No. 114P25

NO. _____P25 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
No. 23CV029308-910



**********

**PLAINTIFF-PETITIONER GOVERNOR JOSHUA H. STEIN'S MOTION FOR TEMPORARY STAY**

**********

TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

Plaintiff-Petitioner Joshua H. Stein, in his official capacity as Governor of the State of North Carolina ("the Governor"), pursuant to Rules 2 and 23(e) of the North Carolina Rules of Appellate Procedure, respectfully moves this Court for an order temporarily staying enforcement of the Court of Appeals 30 April 2025 Order (**Exhibit A** hereto, "COA Order").

The COA Order pauses a 23 April 2025 trial court judgment (**Exhibit B** hereto) enjoining certain unconstitutional provisions of Senate Bill 382 (Session Law 2024-57). If the COA Order is not stayed, a statute that has already been deemed unconstitutional will nevertheless take effect, before this Court or the Court of Appeals has even reviewed a single merits brief or held any argument.



The Governor requests this stay pending this Court's review of the Governor's Petition for Writ of Supersedeas and Petition for Certiorari, which we intend to file later today. In support of this Motion, the Governor shows the Court as follows:

1. The fundamental question for the Court's determination in this Motion is whether the General Assembly's leadership may insist that a statute be enforced while an appeal proceeds, despite that statute's already having been declared unconstitutional beyond a reasonable doubt by a three-judge panel of the Superior Court.

2. The answer to that question must be no. This Court would not condone a defendant borrower in a lending case spending the disputed funds while litigation proceeds or a landowner in a timber rights dispute going ahead and cutting down the forest. And such conduct would be even more galling had a trial court already issued a final judgment determining that the defendant borrower did not own the funds or that the landowner had no rights to the timber.

3. The COA Order represents a remarkable departure from the established practices of our appellate courts. Legislative Defendants have identified no irreparable or imminent harm that would arise from allowing our elections to be governed as they have been for nearly 125 years while this appeal proceeds. Nor can they. 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.



4. The COA Order also disrupts the status quo. The Order will result in the immediate termination ***today*** of the terms of the current members of the State Board of Elections. The State Auditor will be empowered to appoint five new members to the State Board ***tomorrow***.

5. Specifically, Senate Bill 382 transfers the Governor's authority to appoint members of the State Board of Elections to the State Auditor as of May 1, 2025. *See* Session Law 2024-57, § 3A.3.(g). Without a stay, existing members

of the State Board of Elections will be terminated on April 30, 2025, two years before their terms would otherwise end under preexisting law. *See id.*

6. Next, county board members will be statutorily terminated on June 24, 2025, with the Auditor empowered to select each county board chair for a term beginning June 25, 2025. *Id.* §§ 3A.3(h), 3A.3.(f) (amending N.C. Gen. Stat. § 163-30).

7. Finally, on July 1, 2025, the State Board of Elections will transfer from the Secretary of State's Office to the Department of the State Auditor. *Id.* §§ 3A.1, 3A.2.(a), 3A.2.(f); *see* Session Law 2023-139, § 1.1; N.C. Gen. Stat. § 163-28.

8. A stay should issue only to *preserve* the last peaceable status quo, not *destroy* it. *See State v. Fayetteville St. Christian Sch.*, 299 N.C. 731, 733 (1980). That last peaceable status quo structured the State Board of Elections in the same manner that it has functioned for nearly 125 years.

9. If this Court does ***not*** stay enforceability of the challenged statute now, and either appellate court ultimately affirms the trial court judgment finding the challenged statute unconstitutional, the Governor will have suffered irreparable constitutional injury.

10. Specifically, the legislature will have successfully: (a) removed the Governor from any role in ensuring the faithful execution of this State's election laws; and (b) treated the Governor as fungible with any member of the

Council of State for the purposes of his exclusive authority to take care that the laws are faithfully executed.

11. 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." Pet. 11. But the trial court—after full merits briefing and oral argument—already held that the Governor made that showing.

12. For purposes of this emergency motion, then, *a different presumption applies*: this Court must "presum[e] that the judgment entered below is correct." *W. Conf. of Original Free Will Baptists of N.C. v. Creech*, 256 N.C. 128, 140 (1962) (cleaned up). Legislative Defendants' 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.



13. In issuing the writ, the Court of Appeals elevated the legislature's preferred deadlines over the plain text of the North Carolina Constitution and, with no explanation, discarded the trial court's considered judgment that the challenged portions of Senate Bill 382 are unconstitutional "beyond a reasonable doubt."

14. The trial court's judgment faithfully followed this Court's binding precedent. Yet the Court of Appeals permitted an unconstitutional law to take effect—without accepting merits briefs or hearing argument from the parties.

15. Courts must enforce the constitutional balance of powers, no matter the Governor's political affiliation. If not, North Carolina will surely devolve into a government of "men" rather than a "government of laws." *Cf. State v. Revis*, 193 N.C. 192, 195 (1927).

16. This Court should not permit the COA Order and its damage to our constitutional form of government to take effect. A stay must issue.



## CONCLUSION

For the foregoing reasons, the Governor respectfully requests that as it considers the Governor's underlying Petitions, which will be filed later today, this Court:

a. Issue a temporary stay enjoining the 30 April 2025 Order of the Court of Appeals (P25-298); and

b. Grant such other and further relief as this Court deems just and 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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**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

# EXHIBIT A

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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

# 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