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,

Defendants-Respondents,

and

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

Intervenor-Defendant-Respondent.

From Wake County
No. 22CVS006824-910

****

LEGISLATIVE DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFF'S PETITION FOR WRIT OF *CERTIORARI* AND WRIT OF *SUPERSEDEAS*

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****

Defendants-Respondents, 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 (together "Legislative Defendants"), hereby respond to Governor Stein's Petition for Writ of *Certiorari* and Writ of *Supersedeas*.

INTRODUCTION

The Court should deny the Governor's petition. Although the Governor casts the Court of Appeals' 30 April 2025 order granting Legislative Defendants' Petition for Writ of *Supersedeas* (the "Stay Order") as a departure from standard appellate procedure, it is nothing of the sort. Indeed, the Court of Appeals acted properly to stay a badly flawed 2-1 decision by the three-judge panel below that, if left to stand, would have effectively blocked the People from exercising any control over the Board's structure and composition during the pendency of Defendants' appeal.

Contrary to the trial court's decision, Session Law 2024-57, also known as "Senate Bill 382," represents a legitimate exercise of the General Assembly's express and plenary power to structure agencies of State government and to assign duties to the "other elective officers" who serve as members of the Council of State. The Bill, which has been on the books since last December, sought to end years of litigation by the Governor and his predecessor that had blocked efforts to reform the Board and hold it accountable for failing to faithfully implement the State's election laws. Accordingly, it transferred the Board to the Department of the Auditor, provided that the Board's existing members would end on 30 April 2025, and then assigned the

Auditor the duty to appoint the Board's members thereafter.

This is precisely the type of decision our State's founders expected the General Assembly to make. While our federal constitution consolidates all executive power in the President, the drafters of our State Constitution chose to disburse executive power across a multi-member executive branch. They then expressly authorized the General Assembly to assign their duties under Article III, Section 7(2). Senate Bill 382's changes to the Board of Elections are merely the natural outgrowth of those choices. Reinstating the Governor's appointees through judicial fiat would upend the carefully wrought system of checks and balances our founders established.

Ultimately, the Governor's petition fails for at least three primary reasons.

First, a writ of *supersedeas* can be issued only in connection with an underlying appeal. But, while the Governor includes a request for *certiorari* in the title of his petition, he does not offer any argument why the Court should grant it. That silence is telling. The Court of Appeals' Stay Order is an exceptionally poor vehicle. Granting *certiorari* to review that order on an interlocutory basis would merely result in fragmented litigation that would delay, not expedite, a final resolution.

Second, reinstating the trial court's injunction would cause, not prevent, irreparable harm. The People have an interest in seeing that Senate Bill 382's reforms to the Board of Elections are carried into effect. The trial court's order, if left in place, would thwart those reforms and permit, contrary to state law, the Governor's appointees to retake their offices even after their terms were set to expire.

Finally, the Governor cannot show that he is likely to succeed on the merits.

Contrary to his assertions, our Constitution expressly establishes the Auditor and "other elective officers" who comprise the Council of State as members of the executive branch and authorizes the General Assembly to assign their duties in Article III, Section 7(2). The Governor's position would effectively read out those provisions of the Constitution.

BACKGROUND

The Governor's rendition of the facts and procedural history of this case necessarily leaves out events that have occurred since his petition was filed on 30 April 2025.

As provided by statute, the terms of office for the Governor's appointees to the Board of Elections expired on 30 April 2025. *See* N.C. Sess. L. 2024-57 § 3A.3(g). On 1 May 2025, the Auditor appointed three members to the Board chosen from candidates submitted by the Republican Party, and two members chosen from candidates submitted by the Democratic Party.[1] The Board's members, who were appointed to four-year terms, were sworn into office on 7 May 2025, and then elected a chair and appointed a new Executive Director.[2]

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[1] *State Auditor Boliek Appoints Members to State Board of Elections*, NCOSA (May 1, 2025), *available at*, https://www.auditor.nc.gov/news/press-releases/2025/05/01/state-auditor-boliek-appoints-members-state-board-elections; Gary D. Robertson, *North Carolina Auditor Names Elections Board Members After Judges Let Law Stand During Appeal*, Associated Press (May 1, 2025), *available at*, https://apnews.com/article/north-carolina-governor-elections-lawsuit-auditor-1a840ac03ccc750aad25a60c4f292d0d

[2] *New State Board Sworn In, Chairman(" Elected, Executive Director Appointed*, N.C. State Bd. of Elections (May 7, 2025), *available at*, https://www.ncsbe.gov/news/press-releases/2025/05/07/new-state-board-sworn-chairman-elected-executive-director-appointed

Granting the Governor's petition and reinstating the trial court's order would thus reverse the current status quo, which reflects the law on the books.

REASONS THE GOVERNORS' PETITION SHOULD BE DENIED

I. THE GOVERNOR OFFERS NO ARGUMENT IN SUPPORT OF HIS PETITION FOR WRIT OF *CERTIORARI*.

Supersedeas is an "ancillary writ" that can be issued only when there is a pending appeal. *Craver v. Craver*, 298 N.C. 231, 237, 258 S.E.2d 357, 362 (1979) ("The writ of *supersedeas* may issue only in the exercise of, and as ancillary to, the revising power of an appellate court . . . .") *see also Fore v. W. N. Carolina Conf. of United Methodist Church*, 284 N.C. App. 16, 31 875 S.E.2d 32, 42 (2024) (Stroud, J., dissenting) ("In other words, the writ of *supersedeas* only applies when the appeal is pending before this Court."), *vacated and remanded for reasons in dissent*, 386 N.C. 650, 906 S.E.2d 471.

But, while the Governor styles his petition as one for both a "Writ of *Supersedeas*" *and* "Writ of *Certiorari*," he focuses only on why the Court should grant *supersedeas* to allow his appointees to remain in place past the expiration of their terms. He does not offer any argument in support of his petition for *certiorari*—and his silence is telling.

Although he professes to seek a speedy resolution, the Governor's petition is, in fact, carefully crafted to achieve the opposite. He does not ask the Court to review this case on the merits but asks only that the Court review the Court of Appeals' (interlocutory) stay order. Not surprisingly, he does not point to any of the usual bases

that might justify a writ of *certiorari*.

This Court has repeatedly stressed that, in addition to showing that no right of immediate appeal exists, a petitioner seeking *certiorari* must also show "good cause" to grant review. *State v. Grundler*, 251 N.C. 177, 189, 111 S.E.2d 1, 9 (1959) ("*Certiorari* is a discretionary writ, to be issued only for good and sufficient cause shown.") The threshold to meet that burden is greater when, as here, the petitioner seeks *early* review of an interlocutory issue that may eventually reach the Court after a decision in the merits. *See* Nis and Leerberg, NORTH CAROLINA APPELLATE PRACTICE AND PROCEDURE § 21.03 (2025).

But, even if he had tried, the Governor could not show "good cause" to review the Court of Appeals' stay order on an interlocutory basis while the merits of Defendants' appeal proceed below. The underlying issues presented by this case may be of substantial public interest and important to the jurisprudence of the State, but those raised by the Court of Appeals' stay order are not. Reviewing the order would present only a limited procedural question on a limited standard of review that reaches the merits only tangentially. Worse, it will fragment the case and push a final decision even further out into the future.

That may serve the Governor's purpose—since each day Senate Bill 382 is enjoined is another day that his political appointees can continue past the expiration of their terms. But it does not serve the public's interest in a final resolution. *Certiorari* is traditionally granted to promote judicial efficiency, ensure that all issues are considered together, and speed a resolution—not delay it. *See Stetser v. TAP*

Pharm. Prods. Inc., 165 N.C. App. 1, 12, 598 S.E.2d 570, 578-79 (2004) (granting certiorari where doing so would promote "the efficient administration of justice" or "promote judicial economy").

The Court of Appeals' stay order does just what a writ of *supersedeas* is supposed to do—it stays an egregiously flawed trial court order so that validly-enacted (and presumptively constitutional) laws can remain in effect during Defendants' appeal. There is no need for this Court to intervene—and certainly not on the foundation of a fragmented appeal from an otherwise interlocutory order.

The Governor's petition for *certiorari* accordingly should be denied and his petition for writ of *supersedeas* dismissed as moot.

II. THE GOVERNOR'S PETITION FOR WRIT OF *SUPERSEDEAS* SHOULD BE DENIED.

Even if this Court grants *certiorari* to review the Court of Appeals' stay order, it should still deny the Governor's petition for writ of *supersedeas*. Issuance of the writ would cause, not prevent irreparable harm. Further the Governor cannot show a likelihood of success on the merits.

A. Granting the Governor's Petition Would Cause, Not Prevent, Irreparable Harm.

The Governor's petition rests on a remarkable (and disturbing) premise. On one hand, the Governor insists that he will suffer irreparable harm if the trial court's injunction is not reinstated because he will no longer be able to appoint and remove the Board of Elections' members, a power he claims to have exercised "since 1901." Yet, on the other hand, he callously suggests that blocking the disputed provisions of Senate Bill 382—which ended the terms of his appointees on 30 April 2025—would

not cause any harm.

But that assertion gets it backward. The Board of Elections is a creature of statute. It was established by the General Assembly. There is no constitutional requirement that it exist at all, much less that the Governor appoint its members. Similarly, no provision of the Constitution grants the Governor an exclusive right to appoint statutory officers.[3] Thus, the Governor has no "right" to continue appointing the Board of Elections' members, or to insist that his appointees remain in office. Instead, as this Court confirmed in *McCrory*, the power to decide who appoints statutory officers—and how long their terms will last—belongs to the Legislature. *See McCrory,* 368 N.C. at 644, 781 S.E.2d at 255 ("[A]ppointing statutory officers is not an exclusively executive prerogative"); *see also Cooper v. Berger* ("*Cooper Confirmation*"), 371 N.C. 799, 813, 822 S.E.2d 286, 298 (2018) ("[O]ur courts have long held that the appointment power in North Carolina 'is not an executive, legislative, or judicial power, but only a mode of filling the offices created by law'" (quoting *Cunningham v. Sprinkle*, 124 N.C. 638, 643, 33 S.E. 138, 139 (1899)).

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[3] As this Court explained in *McCrory*, although the 1868 Constitution gave the Governor the exclusive right to appoint statutory officers, those provisions were quickly eliminated. *See State ex rel. McCrory v. Berger,* 368 N.C. 633, 641, 781 S.E.2d 248, 253 (2016). Such an expansive shift of the appointment power to the Executive was "'not . . . satisfactory to the dominant sentiment of the State.'" *Id.* (citing *State ex rel. Salisbury v. Croom*, 167 N.C. 223, 226, 83 S.E. 354, 354–55 (1914). Accordingly, just eight years later in 1876, the People amended the appointments clause to return control over the appointment of statutory officers to the General Assembly. *Id.* (citing John L. Sanders, *Our Constitution: An Historical Perspective*, p.3, *available at*: https://www.sosnc.gov/static_forms/publications/North_Carolina_Constitution_Our_Co.pdf).

Simply put, our Constitution reserves the power to create, eliminate, and reorganize statutory offices—as well as to choose who appoints them—for the People, acting through their representatives in the General Assembly. *See Harper v. Hall*, 384 N.C. 292, 323, 886 S.E.2d 393, 414 (2023) ("'[A]ll power which is not limited by the Constitution inheres in the people'" (quoting *McIntyre v. Clarkson*, 254 N.C. 510, 515, 119 S.E.2d 888, 891–92 (1961)). An order wrongly enjoining Senate Bill 382 thus causes irreparable harm, not just to the Legislative Defendants, but to the People themselves.

Indeed, this is why the Court has repeatedly warned "the idea of the judiciary 'preventing . . . the legislature, through which the people act, from exercising its power is the most serious of judicial considerations.'" *Harper*, 384 N.C. at 323, 886 S.E.2d at 414 (quoting *McCrory*, 368 N.C. at 650, 781 S.E.2d at 259 (Newby, J., concurring in part and dissenting in part)). Ultimately, "a restriction on the General Assembly is in fact a restriction on the people." *McKinney v. Goins*, 387 N.C. 35, 43, 911 S.E.2d 1, 8 (2025). And, as this Court has explained, the People have no redress when a trial court enjoins a valid law, potentially for years, until a final ruling on the merits by the Supreme Court. *See, e.g.*, *Town of Boone v. State*, 369 N.C. 126, 794 S.E.2d 710 (2016) (reversing grant of injunction against the General Assembly, holding that challenged law was constitutional and within the General Assembly's plenary power, after injunction in place for two years).

Here the harm posed by the trial court's injunction is self-evident. In the face of the Board's repeated failures (and deliberate refusals) to follow the State election

laws,[4] the People chose to (i) end the terms of the Governor's appointees effectively April 30, 2025; (ii) transfer the Board of Elections to the Department of the Auditor, and (iii) assign the Auditor the duty to appoint their successors. Those measures represent an effort to *check* the Governor's exercise of power and ensure the Board remains accountable to the People by assigning the power to appoint its members to someone other than the leader of one of the State's two primary political parties.

Reinstating the trial court's order would thus put the Board of Elections, and the appointment of its members, beyond democratic control. Worse, it would do so in a piecemeal fashion that would require the Court to effectively rewrite the governing statutes. The trial court only enjoined *part* of Senate Bill 382. Thus, while it blocked the provisions that would terminate the previous board's terms, and authorized the Auditor to appoint their replacements, it left untouched the provisions that transferred the Board of Elections to the Department of the Auditor in the first place. *Compare* Order at p 16 (only enjoining Sections 3A.3.(b), (c), (d), (f), (g), and (h)) *with* N.C. Sess. L. 2024-57, § 3.A.2.(a) (transferring the State Board to the Auditor's

[4] The failures of the Governor's political appointees to adhere to the State's elections laws are well documented and have been the subject of much litigation before this Court and numerous others. *See, e.g.*, *Griffin v. N. Carolina State Bd. of Elections,* -- N.C. --, 913 S.E.2d 894, 896 (N.C. 2025) ("The Board's inattention and failure to dutifully conform its conduct to the law's requirements is deeply troubling."); *see also id.* (noting that the Board failed to comply with provisions, originally enacted in 2004, that required it to collect driver's license or social security numbers when registering voters); *Griffin v. N. Carolina State Bd. of Elections*, No. COA25-181, 2025 WL 1021724, at *9 (N.C. Ct. App. Apr. 4, 2025), *review allowed in part, denied in part*, 913 S.E.2d 894 (N.C. 2025) (concluding that the Board adopted rules exempting overseas voters from identification requirements in direct contravention of the laws enacted by the General Assembly).

Office). Reinstating that order accordingly would result in a regime that was never envisioned by the governing statutes.

Our Constitution does not permit the judiciary to rewrite statutes in such a manner. The People spoke emphatically when they chose to end the terms of the previous Board of Elections. Even if the Governor were right about everything else (which he is not) the decision to limit the previous Board's terms is one the General Assembly is empowered to make. Going back now that new members have been seated and reinstating the Board's previous members, after the expiration of the terms, would not only wreak havoc on the administration of the State's elections laws, it would also substitute the judiciary for the Legislature.

B. The Governor Cannot Show a Likelihood of Success on the Merits.

To succeed, the Governor must show the trial court's ruling was correct and thus that he is likely to succeed on the merits. He cannot do so.[5]

As the Court of Appeals correctly recognized, the trial court's decision represents a radical departure from our State's constitutional text, history, and

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[5] Legislative Defendants maintain that Article III, Section 7(2)'s express textual commitment of authority to assign the duties of the Council of State's members renders this case nonjusticiable. *See Harper,* 384 N.C. at 326, 886 S.E.2d at 416. They also agree with the Auditor that deciding who appoints statutory officials is, in and of itself, a political question and, thus if this Court were to grant *certiorari*, it should take the opportunity to overturn its decision in *Cooper I*. Because the state constitution expressly commits this specific power to the legislative branch, this Court lacks the authority to intervene; *428 the issue presents a nonjusticiable political question. *See Cooper I*, 370 N.C. at 427–28, 809 S.E.2d at 120 ("Because the state constitution expressly commits this specific power to the legislative branch, this Court lacks the authority to intervene; the issue presents a nonjusticiable political question.")

precedent. Indeed, it suffers from three fundamental flaws: (1) It reads the Vesting Clause and Take Care Clause in isolation and ignores other provisions of the Constitution that expressly authorize the General Assembly to assign duties to the other executive officers who comprise the Council of State; (2) it mistakenly treats this as a separation of powers case, even though Senate Bill 382 allocates all of the relevant appointments to a constitutional officer *within the executive branch*; and (3) it ignores this Court's repeated warnings that its decisions in *McCrory*, *Cooper I*, *Cooper Confirmation*, do not apply to appointments structures like the ones at issue here.

Alone, each error would require reversal. But together they leave no doubt—the trial court's decision cannot stand.

1. The Trial Court Misread the Plain Text of the Constitution.

The primary problem with the Governor's position is that it ignores the plain text of the Constitution. The superior court majority accepted the Governor's argument that the Vesting Clause and Take Care Clause require that "the Governor alone" must "wield[] the State's executive authority and bear[] the ultimate duty of faithful execution." (Order at p. 15). But those clauses are not the only provisions of our Constitution that address executive power.

While our Constitution provides—as a general matter—that executive power shall be vested in the Governor in Article III, Section 1, and charges the Governor with the duty to "take care that the laws be faithfully" executed in Article III, Section 5(4), it does not stop there. Our Constitution also creates nine "other elective officers"

within the executive branch. *See* N.C. Const. art. III, § 2(1) (establishing the Lieutenant Governor), § 7(1) (establishing the offices of Secretary of State, Auditor, Treasurer, Superintendent of Public Instruction, Attorney General, Commissioner of Agriculture, Commissioner of Labor, and Commissioner of Insurance). It then grants the General Assembly express authority to assign duties to those officers by providing that "their respective duties shall be prescribed by law." N.C. Const. art. III, § 7(2); *see also id.* § 6 (providing that, in addition to serving as President of the Senate, the Lieutenant Governor "shall perform such additional duties as the General Assembly or Governor may assign him").

Although the trial court acknowledged the existence of these later provisions, it effectively read them out of the Constitution. If the Vesting Clause and Take Care Clause really did require that all executive authority vest in the Governor and that every executive function ultimately be assigned to him, it would render Article III, Section 7(2) mere surplusage, since there would be no duties left for the General Assembly to assign to the other members of the executive branch. But that would violate the well-established principle that all provisions of the Constitution must be read *in pari materia*, and in a manner that gives effect to each provision. *Stephenson v. Bartlett*, 355 N.C. 354, 378, 562 S.E.2d 377, 394 (2002) (citing *In re Peoples,* 296 N.C. 109, 159, 250 S.E.2d 890, 919 (1978)).

Neither the Governor nor the trial court make any real effort to square the general provisions in the Vesting Clause and Take Care Clause with the later, more specific provisions that allow the General Assembly to assign specific duties to the

"other elective officers" within the executive branch. Instead, the Governor offers a series of arguments that, at bottom, simply ask the Court to ignore Article III Section 7(2). None, however, bear scrutiny.

First, the Governor argues the Take Care Clause represents a grant of "exclusive power" that cannot be "reassigned" to the other elective officers within the executive branch. But that is wrong as on several levels. As a matter of plain text, the Take Care Clause does not grant any power to the Governor, but instead it serves to limit his power by requiring that he exercise those duties delegated to him in a manner faithful to the laws passed by the General Assembly. *See* N.C. Const. art. III, § 5(4) ("Execution of laws. The Governor shall take care that the laws be faithfully executed"). The Governor's position also fails as a matter of logic. While the Constitution no doubt assigns some duties exclusively to the Governor, such as the power to serve as Commander in Chief of the militia, N.C. Const. art. III, § 5(5), the generalized obligation to "take care that the laws be faithfully executed" is not one of them. More than one official can take care that the laws are faithfully executed at the same time. Indeed, the Constitution recognizes this when it requires all officials to take oaths promising to "support and maintain . . . the Constitution and laws of North Carolina." N.C. Const. art. VI, § 7.[6]

[6] In his petition, the Governor tries to turn the tables, arguing that, since the Governor is already required to swear an oath to support and maintain the State's laws, there would be no reason for the drafters to also include the Take Care Clause unless it was meant to confer power on the Governor. But his logic does not follow. Requiring the Governor (and all other officials) to swear an oath promising to uphold the State's laws, and including an express provision in the body of the Constitution that requires the Governor to faithfully execute the state's laws are different things.

The Governor's own cases recognize this. In *Cooper Confirmation*, Chief Justice Martin explained that while the Governor has a duty to take care that the laws are faithfully executed, "***the Governor is not alone in this task.***" 371 N.C. at 800, 822 S.E.2d at 290 (emphasis added) (explaining further that "[t]o assist the executive branch in fulfilling its purpose, our constitution requires the General Assembly to 'prescribe the functions, powers, and duties of the administrative departments and agencies of the State" under Article III, § 5(10)).

McCrory and *Cooper I* do not hold otherwise. At most, they hold that the Take Care Clause grants the Governor the limited power to "implement the policy decisions that executive branch agencies subject to his or her control *are allowed, through delegation from the General Assembly*." *Cooper I*, 370 N.C. at 415, 809 S.E.2d at 112 (emphasis added). But that does not create a general, standalone power in the Governor. Indeed, it is a necessary corollary that the Governor does not have any power to make decisions or to carry out duties that have not been assigned to him or the cabinet agencies under his control. *See Cooper v. Berger*, 376 N.C. 22, 852 S.E.2d 64 (2020) (Ervin, J.) ("*Cooper Appropriations*") (holding the Governor has no power to make decisions regarding questions the General Assembly has not delegated to him).

The drafters also had reason to single out the Governor. Unlike the Council of State members, who have only those duties assigned by statute, the Constitution, as stated above, does grant some powers to the Governor as a matter of default. Thus, there was reason for the drafters to make clear that the Governor must use those powers assigned him in a manner that faithfully adheres to the laws enacted by the Legislature.

Second, the Governor argues that the Vesting Clause and Take Care Clause should be read in the same manner as their federal counterparts. But that ignores critical differences between the State and federal constitutions. While the federal constitution vests all power in one man and thus establishes a unitary executive, our State has always had a *plural* executive. *Cooper Confirmation*, 371 N.C. at 800, 822 S.E.2d at 290 (tracing the history of the council of state to the councils that advised royal governors). Thus, while the State and federal clauses may use similar language, they exist in constitutions with vastly different structures. The federal constitution, for instance, does not have any provision equivalent to Article III, Section 7(2), nor does it establish "other elective officers" within the executive branch.

Finally, the Governor tries to invoke history, but in doing so undercuts his own argument. The Governor contends the Vesting Clause, which was first added in as part of the Reconstruction Constitution in 1868, was intended to vest executive power exclusively in him. But he ignores that the same Constitution *also* added provisions that expressly established the other elective officers who serve on the Council of State as members of the executive branch. 1868 N.C. Const. art. III, § 1 (listing governor as one of eight elected offices in the executive branch). The 1868 Constitution also added, for the first time, provisions (i) requiring that the Council of State be directly elected and (ii) expressly stating that their respective duties "shall be prescribed by law." *See* 1868 N.C. Const., art. III, § 13 ("The respective duties of the [constitutional executive officers] shall be prescribed by law.") Thus, "[w]ith the passage of the Constitution of 1868 'the Council of State became a body of elected officers, *with*

executive duties of their own.'" *Cooper Confirmation*, 371 N.C. at 800 n.1 S.E.2d at 290 n.1. (emphasis added) (quoting John V. Orth & Paul Martin Newby, THE NORTH CAROLINA STATE CONSTITUTION 124-25 (2d ed. 2013)).

If anything, history demonstrates that the drafters of the constitution did not intend either the Vesting Clause or the Take Care Clause to place power exclusively in the Governor.

2. This Trial Court Mistakenly Treated This as a Separation of Powers Case.

The trial court also erred by treating this as a Separation of Powers Case when it clearly is not.

The Separation of Powers Clause does not by itself provide an independent limit on the General Assembly's power to structure State agencies or to choose who appoints statutory officers. As the Supreme Court has explained, the Separation of Powers Clause "does not establish the various powers" that belong to each *branch*. *Id.* 384 at 298, 886 S.E.2d at 399. The clause is thus "considered as general statement of broad, albeit fundamental constitutional principle' and must be considered with the related, more specific provisions of the constitution that outline the practical workings for governance. *Id.* (quoting *State v. Furmage*, 250 N.C. 616, 627, 109 S.E.2d 563, 571 (1959); *McKinney*, No. 109PA22-2, 2025 N.C. LEXIS 65, at *12 (same).

As a textual matter, the General Assembly's decision to transfer the Board of Elections to the Department of the Auditor, and to give the Auditor the power to appoint the Board's members (as well as the fifth member of the county boards), does

not implicate the Separation of Powers Clause. The Governor and the Auditor are *both executive officers*. The Governor's current challenge thus involves an *intramural* dispute over the allocation of power *within the executive branch.* The Separation of Powers Clause, however, only speaks to the separation of *powers* between *branches,* not within them. N.C. Const. art. I, 6 ("The *legislative, executive, and supreme judicial powers* of the State government shall be forever separate and distinct from each other." (emphasis added)); *accord Harper* 384 N.C. at 298, 886 S.E.2d at 399 (explaining the clause is intended to protect the people by "keeping *each branch* within its described sphere[]" and merely provides that the "*powers of the branches* are 'separate and distinct'" (emphasis added)).

The Supreme Court's appointment cases recognize this distinction and likewise speak of the division of powers *between the branches*, not just between the General Assembly and the Governor. Thus, in *McCrory,* the Court explained a violation of the separation of powers only occurs when legislation "unreasonably disrupts a *core power of the executive." McCrory*, 368 N.C. at 645, 781 S.E.2d at 256 (emphasis added); *see also Cooper Confirmation*, 371 N.C. at 806, 822 S.E.2d at 293 (same); *Harper*, 384 N.C. at 298, 886 S.E.2d at 399 ("A violation of separation of powers only occurs when one *branch* of government exercises, or prevents the exercise of, a power reserved for another *branch* of government." (emphasis added)).

Despite this, the trial court launched straight into a separation of powers analysis. Worse, it did not analyze the relevant question, which is how Senate Bill 382 affects the balance of power between the branches. Instead, it mistakenly focused

only on whether Senate Bill 382 gave the *Governor* enough control over the Board of Elections. (Order at p. 10 ("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.") But that, of course, is not the question. The question is whether Senate Bill 382 wrongfully interferes with a power reserved for the executive branch as a whole. The Governor is not the executive branch's only member.

Had the trial court started with the right question, it might have gotten the right answer. Senate Bill 382 takes nothing away from the executive branch. Indeed, it allocates all the relevant appointments to an elected, constitutional officer in the executive branch. That cannot violate the separation of powers.

3. *McCrory*, *Cooper I*, and *Cooper Confirmation* Are Inapposite.

The trial court also ignored the Supreme Court's repeated warnings that future courts should not apply its opinions in *McCrory*, Cooper I, and *Cooper Confirmation*, to cases that involve boards assigned to other members of the Council of State.

Indeed, this Court stressed each time that, "[a]s in *McCrory*, 'our 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.'" *Cooper Confirmation*, 371 N.C. at 805 n.4, 822 S.E.2d at 292 n.4 (quoting *McCrory*, 368 N.C. at 646, n.5, 781 S.E.2d at 256 n. 5) (emphasis added); *Cooper I*, 370 N.C. at 407 n.5, 809 S.E.2d at 107 n.5 (same). This makes perfect sense. Neither *McCrory* nor *Cooper I* dealt with boards or commissions within departments headed

by other Council of State members. And because our Constitution establishes a *plural* executive, the Governor does not hold a monopoly on executive power. Thus, the analysis is completely different when it is another executive officer exercising the executive power.

The trial court, however, sped right past the Supreme Court's warnings. It thus concluded, without any hesitation, that "*McCrory*, *Cooper I*, and *Cooper Confirmation* control the Panel's decision in this case" and glibly pronounced that the fact Senate Bill 382 involved the assignment of duties to the Auditor "makes no difference to the constitutional analysis." (Order at pp. 11, 15). Of course, the Supreme Court has repeatedly said the opposite, and the trial court's refusal to recognize the limits the Supreme Court has imposed on its own opinions constitutes clear and unmistakable error.

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In sum, Senate Bill 382 should never have been enjoined. As a result, the Governor cannot show a likelihood of success on the merits. Senate Bill 382 did not transfer any power away from the executive branch. It likewise did not prevent the Governor from carrying out any duty assigned to him. Instead, the General Assembly merely exercised its authority to assign duties to the Auditor—something it expressly empowered to do under Article III, Section 7(2). This is exactly what the drafters of our Constitution intended when they decided to establish a plural, rather than unitary, executive. The trial court's decision would wrongly upend that decision almost 250 years later and effectively eliminate the plural executive model that has

been a key feature of our State's constitutional system since its founding.

CONCLUSION

For the foregoing reasons, Legislative Defendants request that Court deny the Governor's Petition for Writ of *Certiorari* and Writ of *Supersedeas.*

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