.

12. On March 6, 2025, State Auditor Dave Boliek moved to permissively intervene in this action. The Auditor's motion was granted by consent on March 11, 2025.

13. On March 14, 2025, the Governor moved for a temporary restraining order and preliminary injunction.

14. On April 14, 2025, the Governor's motion for temporary restraining order and preliminary injunction, as well as the parties' cross-motions for summary judgment, were heard before the undersigned panel in the North Carolina Superior Court for Wake County

15. The State Board "has responsibility for the enforcement of laws governing elections, campaign finance, lobbying, and ethics, [and therefore,] clearly performs primarily executive, rather than legislative or judicial, functions." *Cooper v. Berger*, 370 N.C. 392, 415, 809 S.E.2d 98, 112 (2018) (herein, "*Cooper I*").

16. County boards are engaged in preparing ballots, hiring employees, and administering elections at the county level throughout North Carolina.

Based on the foregoing undisputed material facts, the Panel enters the following:

CONCLUSIONS OF LAW

1. There are no genuine issues of material fact, and Plaintiff is entitled to summary judgment in his favor as a matter of law.

2. A present and real controversy exists between the parties as to the constitutionality of sections 3A.3.(b), (c), (d), (f), (g), and (h) of Senate Bill 382.

3. As the head of the executive branch, directly elected by the people, Plaintiff has standing to challenge the constitutionality of laws that infringe upon the authority of his office and that of the executive branch. *See, e.g.*, N.C. CONST. art.

I, § 6; art. III, §§ 1, 5(4); *Cooper I*, 370 N.C. at 412, 809 S.E.2d at 110 (reversing trial court order to the extent it dismissed the Governor's claims for lack of standing).

4. Plaintiff's claims are ripe for judicial determination. *See, e.g.*, *Cooper I*, 370 N.C. at 416 n.12, 809 S.E.2d at 112 n. 12.

5. This Court has jurisdiction over the parties and subject matter of this lawsuit, and venue is proper. *See News & Observer Publ'g Co. v. Easley*, 182 N.C. App. 14, 19, 641 S.E.2d 698, 702 (2007) ("The principle that questions of constitutional and statutory interpretation are within the subject matter jurisdiction of the judiciary is just as well established and fundamental to the operation of our government as the doctrine of separation of powers.").

I. Legal Standard

6. Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to judgment as matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c).

7. The Panel presumes that laws of the General Assembly are constitutional. *Cooper v. Berger*, 371 N.C. 799, 804, 822 S.E.2d 286, 291 (2018) (herein, "*Cooper Confirmation*"). This presumption, however, is not absolute. *See id.* at 817-18, 822 S.E.2d at 300-01.

8. The judiciary cannot declare a law invalid unless its "unconstitutionality be determined beyond reasonable doubt." *Baker v. Martin*, 330 N.C. 331, 334, 410 S.E.2d 887, 889 (1991). When evaluating a constitutional

challenge, the Panel examines "the text of the relevant provision, the historical context in which the people of North Carolina enacted it, and this Court's precedents interpreting it." *McKinney v. Goins*, 387 N.C. 35, 45, 911 S.E.2d 1, 16-17 (2025).

9. Our Supreme Court set out the functional test for violations of the Separation of Powers Clause in *State ex rel. McCrory v. Berger*, 368 N.C. 633, 781 S.E.2d 248 (2016). "The clearest violation of the separation of powers clause occurs when one branch exercises power that the constitution vests exclusively in another branch. Other violations are more nuanced, such as when the actions of one branch prevent another branch from performing its constitutional duties." *Id.* at 645, 781 S.E.2d at 256 (citations omitted). "When [the Court] assess[es] a separation of powers challenge that implicates the Governor's constitutional authority, [the Court] must determine whether the actions of a coordinate branch 'unreasonably disrupt core power of the executive.'" *Id.* (quoting *Bacon v. Lee*, 353 N.C. 696, 717, 549 S.E.2d 840, 854 (2001)).

II. Justiciability

10. As an initial matter, the Panel must evaluate Defendants' contention that this case presents a nonjusticiable political question. 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. Recognizing that the Panel is bound by controlling appellate precedent, Legislative Defendants simply "reserve" this argument.

11. In *Cooper I*, the Court summarized the justiciability issue as whether:

> the Governor is seeking to have the judicial branch interfere with an issue committed to the sole discretion of the General Assembly or whether the Governor is seeking to have the Court undertake the usual role performed by a judicial body, which is to ascertain the meaning of an applicable legal principle, such as that embodied in N.C. CONST. art. III, § 5(4).

Cooper I, 370 N.C. at 409, 809 S.E.2d at 108.

12. The Court concluded that the *Cooper I* dispute was the latter, holding that it was error to dismiss the Governor's complaint as a nonjusticiable political question because "the authority granted to the General Assembly pursuant to Article III, Section 5(10) is subject to other constitutional limitations, including the explicit textual imitation contained in Article III, Section 5(4)." *Id.* at 411, 809 S.E.2d at 109. In other words,

> the Governor is not challenging the General Assembly's decision to "prescribe the functions, powers, and duties of the administrative departments and agencies of the State" by merging the State Board of Elections and the Ethics Commission into the Bipartisan State Board and prescribing what the Bipartisan State Board is required or permitted to do; instead, he is challenging the extent, if any, to which the statutory provisions governing the manner in which the Bipartisan State Board is constituted and required to operate pursuant to Session Law 2017-6 impermissibly encroach upon his constitutionally established executive authority to see that the laws are faithfully executed.

Id. at 409-10, 809 S.E.2d at 108 (quoting N.C. CONST. art. III, § 5(10)).

13. Here, like in *Cooper I*, the Governor's Supplemental Complaint challenges the manner in which the State Board of Elections and county boards are constituted and required to operate pursuant to the Session Law and seeks a determination as to the extent of the Governor's power under N.C. CONST. art. III,

Section 5(4), contradistinguished from Legislative Defendants' power under N.C. CONST. art. III, Section 5(10).

14. This Panel cannot look past *Cooper I*, the controlling authority for this specific separation of powers issue. *Harper v. Hall*, 384 N.C. 292, 886 S.E.2d 393 (2023), is not to the contrary. That case examines a wholly different authority granted to the General Assembly and relies on different sections of the Constitution en route to applying the political question doctrine. Accordingly, the Governor's claim is justiciable as a matter of law.

15. The Auditor's arguments about non-justiciability similarly cannot be squared with *Cooper I*. The Governor, relying on *McCrory*, *Cooper I*, and *Cooper Confirmation*, contends here that Senate Bill 382 violates limits established by Article III, §§ 1 and 5(4). Our Supreme Court has repeatedly recognized this claim as a justiciable question.

III. Application of Text, History, and Precedent

16. Having determined that *Cooper I* is on point with the facts of this case as to justiciability, the Panel now turns to applying the functional *McCrory* test.

17. Legislative Defendants contend that this case is different, and that *McCrory* and *Cooper I* are not controlling. But this argument, like the arguments Legislative Defendants raised in *Cooper I*,

> rests upon an overly narrow reading of *McCrory*, which focuses upon the practical ability of the Governor to ensure that the laws are faithfully executed rather than upon (1) the exact manner in which his or her ability to do so is impermissibly limited or (2) whether the impermissible interference stems from (a) direct legislative supervision or control or from (b) the operation of some other statutory provision.

Cooper I, 370 N.C. at 417, 809 S.E.2d at 113. As the Court went on to explain, the separation-of-powers violations discussed in other cases, such as *Wallace* and *McCrory*, "do not constitute the only ways in which the Governor's obligation to 'faithfully execute the laws' can be the subject of impermissible interference." *Id.* Rather, the "relevant issue in a separation-of-powers dispute is whether, based upon a case-by-case analysis of the extent to which the Governor is entitled to appoint, supervise, and remove the relevant executive officials, the challenged legislation impermissibly interferes with the Governor's ability to execute the laws in any manner." *Id.*

18. The Panel first concludes that the State Board and the county boards exercise primarily executive functions. The State Board's duties and authorities have not changed since *Cooper I* was announced. There, the Supreme Court determined that the State Board's duties are executive in nature. They remain so today. Likewise, the county boards perform executive functions in each county.

19. Because the State Board and county boards exercise executive functions, the question becomes whether the Governor, under Senate Bill 382, has sufficient control over those entities. Again, *Cooper I* is controlling. Our Supreme Court has held that "Article III, Section 5(4) of the North Carolina Constitution requires 'the Governor [to] have enough control over' commissions or boards that 'are primarily administrative or executive in character' to perform his [or her] constitutional duty." *Cooper I*, 370 N.C. at 414, 809 S.E.2d at 111 (quoting *McCrory*, 368 N.C. at 645-46,

781 S.E.2d at 256). The extent of the Governor's control depends on his ability to appoint members, supervise their activities, and remove them from office. *Id.*

20. The Take Care Clause "also contemplates that the Governor will have the ability to affirmatively implement the policy decisions that executive branch agencies subject to his or her control are allowed, through delegation from the General Assembly, to make as well." *Id.* at 415, 809 8.E.2d at 112.

21. Senate Bill 382 interferes with the Governor's constitutional duties. All appointment powers for the State Board have been removed from the Governor and given to the State Auditor. And the Governor has no power to fill vacancies or remove members of the State Board, whether for lack of attendance or for cause. *Id.* at 416, 809 S.E.2d at 112-13 (concluding that the statute at issue left the Governor with little control over the Board because, in part, it "significantly constrain[ed] the Governor's ability to remove members"). Likewise, with respect to the county boards, Senate Bill 382 takes from the Governor and transfers to the Auditor the power to appoint the chair of each board.

22. Thus, Senate Bill 382's changes violate the Constitution.

23. That Senate Bill 382 transfers the Governor's authority to the Auditor, rather than the General Assembly (as was the case under Senate Bill 749), makes no difference to the constitutional analysis. The Constitution does not permit the Auditor to be solely responsible for execution of the State's election laws. Constitutional text, history, and precedent confirm as much. *See McKinney*, 387 N.C. at 45.

24. The Constitution makes no mention of the nongubernatorial members of the Council of State—whose duties are separately prescribed by the legislature—in discussing the constitutional duty to take care that the laws be faithfully executed. *Compare* N.C. CONST. art. III, § 5(4) (assigning the Governor the duty to take care that the laws are faithfully executed), *with id.* art. III, § 7(2) (separately discussing the duties of the members of the Council of State, which "shall be prescribed by law"—i.e., by statute).

25. The only way to reassign a duty assigned to an Officer by the Constitution is by a constitutional amendment. NC. CONST. art. XIII; *N.C. State Bd. of Educ. v. State*, 371 N.C. 170, 171-72, 185, 187 (2018) ("[W]hen [the] constitution expressly confers certain powers and duties on an entity, those powers and duties cannot be transferred to someone else without a constitutional amendment."); *State v. Camacho*, 329 N.C. 589, 593-94 (1991) (Superior Court judge could not order a District Attorney to request that the Attorney General prosecute a case, because the North Carolina Constitution and related statutes "give the District Attorneys of the State the exclusive discretion and authority to determine whether to request—and thus permit—the prosecution of any individual case by the Special Prosecution Division [of the Office of the Attorney General]").

26. Because the duty to faithfully execute the laws has been exclusively assigned to the Governor, Senate Bill 382 cannot reassign that duty to the Auditor without violating the Constitution.

27. Although the Constitution permits the legislature to "prescribe[] by law" the "respective duties" of the "[o]ther elective officers" in the Council of State, N.C. CONST. art III, § 7(2), in assigning those duties the legislature cannot violate other constitutional provisions. For example, the legislature could not reassign the power to serve as "Commander in Chief of the military forces of the State" or the power to grant "reprieves, commutations, and pardons," powers that—like the power of faithful execution—are assigned to the Governor alone. *See id*. art. III, §§ 5(5), 5(6).

28. With respect to Senate Bill 382, the Constitution prevents the legislature from unreasonably disturbing the vesting of "the executive power" in the Governor or the Governor's obligation to take care that the laws are faithfully executed. *Cooper Confirmation*, 371 N.C. at 806, 822 S.E.2d at 293 ("The separation of powers clause requires that the Governor have enough control over executive officers to perform his constitutional duty under the take care clause." (cleaned up)).

29. Moreover, the General Assembly's power to prescribe duties to the Council of State is constrained by the people's understanding of the purpose of those offices when they were created. *See Sneed v. Greensboro City Bd. of Ed.*, 299 N.C. 609, 613 (1980) ("Inquiry must be had into the history of the questioned provision and its antecedents, the conditions that existed prior to its enactment, and the purposes sought to be accomplished by its promulgation. The court should place itself as nearly as possible in the position of the men who framed the instrument." (internal quotation marks omitted)). If the people intended Section 7(2) to function as plenary authority for the General Assembly to assign any executive duty to any Council of State

member at any time, then they would have assigned the executive authority and the "take care" obligation to the entire Council of State. They did not.

30. Constitutional history further confirms the Governor's supreme executive authority. The 1868 Constitution established an independent Governor as the state's chief executive. Specifically, it provided that the Governor was to be popularly elected by the people to a four-year term, vested with "the Supreme executive power of the State," and responsible for the faithful execution of the laws. 1868 N.C. CONST., art. III §§ 1, 7. The 1971 Constitution carried forward the modern gubernatorial office that had been established in 1868. *Report of the North Carolina State Constitution Study Commission* 142 (1968) ("It is the Governor who is looked to to give direction and leadership to this massive activity [of managing state government]. No one else in state government has the breadth of view and responsibility and no one else has the authority to do the job.").

31. Additionally, binding precedent from the North Carolina Supreme Court has repeatedly confirmed the exclusive nature of the Governor's executive authority.

32. In *McCrory v. Berger*, the Court explained that the reason the Governor must control executive branch commissions is that the executive branch's "distinctive purpose" is to "faithfully execute[], or give[] effect to" laws enacted by the General Assembly, and the "Governor leads" that branch. 368 N.C. at 635, 781 S.E.2d at 250. There, the Court sided with then-Governor McCrory in his challenge to "legislation that authorize[d] the General Assembly to appoint a majority of the voting members of three administrative commissions." *Id.* at 636. That structure, our Supreme Court

held, left the "Governor with little control over the views and priorities" of those commissions. *Id.* at 647.

33. Likewise, in *Cooper I*, the Court's conclusion that the Governor must have sufficient control over the State Board turned on the Governor's obligation to faithfully execute laws, which the Court explained requires that the Governor retain the ability, "within a reasonable period of time," to have "the final say on how to execute the laws." 370 N.C. at 418, 809 S.E.2d at 114.

34. Even when it has rejected separation of powers challenges to the General Assembly's enactments, the Supreme Court has emphasized the Governor's supreme executive power. In *Cooper Confirmation*, the Court explained that "[t]he Governor is our state's chief executive" and "[h]e or she bears the ultimate responsibility of ensuring that our laws are properly enforced." 371 N.C. at 799 Although the Court noted that members of the Council of State are also executive branch officers, it likened them to "the advisory councils of the English monarchs." *Id.* at 800 n.1. In other words, Council of State members aid the Governor in executing the laws, but the Governor alone wields the State's executive authority and bears the ultimate duty of faithful execution.

35. *McCrory*, *Cooper I*, and *Cooper Confirmation* control the Panel's decision in this case. It is the Governor, and no one else, who must have sufficient control over executive boards, including the State Board of Elections and county boards. *See McCrory*, 368 N.C. at 636, 781 S.E.2d at 250; *Cooper I*, 370 N.C. at 418, 809 S.E.2d at 114; *Cooper Confirmation*, 371 N.C. at 799, 822 S.E.2d at 289.

36. As shown above, and beyond reasonable doubt, Senate Bill 382 contravenes the plain text of the Constitution, constitutional history and context, and binding Supreme Court precedent by assigning to the State Auditor the sole power to supervise the administration of our state's election laws. Senate Bill 382's changes to those boards are thus unconstitutional and must be permanently enjoined.

It is therefore ORDERED, ADJUDGED, AND DECREED that:

1. Plaintiff's Motion for Summary Judgment is GRANTED;

2. Plaintiff's Motion for a Temporary Restraining Order and Preliminary Injunction is DENIED as moot;

3. Legislative Defendants' Motion for Summary Judgment is DENIED;

4. Pursuant to N.C. Gen. Stat. § 1-253 *et seq*. and North Carolina Rules of Civil Procedure 57 and 65, the Court hereby enters final judgment declaring that the following are unconstitutional and are therefore void and permanently enjoined: Sections 3A.3.(b), (c), (d), (f), (g), and (h) of Session Law 2024-57; and

5. The parties shall bear their own costs.

4/23/2025 10:18:29 AM

SO ORDERED, this the ___ day of April, 2025.

4/23/2025 10:43:17 AM

The Honorable Edwin G. Wilson, Jr.
Superior Court Judge

The Honorable Lori I. Hamilton
Superior Court Judge

Judge Womble respectfully dissents from the majority's order.

For the reasons specified below, I respectfully dissent from the order of the majority issued today.

Since its inception, the judicial branch has exercised its implied constitutional power of judicial review with "great reluctance," *Bayard v. Singleton*, 1 N.C. (Mart.) 5, 6, 3 N.C. 42, 1 Martin 48 (1787), recognizing that when it strikes down an act of the General Assembly, the Court is preventing an act of the people themselves. *See Baker v. Martin*, 330 N.C. 331, 336-37, 410 S.E.2d 887, 890 (1991). "Great deference will be paid to acts of the legislature—the agent of the people for enacting laws." *State ex rel. Martin v. Preston*, 325 N.C. 438, 448, 385 S.E.2d 473, 478 (1989).

Our state constitution declares that all political power resides in the people. N.C. Const. art. I, § 2. The people exercise that power through the legislative branch, which is closest to the people and most accountable through the most frequent elections. *See Id.* art. I, § 9. The people through the express language of their constitution have assigned specific tasks to, and expressly limited the powers of, each branch of government. Only the people can amend it. *See Id.* art. XIII, § 2.

The people act through the General Assembly. *State ex rel. Ewart v. Jones*, 116 N.C. 570, 570, 21 S.E. 787, 787 (1895) ("[T]he sovereign power resides with the people and is exercised by their representatives in the General Assembly"). Unlike the Federal Constitution, "a state constitution is in no matter a grant of power. All power which is not limited by the Constitution inheres in the people, and an act of a State legislature is legal when the Constitution contains no prohibition against it." *McIntyre v. Clarkson*, 254 N.C. 510, 515, 119 S.E.2d 888, 891 (1961) (quoting *Lassiter*

v. Northampton Cty. Bd. of Elections, 248 N.C. 102, 112, 102 S.E.2d 853, 861 (1958), aff'd, 360 U.S. 45, 79 S. Ct. 985, 3 L. Ed. 2d 1072 (1959)).

The presumptive constitutional power of the General Assembly to act is consistent with the principle that a restriction on the General Assembly is in fact a restriction on the people. *Baker*, 330 N.C. at 336, 410 S.E.2d at 890. Thus, this Panel presumes that legislation is constitutional, and a constitutional limitation upon the General Assembly must be express and demonstrated beyond a reasonable doubt. E.g., *Hart v. State*, 368 N.C. 122, 126, 774 S.E.2d 281, 284 (2015).

As "essentially a function of the separation of powers," the political question doctrine operates to check the judiciary and prevent its encroaching on the other branches' authority. *Baker v. Carr*, 369 U.S. 186, 217, 82 S. Ct. 691, 710, 7 L. Ed. 2d 663 (1962). To determine whether an issue is non-justiciable under the political question doctrine, "the appropriateness under our system of government of attributing finality to the action of the political departments and also the lack of satisfactory criteria for a judicial determination are dominant considerations." *Cooper v. Berger*, 370 N.C. 392, 408, 809 S.E.2d 98, 107 (2018) (quoting *Baker v. Carr*, 269 U.S. 186, 210(1962) (internal quotations omitted). The "doctrine excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the legislative or executive branches of government." *Id.* (quoting *Bacon v. Lee*, 353 N.C. 696, 716, 549 S.E.2d 840, 853 (2001) (internal quotations omitted). Accordingly, out of respect for separation of powers, a court must refrain from adjudicating a claim when any one of

the following is present: (1) a textually demonstrable commitment of the matter to another branch; (2) a lack of judicially discoverable and manageable standards; or (3) the impossibility of deciding a case without making a policy determination of a kind clearly suited for nonjudicial discretion. *Harper v. Hall*, 384 N.C. 292, 325, 886 S.E.2d 393, 416 (2023). None of which are present here.

Further, the principle that questions of constitutional and statutory interpretation are within the subject matter jurisdiction of the judiciary is well established and just as fundamental to the operation of government as the doctrine of separation of powers. *News & Observer Publ'g Co. v. Easley*, 182 N.C. App. 14, 19, 641 S.E.2d 698, 702 (2007). I agree with the majority that the claims and arguments at issue in this case are justiciable.

Having determined the issue of justiciability, I now turn to the issue of constitutionality of Senate Bill 382 subject to the aforementioned principles. The Supreme Court has yet to take a position on how the separation of powers clause applies to those executive departments that are headed by independently elected members of the Council of State, as such *McCrory*, *Cooper I*, and *Cooper Confirmation* are not controlling but provide a helpful framework for interpreting our constitution. *State ex rel. McCrory v. Berger*, 368 N.C. 633, 781 S.E.2d 248 (2016) ("McCrory"); *Cooper v. Berger,* 370 N.C. 392, 809 S.E.2d 98 (2018) ("Cooper I"); *Cooper v. Berger*, 371 N.C. 799 , 822 S.E.2d 286 (2018) ("Cooper Confirmation").

The constitution charges the Governor with supervising the executive branch and its functions while, at the same time, granting certain executive powers to other

executive officers. E.g., N.C. Const. art. III, § 7(1)-(2) (listing the other eight elective officers and assigns their duties as prescribed by law). In addition to prescribing duties to the executive officers, our constitution expressly recognizes the General Assembly's power to organize and reorganize the executive branch. N.C. Const. art. III, § 5(10) ("The General Assembly shall prescribe the functions, powers, and duties of the administrative departments and agencies of the State and may alter them from time to time . . . ."); see *id*. art. III, § 11 ("Regulatory, quasi-judicial, and temporary agencies may, but need not, be allocated within a principal department."). For example, the General Assembly has charged the State Auditor with the duty to "independently examine and make findings" as to whether State agencies conduct programs and spend the public's money "in faithful, efficient, and economical manner in compliance with and in furtherance of applicable laws of the State." N.C. Gen. Stat. 147-64.6 (4).

The constitution likewise gives the Governor specific guidelines by which he may influence the allocation of administrative functions, powers, and duties. *Cooper v. Berger,* 370 N.C. 392, 435, 809 S.E.2d 98, 124 (2018). Nonetheless, the text reserves the final authority for the legislative branch. *Id*. Thus, while the Governor has general supervisory responsibility, N.C. Const. art. III, §§ 4,10, each constitutional executive officer is primarily responsible for executing the laws assigned to that official by the General Assembly, *id*., art. III, § 7 (1)-(2).

Here, the Take Care Clause in Art. III, § 5(4) or separation of powers is not implicated because the Governor continues to share the exercise of executive powers

with the other constitutional executive officers who are separately elected members of the Council of State, N.C. Const. art. III, §§ 7(1)-(2), 8, while maintaining his supervisory role, *id.* art. III, §§ 1, 5(4). The General Assembly in Senate Bill 382 reassigns the duties of the auditor, while keeping the appointment power within the Executive Branch, which is still subject to the supervision and direction of the Governor. The plain text of the constitution establishes the Auditor as a member of the executive branch and authorizes the General Assembly to assign his duties. Thus, the decision to assign the duty of appointment of members to the Board of Elections to the Auditor is one the General Assembly was expressly authorized to make. As a result, the Governor cannot show that Senate Bill 382 neither impedes his ability to take care that the laws will be faithfully executed nor violates the separation of powers clause. Therefore, I respectfully dissent.

This the 4/23/2025 day of April, 2025.

4/23/2025 11:17:39 AM

The Honorable R. Andrew Womble
Superior Court Judge