IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA25-652

Filed 16 September 2026

Wake County, No. 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.

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Appeal by Defendants from order entered 23 April 2025 by Judges Edwin G. Wilson, Jr., Lori I. Hamilton, and R. Andrew Womble in Wake County Superior Court. Heard in the Court of Appeals 10 February 2026.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by Daniel F.E. Smith, Jim W. Phillips, Jr., and Eric F. Fletcher; and Wilmer Cutler Pickering Hale & Dorr LLP, by W. Swain Wood, for Plaintiff-Appellee.

Womble Bond Dickinson (US) LLP, by Matthew F. Tilley, Michael A. Ingersoll, and Emmett Whelan; Nelson Mullins Riley & Scarborough, LLP, by Noah H. Huffstetler, III, and D. Martin Warf, for Defendants-Appellants.

Ward & Smith, P.A., by Alexander C. Dale, and Mark S. Wigley, for Intervenor-Defendant-Appellant.

WOOD, Judge.

Destin C. Hall, in his official capacity as Speaker of the House of Representatives and Philip E. Berger, in his official capacity as President *Pro Tempore* of the North Carolina Senate (collectively "Legislative Defendants"), along with Dave Boliek, in his official capacity as North Carolina State Auditor ("Auditor" or collectively with Legislative Defendants, "Defendants") appeal from the order entered on 23 April 2025 by a divided three-judge superior court panel (the "three-judge panel"). The order granted Joshua H. Stein's ("Governor"), in his official capacity as Governor of the State of North Carolina, motion for summary judgment; denied the Governor's motion for a temporary restraining order and preliminary injunction as moot; denied Legislative Defendants' motion for summary judgment; and declared Sections 3A.3.(b), (c), (d), (f), (g), and (h) of Session Law 2024-57 unconstitutional.

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I. Factual and Procedural Background

The North Carolina State Board of Elections ("State Board") is responsible for the enforcement of laws governing elections, campaign finance, lobbying, and ethics and has the "authority to make such reasonable rules and regulations with respect to the conduct of primaries and elections as it may deem advisable . . . ." N.C. Gen. Stat. § 163-22 (Powers and duties of State Board of Elections). The State Board also advises and monitors for compliance the state's county boards of election ("County Boards"). N.C. Gen. Stat. § 163-22(e).

The North Carolina General Assembly ("General Assembly") created the first

State Board in 1899; all members of the State Board were appointed by the General Assembly. *See* An Act to Regulate Elections, ch. 507, § 4, 1899 Sess. Laws 659. In 1901, the General Assembly transferred to the Governor the duty to appoint all members to the State Board. *See* An Act to Provide for the Holding of Elections in North Carolina, ch. 89, § 5, 1901 Sess. Laws 244. Since 1901, the Governor has retained the duty to appoint all members to the State Board. Additionally, the Governor has appointed the chair of each County Board since 2018.

On 10 October 2023, the General Assembly succeeded in its efforts to override Former Governor Roy Cooper's ("Governor Cooper") veto and enacted Session Law 2023-139 ("SB 749") which transferred the State Board "administratively to the Department of the Secretary of State." Further, SB 749 increased the number of State Board members from five to eight and transferred the duty to appoint all members of the State Board from the Governor to the General Assembly. On 17 October 2023, Governor Cooper filed a complaint alleging that the changes to the State Board within SB 749 were unconstitutional. On 6 November 2023, Governor Cooper filed a motion for a temporary restraining order to prevent the challenged portions of SB 749 from going into effect on 1 January 2024.

On 8 November 2023, the matter was transferred to a three-judge panel in the Superior Court of Wake County as required when there is a facial challenge to the validity of an act of the General Assembly. The three-judge panel granted the motion for preliminary injunction; the legislative defendants filed an answer and motion to

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dismiss for lack of subject matter jurisdiction and for failure to state a claim; and the three-judge panel entered a case management order.

On 9 February 2024, the legislative defendants filed a motion to dismiss and, alternatively, motion for judgment on the pleadings pursuant to North Carolina Rules of Civil Procedure 12(b)(1) and 12(c) asserting that Governor Cooper's claims are political questions and nonjusticiable, thus, the three-judge panel should dismiss for lack of subject matter jurisdiction. On 9 February 2024, Governor Cooper filed a motion for summary judgment pursuant to Rule 56.

On 11 March 2024, the three-judge panel[1] granted Governor Cooper's motion for summary judgment and denied the legislative defendants' motion to dismiss and motion for judgment on the pleadings. The three-judge panel determined Governor Cooper's claim to be justiciable as a matter of law and found a separation of powers issue to exist which *Cooper I* controlled. *See generally Cooper v. Berger* (*Cooper I*), 370 N.C. 392, 809 S.E.2d 98 (2018); *State ex rel. McCrory v. Berger* (*McCrory*), 368 N.C. 633, 781 S.E.2d 256 (2016). The three-judge panel concluded in part:

> 12. Because the State Board and County Boards exercise executive functions, the question becomes whether the Governor, under the Session Law, has sufficient control. 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

[1] Judges Edwin Wilson, Lori Hamilton, and Andrew Womble.

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S.E.2d at 111 (quoting *McCrory*, 368 N.C. at 645-46, 781 S.E.2d at 256). The degree of control depends on the ability to appoint members, supervise their activities, and remove them from office. *Id.*

13. The constitutional provision "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." *Cooper I*, 370 N.C. at 415, 809 S.E.2d at 112.

14. Without explicitly defining "control," it is still clear that the Session Law infringes upon the Governor's constitutional duties. First, all appointment powers were removed from the Governor and given to the General Assembly for the State Board and the County Boards. Second, Defendants have the final decision on the Chair and Executive Director of the State Board if the members are unable to reach a majority decision. Similarly, if the County Board members cannot reach a decision on their Chair, the General Assembly selects the Chair. Finally, the Governor has no power to remove members of the State Board and County Boards, whether for lack of attendance or for cause. *Cooper I*, 370 N.C. at 416, 809 S.E.2d at 112-13 (concluding 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"). Defendants' actions are the most stark and blatant removal of appointment power from the Governor since *McCrory* and *Cooper I*. *Cooper I* and *McCrory* control, and the Session Law must be permanently enjoined.

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On 5 November 2024, Democratic candidate Joshua H. Stein won the North Carolina Governor election and Republican candidate David Boliek won the North Carolina Auditor election.

While the appeal of SB 749 was still pending, Senate Bill 382 ("SB 382") was introduced on 19 November 2024 and passed in both chambers of the General Assembly before being presented to the Governor. Governor Cooper vetoed SB 382 on 26 November 2024. The Governor's veto was overridden by a Republican super-majority vote on 11 December 2024.

SB 382, in relevant part, transferred the State Board administratively from an independent agency under the Governor to the Department of the State Auditor; relieved the Governor entirely of his duty to appoint and remove State and County Board members; assigned all of the Governor's former appointment duties to the Auditor along with the duty to fill vacancies or remove members who fail to attend meetings; and assigned the Auditor to direct and supervise the budgeting functions of the State Board. S.B. 382 Sec. 3A.1-3A.3 of S.L. 2024-57, Legis. Analysis Div., N.C. Gen. Assemb., Reg. Sess., at 2 (9 Jan. 2025). SB 382 effectively repealed the challenged and enjoined portions of SB 749.

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On 28 January 2025, the parties[2] jointly moved for an order vacating the 11 March 2024 final judgment pursuant to Rule 60 to "permit supplemental amendment of [Governor Cooper's] complaint pursuant to Rule 15(d), as requested in [Governor Cooper's] 23 December 2024 motion; and to establish a briefing schedule for

[2] Now the named parties to the case: Governor Joshua H. Stein, in his official capacity as Governor of the State of North Carolina, Plaintiff, vs. Destin C. Hall, in his official capacity as Speaker of the House of North Carolina House of Representatives; and Philip E. Berger, in his official capacity as President *Pro Tempore* of the North Carolina Senate, Defendants.

dispositive motions on [Governor Cooper's] supplemental complaint." That same day, the Governor filed a notice of voluntary dismissal without prejudice.

On 11 February 2025, the three-judge panel filed an amended consent order granting the joint motion to vacate the 11 March 2024 final judgment. That same day, the Governor filed a supplemental complaint pursuant to Rules 15(d) and 19, seeking a declaratory judgment and preliminary and permanent injunctions challenging Sections 3A.3.(b), (c), (d), (f), (g), and (h) of SB 382. Notably, the Governor has *not* challenged the administrative move of the State Board to the Department of the Auditor nor that the budgeting functions shall be performed under the supervision and direction of the Auditor.

On 25 February 2025, Legislative Defendants filed their answer to the Governor's supplemental complaint and asserted that the Governor's claim should be dismissed pursuant to Rule 12(b)(1) and 12(b)(6) for lack of subject matter jurisdiction and for failure to state a claim upon which relief may be granted.

On 25 February 2025, Legislative Defendants filed a motion for summary judgment pursuant to Rule 56 on all claims raised in the supplemental complaint. On 26 February 2025, the Governor filed a motion for summary judgment as to the supplemental complaint pursuant to Rule 56. On 6 March 2025, the Auditor filed a motion and memorandum in support of his motion to permissively intervene as a defendant and subsequently filed his proposed answer to the Governor's supplemental complaint.

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On 7 March 2025, the trial court entered an order transferring the matter to a three-judge panel. On 11 March 2025, the three-judge panel filed a consent order allowing the Auditor to permissively intervene under Rule 24(b). On 14 March 2025, the Governor filed a motion for temporary restraining order and preliminary injunction. The matter came on for hearing on 14 April 2025.

On 23 April 2025, the three-judge panel filed its order granting the Governor's motion for summary judgment, denying Legislative Defendants' motion for summary judgment, and denying as moot the Governor's motion for temporary restraining order and preliminary injunction. On 24 April 2025, Legislative Defendants filed a motion to stay the 23 April 2025 order while their appeal was pending. That same day, Legislative Defendants filed notice of appeal of the 23 April 2025 order; the Auditor filed notice of appeal two days later. On 28 April 2025, the three-judge panel denied Legislative Defendants' motion for an appellate stay.

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On 12 May 2025, this Court entered an order allowing the petition for writ of supersedeas and motion for temporary stay filed by Legislative Defendants. The order stayed the matter until further order by this Court; therefore, SB 382 took effect notwithstanding the three-judge panel having found the challenged portions of SB 382 unconstitutional. The Governor appealed this Court's order to our Supreme Court which on 21 May 2025 filed an order concluding this Court did not abuse its discretion. *See Stein v. Berger* (*Stein Stay Order*), 387 N.C. 575, 915 S.E.2d 146 (2025). The order from our Supreme Court concluded:

> The constitutionality of [SB 382] remains vigorously contested. Given that defendants have already exercised their appeal as of right to the Court of Appeals—and that the outcome of their appeal is still pending—the three-judge panel will not have the final say on the law's enforceability. Accordingly, the Court of Appeals' ruling was not manifestly unsupported by reason or so arbitrary that it could not have been the result of a reasoned decision.
>
> The Governor's Petition for Writ of Supersedeas and Petition for Writ of Certiorari are denied, and his Motion for Temporary Stay is dismissed as moot.

Id. at 579, 915 S.E.2d at 149. The vigorously contested question regarding the constitutionality of SB 382/ Session Law 2024-57 is now before this Court.

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II. Analysis

The case before us presents a matter of first impression regarding the General Assembly's ability to reassign certain duties prescribed by law among Council of State members *within* the executive branch. N.C. Const. art. III, § 7(2). Legislative Defendants argue the three-judge panel erred by declaring the challenged sections of SB 382 unconstitutional because: SB 382 represents "a legitimate exercise of the General Assembly's express and plenary power to structure agencies of State government and assign duties to the 'other elective officers' who serve as members of the Council of State"; our constitution expressly authorizes the General Assembly to distribute duties among the members of the executive branch; the cases *McCrory*, *Cooper I*, and *Cooper Confirmation* are inapposite to the issue presented; SB 382 does not interfere with the Governor's constitutional duties; and the Governor's challenge

to SB 382 is nonjusticiable. *See generally McCrory*, 368 N.C. 633, 781 S.E.2d 256; *Cooper I*, 370 N.C. 392, 809 S.E.2d 98; *Cooper v. Berger* (*Cooper Confirmation*), 371 N.C. 799, 822 S.E.2d 286 (2018). The Auditor further supports Legislative Defendants' arguments by contending that our constitution's reorganization clause "expressly permits this kind of intra-executive branch restructuring—full stop," and that regardless, the reorganization clause of Article III, § 5(10) renders the Governor's challenge to SB 382 nonjusticiable.

In contrast, the Governor argues the three-judge panel did not err by declaring the challenged sections of SB 382 unconstitutional because a violation of the separation of powers clause occurs not only when "one branch exercises power that the constitution vests exclusively in another branch," but also equally forbids "one branch from 'prevent[ing] another branch from performing its constitutional duties.'" *McCrory*, 368 N.C. at 645, 781 S.E.2d at 256. By enacting SB 382, the Governor asserts that the General Assembly has prevented him from performing his constitutional duties, i.e., ensuring the State Board faithfully executes the law. After a careful review of the record and applicable law, we conclude the Governor has presented a justiciable question of law, and the General Assembly has not violated the separation of powers.

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A. Standard of Review

This Court reviews an order granting or denying summary judgment containing constitutional arguments *de novo*, considering the matter anew and freely

substituting its own judgment for that of the lower court. *Stein v. Berger* (*Stein Commissions*), __ N.C. App. __, __, 923 S.E.2d 579, 584 (2025). In our review, we *must* "presum[e] that legislation is constitutional and that a constitutional limitation on the General Assembly must be explicit in the text and demonstrated beyond a reasonable doubt." *McKinney v. Goins*, 387 N.C. 35, 42, 911 S.E.2d 1, 7 (2025) (citing *Harper v. Hall*, 384 N.C. 292, 323-24, 886 S.E.2d 393, 414 (2023)). "[W]e will not declare a law invalid unless we determine that it is unconstitutional beyond a reasonable doubt." *Stein Commissions*, __ N.C. App. at __, 923 S.E.2d at 584 (quoting *McCrory*, 368 N.C. at 639, 781 S.E.2d at 252).

The Governor, as the challenging party, "bears the burden of overcoming our presumption of validity." *McKinney*, 387 N.C. at 44, 911 S.E.2d at 9. "[A] claim that a law is unconstitutional must surmount the high bar imposed by the presumption of constitutionality and meet the highest quantum of proof, a showing that the statute is unconstitutional beyond a reasonable doubt." *Harper*, 384 N.C. at 324, 886 S.E.2d at 414-15. For an act to be unconstitutional beyond a reasonable doubt, "the constitutional violation must be plain and clear. To determine whether the violation is plain and clear, we look to the text of the constitution, the historical context in which the people of North Carolina adopted the applicable constitutional provision, and our precedents." *McCrory*, 368 N.C. at 639, 781 S.E.2d at 252. Therefore, if the Governor here has "fail[ed] to meet his burden beyond a reasonable doubt, 'we must uphold the statute regardless of whether we agree with the General Assembly's public

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policy choices.'" *McKinney*, 387 N.C. at 44, 911 S.E.2d at 9 (quoting *Cmty. Success Initiative v. Moore*, 384 N.C. 194, 212, 886 S.E.2d 16, 32 (2023)).

"Under our Constitution, 'power remains with the people and is exercised through the General Assembly, which functions as the arm of the electorate. An act of the people's elected representatives is thus an act of the people and is presumed valid *unless it conflicts with the Constitution*.'" *Holmes v. Moore*, 384 N.C. 426, 435, 886 S.E.2d 120, 129 (2023) (quoting *Pope v. Easley*, 354 N.C. 544, 546, 556 S.E.2d 265, 267 (2001)). Additionally, our Supreme Court precedent makes clear:

> [t]he Legislature alone may determine the policy of the State, and its will is supreme, except where limited by constitutional inhibition, which exception or limitation, when invoked, presents a question of power for the courts to decide. But even then the courts do not undertake to say what the law ought to be; they only declare what it is.

Holmes, 384 N.C. at 435, 886 S.E.2d at 129 (quoting *State v. Revis*, 193 N.C. 192, 195, 136 S.E. 346, 347 (1927) (recently quoted in substantial part in *McKinney*, 387 N.C. at 42, 911 S.E.2d at 7). It is this Court's task now to set aside whatever the General Assembly's public policy choices may have been and consider the constitutional limitations of the General Assembly's authority by looking at "the plain text of the constitution just as [we] would look to the plain text of a statute" and consider whether the Governor has met the high bar in overcoming the presumption of constitutionality afforded to the challenged provisions of SB 382. *Harper*, 384 N.C. at 324, 886 S.E.2d at 414.

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B. Justiciability

First, we address Defendants' argument that the Governor's lawsuit presents a nonjusticiable political question. Legislative Defendants contend the case *sub judice* "does not involve [a] separation of powers, but instead the General Assembly's express (and plenary) authority to assign unreserved official duties among Council of State members within the executive branch under Article III, Section 7(2)."

In contrast, the Governor argues the question is justiciable and similar to the issue in *Cooper I* that was held as such. The Governor does not challenge "the General Assembly's decision to 'prescribe the functions, powers, and duties of the administrative departments and agencies of the State,'" but rather he contends that "the General Assembly has impermissibly exceeded a defined, textual limit on the power that may be assigned to the State Auditor and encroached on the Governor's executive authority."

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The political question doctrine "'excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for the resolution to the' legislative or executive branches of government." *Cooper I*, 370 N.C. at 407-08, 809 S.E.2d at 107 (quoting *Bacon v. Lee*, 353 N.C. 696, 717, 549 S.E.2d 840, 854 (2001)). "Purely political questions are those questions which have been wholly committed to the 'sole discretion' of a coordinate branch of government, and those questions which can be resolved only by making 'policy choices and value determinations.'" *N.C. State Conf. of NAACP v.*

Moore, 382 N.C. 129, 141, 876 S.E.2d 513, 524 (2022) (quoting *Bacon*, 353 N.C. at 717, 549 S.E.2d at 854). Our Supreme Court has recognized general justiciability principles including "two criteria of political questions: (1) where there is a 'textually demonstrable constitutional commitment of the issue' to the 'sole discretion' of a 'coordinate political department'; and (2) those questions that can be resolved only by making 'policy choices and values determinations.'" *Id.* at 141, 876 S.E.2d at 525-26 (cleaned up) (quoting *Bacon*, 353 N.C. at 717, 549 S.E.2d at 854).

"The political question doctrine controls, essentially, when a question becomes 'not justiciable because of the separation of powers provided by the Constitution.'" *Cooper I*, 370 N.C. at 407, 809 S.E.2d at 107 (cleaned up) (quoting *Bacon*, 353 N.C. 717, 549 S.E.2d at 854). "The judicial branch is designed to resolve legal disputes and to ensure that the other branches do not violate the constitution." *Harper*, 384 N.C. at 298, 886 S.E.2d at 399.

> Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution.

Cooper I, 370 N.C. at 408, 809 S.E.2d at 107 (quoting *Baker v. Carr*, 369 U.S. 186, 210, 82 S. Ct. 691, 706 (1962)). Consequently, our Supreme Court has consistently held it necessary to first "undertake a separation of powers analysis in order to

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determine whether the political question doctrine precludes judicial resolution of a particular dispute." *Id.*

Our Supreme Court in *Cooper I* contrasted *Bacon v. Lee* ("*Bacon*") and *News & Observer Publishing Co. v. Easley* ("*News & Observer*") to illustrate distinctions between cases involving nonjusticiable political questions and those that do not. *Id.* *Bacon* and *News & Observer* both dealt with clemency; the first addressed "the constitutionality of the Governor's exercise of his clemency power under Article III, Section 5(6)," and the latter whether *News & Observer* was entitled under the public records law to certain clemency records within the possession of the Governor. *Bacon*, 353 N.C. at 698, 549 S.E.2d at 843; *News & Observer Pub. Co. v. Easley*, 182 N.C. App. 14, 19, 641 S.E.2d 698, 702 (2007).

In *Bacon*, our Supreme Court stated a "question may be held nonjusticiable under this doctrine if it involves 'a textually demonstratable constitutional commitment of the issue to a coordinate political department.'" *Bacon*, 353 N.C. at 717, 549 S.E.2d at 854 (quoting *Baker*, 369 U.S. at 216, 82 S. Ct. at 710). Since Article III, § 5(6) "expressly commits the substance of the clemency power to the sole discretion of the Governor," it determined that "judicial review of the exercise of clemency power would unreasonably disrupt a core power of the executive." *Id.*

In the case of *News & Observer,* this Court held the parties' arguments did not "involve judicial review of the Governor's exercise of clemency power," but "[i]nstead the question before the Court [was] whether the [*News & Observer*] [was] entitled,

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under the Public Records Law, to certain clemency records within the possession of the Governor." *News & Observer Pub. Co.*, 182 N.C. App. at 19, 641 S.E.2d at 702. To answer the question, this Court determined that the "question turns not on a political question, but on the meaning of our constitution's proviso that the Governor's power is subject to legislation relative to the manner of applying for pardons." *Id.* (cleaned up). Further, this Court stated, "[t]he 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." *Id.* Thus,

> in order to resolve the justiciability issue, we must decide 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.

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Here, the Governor has not challenged the administrative transfer of the State Board to the department of the Auditor and concedes in his supplemental complaint that "[i]t is undisputed that the General Assembly has considerable authority to restructure the agencies of North Carolina government and assign, modify, and remove powers, functions, and duties." The Governor asserts in his supplemental complaint that a statute restructuring an executive board—leaving the Governor

without any "direct or indirect powers of appointment, supervision or removal over any members"—prevents the Governor from performing his constitutional duty to "take care that the laws be faithfully executed" and "treat[s] the State Auditor and Governor as if they were interchangeable for constitutional purposes." The Governor reasons that a statute structured in this manner "impermissibly, facially, and beyond a reasonable doubt interferes with the Governor's ability to ensure that the laws are faithfully executed as required by Article III, Section 5(4) of the North Carolina [Constitution]." *Id.* at 418, 809 S.E.2d at 114. Because the challenged statutory provisions allegedly violate his constitutional duty to take care, the Governor asserts the statute violates the separation of powers. Thus, we consider the General Assembly's reassignment of duties between the Governor and the Auditor and *not* the restructuring of functions, powers, and duties between "administrative departments, agencies, and offices of the State." Our focus is narrowly tailored to address any potential conflict between Article III, § 7(2) and Article III, § 5(4) and does not require us to examine Article III, § 11 at length in our analysis.

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This case presents the question of whether the General Assembly by enacting the statute at issue pursuant to Article III, § (7)(2) has prevented the Governor from being able to perform his constitutional duty to take care the laws be faithfully executed pursuant to Article III, § 5(4), that is, whether the General Assembly's authority to prescribe Council of State members their respective duties is limited by

the Governor's duty to take care the laws be faithfully executed. *Id.* at 412, 809 S.E.2d at 110.

This question "requires us to examine the constitutional provisions enacting a system of government founded on principles of popular sovereignty and democratic self-rule and to then determine if those provisions limit the authority of legislators who" seek to remove duties assigned to the Governor over an executive board or commissions. *N.C. State Conf. of NCAAP*, 382 N.C. at 145, 876 S.E.2d at 526. Therefore, the question before us is not excluded from judicial review.

C. Reassignment of Elected Officer Duties

The case before us presents a matter of first impression regarding the General Assembly's ability to reassign certain duties prescribed by law among Council of State members *within* the executive branch. N.C. Const. art. III, § 7(2). Accordingly, the three-judge panel erred by concluding it "makes no difference to the constitutional analysis" that the duties at issue here were transferred from the Governor to the Auditor rather than the General Assembly. Specifically, this case considers to what extent the General Assembly may reassign duties that *the General Assembly* had delegated to the Governor for more than one hundred years, but now the General Assembly desires to delegate to a different elected officer within the Council of State under the authority granted pursuant to Article III § 7(2) of our constitution. Article III § 7(2) of our constitution states that Council of State members' "respective duties

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shall be prescribed by law," i.e., prescribed by the General Assembly. N.C. Const. art. III, § 7(2).

The Governor argues the General Assembly violated the separation of powers by reassigning duties because, in his words, "[i]f the General Assembly can freely allocate responsibility for administering elections among Council of State members, it can effectively control elections administration itself."[3] "When a branch is accused of violating separation of powers by encroaching upon the executive branch's authority, we consider whether the accused branch's actions 'unreasonably disrupt a core power of the executive.'" *Stein Commissions*, __ N.C. App. at __, 923 S.E.2d at

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[3] We also note the following argument from the Governor's brief on appeal:

> the General Assembly cannot assign the responsibility to administer elections to the Auditor. Administering elections is wholly unrelated to the Auditor's core constitutional function. And, equally importantly, for the entire life of this State, the Auditor has never played a meaningful role in our State's elections. . . . The General Assembly's decision nevertheless to appoint the Auditor as our State's chief elections administrator also violates the Separation of Powers Clause. If the General Assembly can freely allocate responsibility for administering elections among Council of State members, it can effectively control elections administration itself. The Constitution forbids that result. And because the General Assembly cannot task the Auditor with administering elections, that responsibility must revert to the Governor, who enjoys any residual executive authority. Because Senate Bill 382 adopts a contrary regime, the provisions challenged here are unconstitutional.

It is important to note that despite this argument from the Governor on appeal, the Auditor is not the Executive Director of the State Board nor the chief elections official for the state. In fact, the members of the State Board appoint the Executive Director who is "responsible for staffing, administration, and execution of the State Board's decisions and orders and shall perform such other responsibilities as may be assigned by the State Board." N.C. Gen. Stat. § 163-27. Further, "[t]he Executive Director shall be the chief State elections official," not the Auditor. N.C. Gen. Stat. § 163-27(d).

584 (quoting *McCrory*, 368 N.C. at 645, 781 S.E.2d at 256). Generally, a core power of the executive is disrupted and a separation of powers violation has occurred when the "accused branch 'retains some control' over the executive branch's functions." *Id.* at __, 923 S.E.2d at 584 (quoting *McCrory*, 368 N.C. at 645, 781 S.E.2d at 256). As our Supreme Court previously has noted: the State Board "clearly performs primarily executive, rather than legislative or judicial, functions" as it is responsible for "the enforcement of laws governing elections, campaign finance, lobbying, and ethics." *Cooper I*, 370 N.C. at 415, 809 S.E.2d at 112.

However, there is no "categorical rule that would resolve every separation of powers challenge," and because "each statutory scheme varies," we must examine the "specific factual and legal context" of each challenge. *Stein Commissions*, __ N.C. App. at __, 923 S.E.2d at 584-85 (recognizing separation of powers violations "can be 'more nuanced' and occur 'when the actions of one branch prevent another branch from performing its constitutional duties.'") (quoting *McCrory*, 368 N.C. at 645, 781 S.E.2d at 256). "Asserted separation of powers violations are analyzed on a case-by-case basis with a flexible and pragmatic approach." *Cooper v. Berger*, 256 N.C. App. 190, 196, 807 S.E.2d 176, 180 (2017).

Further, "[e]very constitutional inquiry 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*, 387 N.C. at 45, 911 S.E.2d at 9. "A violation of separation of powers only occurs when one branch of government

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exercises, or prevents the exercise of, a power reserved for another branch of government." *Harper*, 384 N.C. at 322, 886 S.E.2d at 413 (emphasis added). Consequently, our task is to determine whether by reassigning the duties within the challenged sections of SB 382 the General Assembly has exercised, or prevented the exercise of, a power reserved only for the executive branch.[4]

1. Separation of Powers

The separation of powers clause in our constitution states, "[t]he legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other." N.C. Const. art. I, § 6. While Legislative Defendants assert that the "separation of powers only deals with the balance of power *between* branches, not the allocation of duties *within* a single branch," they fail to recognize separation of powers violations can be more nuanced.

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[4] Our Supreme Court in the *Stein Stay Order* indicates that "[i]n cases of first impression, the presumption of constitutionality is especially strong," and further explains in a footnote:

> This is because cases of first impression inherently lack precedential guidance and require the reviewing court to conduct a novel constitutional analysis. Accordingly, it is particularly inappropriate for courts in such cases to declare an act of the General Assembly unconstitutional unless a rigorous examination of text and history reveals a constitutional violation beyond a reasonable doubt. *See McKinney*, 387 N.C. at 41-42, 44-45, 911 S.E.2d 1 (explaining that enacted laws are presumptively constitutional and must be proven otherwise beyond a reasonable doubt, which courts evaluate by "examining the text of the relevant constitutional provision, the historical context in which the people of North Carolina enacted it, and this Court's precedents interpreting it").

Stein Stay Order, 387 N.C. at 577 n.3, 915 S.E.2d at 147 n.3.

> When a branch is accused of violating separation of powers by encroaching upon the executive branch's authority, we consider whether the accused branch's actions "unreasonably disrupt a core power of the executive." Such action generally occurs when the accused branch "retains some control over the executive branch's functions."
>
> There is, however, no "categorical rule that would resolve every separation of powers challenge" because "each statutory scheme" varies. Consequently, "we must resolve each challenge by carefully examining its specific factual and legal context."
>
> Separation of powers violations, therefore, can be "more nuanced" and occur "when the actions of one branch prevent another branch from performing its constitutional duties."

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Stein Commissions, __ N.C. App. at __, 923 S.E.2d at 584-85 (quoting *McCrory*, 368 N.C. at 645-46, 781 S.E.2d at 256-57). This Court recently acknowledged again in the cases of *Stein Commissions* and *Stein Utilities* that our Supreme Court has yet to address just "how the separation of powers clause applies to those executive departments that are *headed by the independently elected members of the Council of State*." *Stein v. Hall* (*Stein Utilities*), __, N.C. App. __, __ , 925 S.E.2d 832, 842 (2026) (quoting *McCrory*, 368 N.C. at 646 n.5, 781 S.E.2d at 256 n.5); *see Stein Commissions*, __ N.C. App. at __, 923 S.E.2d at 590-94 (Murry, J., concurring). The Council of State is composed of the following members: the Governor, the Lieutenant Governor, the Secretary of State, the Auditor, the Treasurer, the Superintendent of Public Instruction, the Attorney General, the Commissioner of Agriculture, the Commissioner of Labor, and the Commissioner of Insurance. N.C. Const. art. III, §§

7(1), 8. The Governor, although head of the executive branch and leader of the Council of State, does not unilaterally exercise the executive power but shares this power with the other Council of State members. *Stein Commissions*, __ N.C. App. at __, 923 S.E.2d at 584; *Carrington v. Brown*, 136 N.C. App. 554, 560, 525 S.E.2d 230, 235 (2000); *Cooper Confirmation*, 371 N.C. at 799-800, 822 S.E.2d at 289 (stating, "[b]ut the Governor is not alone in this task" of taking care the laws are faithfully executed because our "constitution establishes nine other offices in the executive branch.").

Because this is a case of first impression, we recognize the difficulty the three-judge panel faced in analyzing the issues presented. However, the three-judge panel's contention that it "makes no difference to the constitutional analysis" that the transfers of appointment and removal powers at issue were transferred from the Governor to the Auditor, rather than from the Governor to the General Assembly, is flawed in light of the nuances arising under the facts of this case. While the three-judge panel relied on *McCrory, Cooper I*, and *Cooper Confirmation* as directly controlling, we conclude that the issues presented are distinguishable and therefore, the cases are not directly controlling. Nonetheless, we recognize that while the cases are not directly controlling, each may provide useful guidance; we examine each to consider its application of the relevant constitutional provisions and its examination of separation of powers violation nuances.

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2. McCrory, Cooper I, and Cooper Confirmation

Although *McCrory*, *Cooper I*, and *Cooper Confirmation* are distinguishable from the case *sub judice*, we consider each of their applications of the relevant constitutional provisions because they still provide useful guidance. Specifically, these cases are distinguishable because the issue in each was legislation whereby the General Assembly took a duty it had assigned to the Governor, i.e., the executive branch, and either transferred it to itself or exerted great control over duties assigned to the Governor, thus, posing a classic separation of powers question.

The challenged legislation in *McCrory* authorized *the General Assembly to appoint* the majority of the voting members to three administrative commissions: the Oil and Gas Commission, the Mining Commission, and the Coal and Ash Management Commission, each of which performed primarily executive functions. Our Supreme Court concluded that, "[i]n short, the legislative branch has exerted too much control over commissions that have final executive authority. By doing so, it has prevented the Governor from performing his express constitutional duty to take care that the laws are faithfully executed." *McCrory*, 368 N.C. at 636, 781 S.E.2d at 250. The holding in *McCrory* states:

> When *the General Assembly* appoints executive officers that the Governor has little power to remove, it can appoint them essentially without the Governor's influence. That leaves the Governor with little control over the views and priorities of the officers that the General Assembly appoints. When those officers form a majority on a commission that has the final say on how to execute the laws, the General Assembly, not the Governor, can exert most of the control over the executive policy that is

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> implemented in any area of the law that the commission regulates. As a result, the Governor cannot take care that the laws are faithfully executed in that area. The separation of powers clause plainly and clearly does not allow *the General Assembly* to take this much control over the execution of the laws from the Governor and lodge it with itself.

Id. at 647, 781 S.E.2d at 257 (emphasis added). Significantly, *McCrory*, explicitly stated that the "opinion takes no position on how the separation of powers clause applies to those executive departments that are headed by the independently elected members of the Council of State." *Id.* at 646 n.5, 781 S.E.2d at 256 n.5.

Two years later in *Cooper I*, our Supreme Court examined an attempt by the General Assembly to lessen the Governor's control over the State Board and acknowledged certain "policy-related decisions committed to the General Assembly" pursuant to Article III, § 5(10). *Cooper I*, 370 N.C. at 418, 809 S.E.2d at 114. Specifically, the "policy-related decisions committed to the General Assembly" include: specifying "the number of members of an executive branch commission"; establishing "qualifications for commission membership"; making "certain persons ex officio members of the commission"; mandating that "differing policy preferences be reflected in the commission's membership"; providing "the commission with a reasonable degree of independence from short-term political interference"; and fostering "the making of independent, non-partisan decisions." *Id.* at 417-18, 809 S.E.2d at 113-14. Additionally, our Supreme Court recognized that the General

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Assembly cannot, "consistent with the textual command contained in" Article III, § 5(4):

> structure an executive branch commission in such a manner that the Governor is unable, within a reasonable period of time, to "take care that the laws be faithfully executed" because he or she is required to appoint half of the commission members from a list of nominees consisting of individuals who are, in all likelihood, not supportive of, if not openly opposed to, his or her policy preferences while having limited supervisory control over the agency and circumscribed removal authority over commission members. An agency structured in that manner "leaves the Governor with little control over the views and priorities of the majority of officers" and prevents the Governor from having "the final say on how to execute the laws."

Id. at 418, 809 S.E.2d at 114 (quoting *McCrory*, 368 N.C. at 647, 781 S.E.2d at 257). *Cooper I* further clarified in a footnote that when referencing "the Governor's policy preferences" in regard to the "interstitial policy decisions given to administrative agencies,"

> [w]e refer to the ability of the executive branch to make these discretionary determinations as the effectuation of "the Governor's policy preferences" throughout the remainder of the opinion. *The use of this expression should not be understood as suggesting that the Bipartisan State Board has the authority to make any policy decision that conflicts with or is not authorized by the General Assembly, subject to applicable constitutional limitations.*

Id. at 415 n.11, 809 S.E.2d at 112 n.11 (emphasis added). *Cooper I* further discussed *McCrory* and the degree of control the Governor must retain and how the policy preferences of the Governor are to be considered:

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> As was the case in *McCrory*, in which we determined that the General Assembly had exerted excessive control over certain executive agencies by depriving the Governor of "control over the views and priorities" of a majority of the members of the commissions at issue in that litigation, we conclude that the relevant provisions of Session Law 2017-6, when considered as a unified whole, "leave the Governor with little control over the views and priorities" of the Bipartisan State Board, by requiring that a sufficient number of its members to block the implementation of the Governor's policy preferences be selected from a list of nominees chosen by the leader of the political party other than the one to which the Governor belongs,[n.12] limiting the extent to which individuals supportive of the Governor's policy preferences have the ability to supervise the activities of the Bipartisan State Board, and significantly constraining the Governor's ability to remove members of the Bipartisan State Board.

Id. at 416, 809 S.E.2d at 112-13 (quoting *McCrory*, 368 N.C. at 647, 781 S.E.2d at 257). Importantly, the issue of the Governor's policy preferences and how it is considered in the analysis was again clarified in a footnote:

> We are, of course, unable to conclude with absolute certainty that persons chosen by the chair of the opposing political party will invariably and in all instances act to thwart the Governor's policy preferences at every turn. However, we do not believe that the applicable standard of review, including the presumption of constitutionality, requires us to turn a blind eye to the functions appropriately performed by the leader of an opposition party in our system of government or to force the Governor to be subject to the uncertainty that will necessarily arise from a determination that the showing of an actual interference with the Governor's executive authority is a necessary prerequisite to his or her ability to challenge legislation as violative of Article III, Section 5(4) of the North Carolina Constitution. Utilizing similar logic, the Court held in *McCrory* that the Governor lacked sufficient

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> control over the administrative commissions at issue in that case *based upon the fact that a majority of appointments had been made by the members of the General Assembly*. As a result, our decision in this case is fully consistent with the applicable standard of review.

Id. at 416 n.12, 809 S.E.2d at 112 n.12 (emphasis added).

In the same year as *Cooper I*, the General Assembly enacted a statute authorizing the North Carolina Senate to confirm the individuals the Governor nominates to serve in his Cabinet. Our Supreme Court in *Cooper Confirmation* ultimately held that the Governor retained enough control over the members of his Cabinet to ensure the laws be faithfully executed and senatorial confirmation did not violate separation of powers because:

> The Governor's power to nominate is significant, and the ultimate appointee will be a person that he alone has chosen, subject only to an up-or-down vote by the Senate. The Governor's supervisory and removal powers, moreover, ensure that the Governor retains ample post-appointment control over how his Cabinet members perform their duties.

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Cooper Confirmation, 371 N.C. at 801, 822 S.E.2d at 290. We reiterate, *Cooper Confirmation* explicitly stated that it "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." *Id.* at 806 n.5, 822 S.E.2d at 293 n.5 (cleaned up).

3. Core Constitutional Duties

The Governor is not just another Council of State member within the executive branch; the Governor is the *head* of the executive branch. The Governor and other Council of State members are *not* fungible as alleged by Legislative Defendants. When functions, powers, and duties assigned to the Governor are reassigned by the General Assembly, additional consideration is required to determine whether that reassignment prevents the Governor from performing a core constitutional duty and whether the General Assembly has retained control over executive branch functions. If it is determined that the General Assembly's reassignment of duties to executive commissions, like the State Board, encroached upon the Governor's constitutional duties, separation of powers may be violated. Therefore, we examine the Governor's argument that the General Assembly has encroached upon his core constitutional duties.

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a. Duties of the Governor as Chief Executive Officer of the State

"The Governor is our state's chief executive. He or she bears the ultimate responsibility of ensuring that our laws are properly enforced." *Id.* at 799, 822 S.E.2d at 289. Although the Governor is the head of the executive branch, our Supreme Court has stated the Governor does not unilaterally exercise the executive power nor is he unilaterally responsible for taking care the laws are faithfully executed. *Stein Commissions*, __ N.C. App. at __, 923 S.E.2d at 584; *Carrington*, 136 N.C. App. at 560, 525 S.E.2d at 235. Specifically, our Supreme Court has interpreted the take care clause to be a "nonexclusive duty conferred upon all ten Council of State members."

Stein Commissions, __ N.C. App. at __, 923 S.E.2d at 584; N.C. Const. art. III, § 5(4); *Cooper Confirmation*, 371 N.C. at 799-800, 822 S.E.2d at 289 (stating, "[b]ut the Governor is not alone in this task" of taking care the laws be faithfully executed because our "constitution establishes nine other offices in the executive branch.")

Article III, § 5 of our constitution sets forth eleven constitutional duties of the Governor: (1) Residence; (2) Information to General Assembly; (3) Budget; (4) Execution of Laws; (5) Commander in Chief; (6) Clemency; (7) Extra Sessions; (8) Appointments; (9) Information; (10) Administrative reorganization; and (11) Reconvened sessions. N.C. Const. art. III, § 5. While the issue in the case *sub judice* involves the duty to appoint members to the State Board and our constitution includes "Appointments" as a duty of the Governor, this duty to appoint extends only to "all officers whose appointments are not otherwise provided for," which our Supreme Court has interpreted to give "the Governor the exclusive authority to appoint *constitutional* officers whose appointments are not otherwise provided for *by the constitution*." N.C. Const. art. III, § 5(8); *McCrory*, 368 N.C. at 639, 781 S.E.2d at 252. Members of the State Board and County Boards are not constitutional officers, they are statutorily created officers of executive branch commissions. *McCrory*, 368 N.C. at 639-40, 781 S.E.2d at 252-53. Therefore, it is not a core constitutional duty of the Governor to appoint members to the State Board, leaving only the Governor's duty to "take care that the laws be faithfully executed" as a core constitutional duty that could be encroached upon.

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b. Duties of the Auditor

Our constitution establishes the position of the State Auditor within the executive branch and as a member of the Council of State; however, the only constitutional duty of the Auditor is the nonexclusive duty conferred upon all Council of State members to "take care that the laws be faithfully executed." *Stein Commissions*, __ N.C. App. at __, 923 S.E.2d at 584; N.C. Const. art. III, § 5(4); *Cooper Confirmation*, 371 N.C. at 799-800, 822 S.E.2d at 289 (stating, "[b]ut the Governor is not alone in this task" of taking care the laws be faithfully executed because our "constitution establishes nine other offices in the executive branch."). All other duties of the Auditor are those prescribed by the General Assembly. N.C. Const. art. III, § 7(2).

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Our general statutes provide that "[i]t is the policy of the General Assembly to provide for the auditing and investigation of State agencies by *the impartial, independent* State Auditor." N.C. Gen. Stat. § 147-64.6(a) (emphasis added). To maintain the impartial, independent, and objective nature of

> the audit function, the Auditor and his employees may not, unless otherwise expressly authorized by statute, serve in any capacity on an administrative board, commission, or agency of government of a political subdivision of the State or any other organization that, under the provisions of this act, they have the responsibility or authority to audit. Nor shall they have a material, direct or indirect financial, or other economic interest in the transactions of any State agency.

N.C. Gen. Stat. § 147-64.12 (a). Thus, the Auditor, along with the Governor, does not

have an explicit constitutional duty to appoint members to the State Board. However, the Auditor, as the one presently assigned the duty to make appointments to the State Board, now has the constitutional duty to continue to "take care that the laws be faithfully executed" by the board members he appoints. N.C. Const. art. III, § 5(4); N.C. Gen. Stat. § 147-64.6(c)(23).

D. Apolitical Nature of the State Board

While the State Board clearly performs executive functions, it is distinct from those other administrative boards and commissions that also perform primarily executive functions. The State Board should not, nor is it designed to, effectuate the policy preferences of any elected or appointed official. Elections are the backbone of democracy and should be administered without the influence of any particular policy preference. The State Board should and is designed to be an apolitical entity that does not require consideration of, or adherence to, the political preferences of *the Governor* to ensure that the laws pertaining to elections are faithfully executed. Any Council of State member can effectively perform the nonexclusive executive branch duty to "take care that the laws be faithfully executed" because policy preferences have no role in the administration of election laws. N.C. Const. art. III, § 5(4).

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Members of the State Board are required to take an Oath of Office and must adhere to strict guidelines prohibiting certain political involvement and activity; these prohibitions effectively require the State and County Boards to appear primarily apolitical during their term; specifically:

(f) No person shall be eligible to serve as a member of the State Board who:

(1) Holds any elective or appointive office under the government of the United States, the State of North Carolina, or any political subdivision thereof.

(2) Is a candidate for nomination or election to any office.

(3) Holds any office in a political party or organization.

(4) Is a campaign manager or treasurer of any candidate in a primary or election.

(5) Is currently an employee of the State, a community college, or a local school administrative unit.

(6) Within the 48 months prior to appointment, has held any of the following positions with an organization that has engaged in electioneering in those 48 months:

a. Director, officer, or governing board member.

b. Employee.

c. Lobbyist registered under Chapter 120C of the General Statutes.

d. Independent contractor.

e. Legal counsel of record.

(g) No person while serving on the State Board shall:

(1) Make a reportable contribution to a candidate for a public office over which the State Board would have jurisdiction or authority.

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> (2) Register as a lobbyist under Chapter 120C of the General Statutes.
>
> (3) Make written or oral statements intended for general distribution or dissemination to the public at large supporting or opposing the nomination or election of one or more clearly identified candidates for public office.
>
> (4) Make written or oral statements intended for general distribution or dissemination to the public at large supporting or opposing the passage of one or more clearly identified referendum or ballot issue proposals.
>
> (5) Solicit contributions for a candidate, political committee, or referendum committee.
>
> (6) Serve as a member of any other State board, as defined in G.S. 138A-3.

N.C. Gen. Stat. § 163-19(f), (g). Further, the five-member State Board may not consist of more than three members affiliated with the same political party and members are appointed from a list of nominees submitted by the "State party chair of each of the two political parties having the highest number of registered affiliates as reflected by the latest registration statistics published by the State Board." N.C. Gen. Stat. § 163-19(b).

Board members are not prohibited from: (1) making individual expressions of "opinion, support, or opposition for general public distribution"; (2) participating "in a political party convention as a delegate"; (3) "making a contribution to a candidate, political committee, or referendum committee"; or (4) "advising other governmental entities as to technical matters related to election administration or revision of

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electoral district boundaries." N.C. Gen. Stat. § 163-39. However, board members are *explicitly prohibited* from: (1) making "written or oral statements intended for general distribution or dissemination to the public at large supporting the nomination or election of one or more clearly identified candidates for public office"; (2) making "written or oral statements intended for general distribution or dissemination to the public at large supporting or opposing the passage of one or more clearly identified referendum proposals"; and (3) "[s]olicit[ing] contributions for a candidate, political committee, or referendum committee." *Id.*

These political activity limitations are necessary to ensure that "[a]ll elections shall be free." N.C. Const. art. I, § 10. Unlike other state executive boards and commissions, it is absolutely imperative that the State Board and County Boards operate free of political influence and interference, irrespective of those policy preferences of the Governor.

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The ultimate purpose of free elections is to give power to the people and "[u]nder our Constitution, 'power remains with the people and is exercised through the General Assembly, as the functioning arm of the electorate. An act of the people's elected representatives is thus an act of the people and is presumed valid *unless it conflicts with the Constitution*.'" *Holmes*, 384 N.C. at 435, 886 S.E.2d at 129 (quoting *Pope*, 354 N.C. at 546, 556 S.E.2d at 267). Elections allow the people to choose who will represent them and further allow for the peaceful replacement of those elected representatives. "These processes enable the sovereign power to be *exercised* by the

People's representatives in the General Assembly, but at all times the sovereign power *resides* with the people." *N.C. State Conf. of NCAAP*, 382 N.C. at 147, 876 S.E.2d at 527 (cleaned up). For elections to be free and fair, election administration must be structured apolitically and those individuals charged with the duty to conduct elections shall not be given the power to influence the people to vote for their preferred candidate. The role of an election official is to ensure that every eligible voter has an equal opportunity to vote and that every lawful vote is counted accurately.

E. Summary and Application to Present Case

In summary, prior to SB 382 the Governor: appointed all five members of the State Board; held the duty to fill vacancies or remove members who failed to attend meetings; appointed the chair of each County Board of Elections; and directed and supervised budgeting functions for the State Board. SB 382 transferred all of these assigned duties from the Governor to the Auditor. This reassignment of duties clearly leaves the Governor without a degree of control over the State Board or the ability to ensure board members align with his policy preferences. However, separation of powers violations can be nuanced, as is the separation of powers question here.

McCrory, *Cooper I*, and *Cooper Confirmation* are clear examples of the General Assembly encroaching on the executive branch's—and at the time, the Governor's—core powers and preventing the executive branch from "tak[ing] care that the laws be faithfully executed." N.C. Const. art. III, § 5(4). However, the Courts in those cases

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did not consider what the outcome would have been had the duties at issue been reassigned to another Council of State member instead of to the General Assembly itself, or if any of the restrictions placed on the Governor's appointments were controlled in some way by another Council of State member instead of the General Assembly.

Specifically, in the case of *Cooper I,* our Supreme Court held it was unconstitutional for the legislation to mandate that the Governor "appoint half of the commission members from a list of nominees consisting of individuals who are, in all likelihood, not supportive of, if not openly opposed to, his or her policy preferences while having limited supervisory control over the agency and circumscribed removal authority over commission members." *Cooper I*, 370 N.C. at 418, 809 S.E.2d at 114. Here, the challenged provisions of SB 382 do not place heightened restrictions on who can be appointed to the State Board such that the appointer is required to select individuals who could potentially prevent the ability to "take care that the laws be faithfully executed." N.C. Const. art. III, § 5(4). The challenged provisions take the same appointment parameters by which the Governor previously had been required to abide when making the appointments and replaced the Governor with the Auditor as the appointer. Therefore, the issue is whether the Auditor, i.e., another elected officer of the executive branch and member of the Council of State who has the nonexclusive duty to "take care that the laws be faithfully executed," can sufficiently perform this particular constitutional duty or whether the General Assembly, by

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reassigning this duty to the Auditor, has prevented the executive branch from performing its constitutional duty. *Stein Commissions*, __ N.C. App. at __, 923 S.E.2d at 584. For the reasons stated herein, we hold the challenged provisions of SB 382 do not violate the separation of powers.

In the case of the State Board, we cannot hold that the reassignment of duties from the Governor to the Auditor results in a plain and clear violation of the separation of powers. Whether the General Assembly *should* be allowed to reassign these duties from a public policy standpoint is not for this Court to decide. It is this Court's duty to "uphold the statute regardless of whether we agree with the General Assembly's public policy choices" if the Governor, as the challenging party, has failed to prove beyond a reasonable doubt that the challenged provisions are unconstitutional. *McKinney*, 387 N.C. at 44, 911 S.E.2d at 9 (quoting *Cmty. Success Initiative*, 384 N.C. at 212, 886 S.E.2d at 32). Stated differently, "[w]hen assessing a challenge to the constitutionality of legislation, this Court's duty is to determine whether the General Assembly has complied with the constitution. If constitutional requirements are met, the wisdom of the legislation is a question for the General Assembly." *Hart v. State*, 368 N.C. 122, 126, 774 S.E.2d 281, 284 (2015).

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We emphasize this opinion does not create a bright line rule for how the separation of powers clause applies to future potential reassignment of duties among Council of State members. Whether a reassignment of duties among Council of State members constitutes a violation of the separation of powers must be analyzed on a

case-by-case basis to consider the specific factual and legal circumstances presented. We further recognize that there are aspects of the election administration process about which elected legislators and policy makers may reasonably disagree from a policy standpoint, such as voter ID requirements, early voting periods and locations, and absentee voting rules, for example. It is important in this analysis to recognize these "policy-related decisions [are] committed to the General Assembly rather than to this Court," and the "General Assembly has the undoubted authority to prescribe the commission's functions, powers and duties and to determine the substance of the laws and policies that the commission is called upon to execute." *Cooper I*, 370 N.C. at 417-18, 809 S.E.2d at 113-14 (2018). It is the task of the State and County Boards to administer elections pursuant to the laws duly enacted by the General Assembly. While the General Assembly "in the exercise of its authority to delegate the making of interstitial policy decisions to administrative agencies" may give "decision making responsibilities to the executive branch by way of [the State Board]," this should not be taken to suggest that the State Board may make interstitial policy decisions "that conflict[] with or [are] not authorized by the General Assembly, subject to applicable constitutional limitations." *Id.* at 415 n.11, 809 S.E.2d at 112 n.11.

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Elections are the backbone of our democracy and their administration should be free, fair, and without the influence of the policy preferences of those tasked with administering them and appointing those who administer them. Additionally, as suggested in *Cooper I*, the State Board would not have the "authority to make any

policy decision that conflicts with or is not authorized by the General Assembly, subject to applicable constitutional limitations" regardless of its policy preferences. *Id.* Further, "the General Assembly has the undoubted authority to prescribe [an executive] commission's functions, powers, and duties and to determine the substance of the laws and policies that the commission is called upon to execute," and "the General Assembly has the authority to provide [an executive] commission with a reasonable degree of independence from short-term political interference and to foster the making of independent, non-partisan decisions." *Id.* at 417, 809 S.E.2d at 113. Accordingly, the General Assembly has not structured the State Board in such a manner that the executive branch, through the Auditor, cannot "take care that the laws be faithfully executed." N.C. Const. art. III, § 5(4).

We are not ignorant to the fact that our current Governor and Auditor are members of opposing political parties and may have opposing policy preferences. Further, we note that this policy decision by the General Assembly to reassign the duties at issue leaves open the possibility for future reassignment of these duties back to the Governor or to another Council of State member as the political makeup of the General Assembly changes. However, the State Board is not designed to be driven by the political preferences of its members or the preferences of the Council of State member assigned to make the appointments of board members. State Board members are explicitly prohibited from certain political activities; thus, for us to conclude that it is a violation of the separation of powers for the General Assembly to

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make this *specific reassignment* of duties would be to say that the State Board must operate under the political preferences of specifically the Governor. It is the Auditor's, not solely the Governor's, constitutional duty to "take care that the laws be faithfully executed," and it is within the General Assembly's constitutional authority to prescribe the duties of the Auditor and further "prescribe the functions, powers, and duties of the administrative departments and agencies of the State," which includes the State Board. N.C. Const. art. III, §§ 5(4), 7(2). Because the duties at issue within the challenged provisions of SB 382 are not constitutionally assigned to a particular Council of State member we will not declare that the policy preferences of the Governor hold greater weight than the policy preferences of the Auditor when it comes to any potential influence this individual may have over *this particular state board* tasked with administering the free elections our constitution and democracy demand.

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The Governor has not demonstrated beyond a reasonable doubt that the challenged provisions of SB 382 demonstrate a "plain and clear" separation of powers violation in that the General Assembly has "retained some control" over the executive branch's functions and has unreasonably disrupted a core power of the executive. *McCrory*, 368 N.C. at 639, 645, 781 S.E.2d at 252, 256. In other scenarios the General Assembly may be restrained by the Governor's explicit constitutional duty to "take care that the laws be faithfully executed" because of his position as Chief Executive

Officer and head of the Council of State; but this has not been proven in the case *sub judice*. N.C. Const. art. III, § 5(4), (10).

The duty to "take care" is a duty reserved for the executive branch. The General Assembly may have stripped the Governor entirely of control over the State Board, but the General Assembly reassigned the duties at issue to another Council of State member in a manner that has not exerted control over, or prevented, the executive branch from performing its core constitutional duties. Thus, the General Assembly is not effectively controlling how the functions of the executive branch are carried out and a separation of powers violation has not occurred. *See Stein Commissions*, __ N.C. App. at __, 923 S.E.2d at 584-85.

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III. Conclusion

For the foregoing reasons, we hold the Governor's complaint raises a justiciable question. We affirm the portion of the three-judge panel's order determining the Governor's claims are ripe for judicial determination. We further hold the General Assembly did not violate the separation of powers by enacting Sections 3A.3.(b), (c), (d), (f), (g), and (h) of SB 382. Therefore, we reverse the remainder of the three-judge panel's order because it erred by concluding the Governor has proven beyond a reasonable doubt that the challenged portions of SB 382 are unconstitutional. Because the Governor has not proven the challenged portions unconstitutional beyond a reasonable doubt, the challenged portions of SB 382 are presumed to be constitutional. Therefore, Sections 3A.3.(b), (c), (d), (f), (g), and (h) of SB 382 retain

their presumption of constitutionality. We reverse the portion of the three-judge panel's order concluding otherwise.

AFFIRMED IN PART AND REVERSED IN PART.

Judge ZACHARY concurs.

Judge ARROWOOD dissenting by separate opinion.

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ARROWOOD, Judge, dissenting.

"The executive power of the State shall be vested in the Governor." N.C. Const. art. III, § 1. Article III, Section 5 is titled "Duties of Governor." Section 5(4) provides that "[t]he Governor shall take care that the laws be faithfully executed." Section 5(10) states that "the Governor may make such changes in the allocation of offices and agencies and in the allocation of those functions, powers, and duties as he considers necessary for efficient administration." Section 7 states that the duties of other elected officers in the executive branch, including the Auditor, "shall be prescribed by law." By the plain text of our Constitution, only the Governor is charged with taking care that the law be faithfully executed.

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I agree with the majority that this case presents a justiciable question of law and with much of the majority's framing of the questions presented in this appeal. I further commend the majority for acknowledging and emphasizing the importance and constitutional underpinnings of ensuring that our elections remain free and fairly administered. However, I respectfully dissent from the majority's conclusion that the General Assembly has not violated the separation of powers. I also take exception to this Court's decision to issue writ of supersedeas to effectively reverse the lower court during the pendency of this appeal, with no briefing or arguments and by order that includes no reasoning, rather than maintain the status quo.

I. Article III and Core Constitutional Functions

The Legislative Defendants assert that pursuant to Article III, Section 7(2) the

General Assembly may freely reallocate various functions, powers, and duties among the members of the Council of State; that as long as executive functions remain somewhere within the executive branch, any such reallocations are permissible under the Constitution.

I totally disagree. Article III Sections 1 and 5 create a requirement that the Governor be the primary executive charged with taking care that the laws be faithfully executed; our Supreme Court has recognized that the Governor must have "enough control" over agencies that "are primarily administrative or executive in character[.]" *State ex. rel. McCrory v. Berger*, 368 N.C. 633, 645–46 (2016); *see also Cooper v. Berger* (*Cooper I*), 370 N.C. 392, 414 (2018).[5] "When we assess a separation of powers challenge that implicates the Governor's constitutional authority, we must determine whether the actions of a coordinate branch 'unreasonably disrupt a core power of the executive.' " *McCrory*, 368 N.C. at 645 (quoting *Bacon v. Lee*, 353 N.C. 696, 717 (2001)). The State Board and County Boards, with "responsibility for the enforcement of laws governing elections, campaign finance, lobbying, and ethics, clearly perform[ ] primarily executive" functions. *Cooper I*, 370 N.C. at 415. Each separation of powers challenge must be resolved by "carefully examining its specific factual and legal context." *McCrory*, 368 N.C. at 646–47.

Prior to SB 382, overseeing the State Board and County Boards was a part of

[5] Although the majority finds these cases distinguishable and not directly controlling, I disagree and believe we are required to consider whether the Governor has sufficient control.

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the Governor's duties for over 100 years, and relates to a major purpose of the Governor's constitutional duties: enforcement of laws governing elections, campaign finance, and beyond. The Governor exerted control over the Boards primarily by appointment power.

The Auditor's duties, by contrast, have historically involved "the auditing and investigation of State agencies" and ensuring state agencies are complying with the laws, rather than directly overseeing a separate agency or directly enforcing the laws. N.C.G.S. § 147-64.6(a) (2025). The Auditor did not have any appointment powers prior to being assigned the Board.

Considering this context, I would conclude the enforcement of election laws is a core function and power of the Governor, who accordingly requires some degree of control over the State Board and County Boards as part of his constitutional duties. Instead, the General Assembly has removed the Boards entirely from the Governor's oversight and control, which in turn prevents the Governor from carrying out his core constitutional duties.

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Our Supreme Court has previously recognized that "independent executive offices . . . with their differing functions and duties under the constitution create a clear potential for conflict[,]" calling us to consider whether an executive officer's duties "as prescribed by statutory and common law" are "in derogation of or inconsistent with the executive power vested by the constitution in the Governor." *Martin v. Thornburg*, 320 N.C. 533, 546 (1987). I believe SB 382 creates such a

conflict by prescribing duties to the Auditor in derogation of the executive power vested in the Governor, and thereby impermissibly infringes on the separations of power required by the Constitution.

II. Writ of Supersedeas

Our Supreme Court has already addressed this Court's decision to issue writ and staying the lower court's order; however, I take the opportunity to discuss my concerns with that decision and for how similar applications plainly lead to unacceptable results.

" 'Supersedeas' is a writ issuing from an appellate court to preserve the status quo pending the exercise of the appellate court's jurisdiction, is issued only to hold the matter in abeyance pending review, and may be issued only by the court in which an appeal is pending." *City of New Bern v. Walker*, 255 N.C. 355, 356 (1961) (citation omitted).

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Allowing a law overturned by a lower court to take effect does not preserve the status quo. As Justice Dietz recognized, "[t]he effect of the writ was to permit a law that had not yet taken effect to do so, despite a trial court judgment concluding that the law was unconstitutional." *Stein v. Berger*, 387 N.C. 575, 583–84 (2025) (Dietz, J., concurring). The "status quo" preserved by this Court acts as though the lower court does not exist and transforms the case into a consideration of whether the law should be overturned *after* it has already taken effect.

I do not believe it was proper to issue such an extraordinary writ in a case of this importance without providing any reasoning, analysis, or other explanation, and without the benefit of any argument or briefing on the merits. I view this as a significant deviation from both the common definition of status quo and in how this Court addresses writ of supersedeas and other extraordinary writs. I am concerned that continued application in this manner would see other lower courts ignored while appeals are effectively decided during their pendency, or the normalization of deciding extraordinary writs with no reasoning. This Court should have left the trial court's judgment undisturbed to preserve the status quo, rather than effectively reversing the trial court during the pendency of the appeal which rather than maintaining the status quo had the polar opposite effect.

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While I believe that the trial court's order should be affirmed and the power to appoint the State Board and County Boards returned to its rightful place with the Governor, I would not suggest that the Board be returned to the Governor in this election cycle in light of the close proximity to the election and the disruption that would be caused by reallocating the Board to the Governor at this stage. *See, e.g.*, *Purcell v. Gonzalez*, 549 U.S. 1, 5–6 (2006) ("Given the imminence of the election and the inadequate time to resolve the factual disputes, our action today shall of necessity allow the election to proceed . . . ."); *Pender Cnty. v. Bartlett*, 361 N.C. 491, 510 (2007) ("[T]o minimize disruption to the ongoing election cycle, the remedy . . . shall be stayed until after the . . . election."), *aff'd sub nom. Bartlett v. Strickland*, 556 U.S. 1

(2009); *Griffin v. N.C. Bd. of Elections*, 387 N.C. 386, 392–94 (2025) (Mem.) (Dietz, J., dissenting) (discussing importance of *Purcell* principle and settling election laws well in advance of an election).

III. Apolitical Nature of the State Board

I agree with the majority that it is imperative that the Boards operate free of political influence and interference. However, I am unpersuaded that the "apolitical" design of the Boards is a meaningful or deciding factor that renders this legislation constitutional where a similar re-assignment would otherwise not be. Despite its design as a bipartisan entity, actions taken by the newly constituted State Board, the Auditor and proposed changes to elections passed by the General Assembly suggest a potential purpose for the change was to interject political interference into the manner in which elections are conducted, rather than to execute the election laws free from political influence and interference.

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It is true that the Board members are prohibited from engaging in political advocacy and fundraising among other things, but there are a number of exempt employee positions for the Board, which the Executive Director Sam Hayes has described as allowing him to quickly fill out senior leadership positions with less restriction. Recent legislative efforts have sought to increase the number of exempt employee positions. Additionally, the State Board has taken several actions intended to be applied to the upcoming election, including elimination of Sunday voting during the early-voting period in certain jurisdictions, elimination of polling places on

certain college campuses, and reducing the cure period for absentee ballots while also making it easier to reject an absentee ballot with the votes of members of only one party's members as simple majority.

These actions all appear to be designed to make it more difficult for citizens, who have historically voted in favor of candidates not favored by the majority of the members or the Legislature or the Auditor, to vote. These efforts follow the Auditor's appointment of the current Board of Elections which in one of its first actions replaced the Executive Director of the Board, a nineteen-year career employee of Board, with the former General Counsel to the current Speaker of the House. The Auditor additionally selected a former Executive Director of the North Carolina Republican Party as the Elections Liaison of the Government Affairs Division, whose duties included coordinating with county election board members throughout the State on early voting plans.

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None of these actions appear designed to promote boards of elections free from political influence or interference. Thus, I am not convinced that we should afford the reallocation of the State Board and County Boards any greater deference on the basis of a bipartisan design than other boards or commissions that perform primarily executive functions.

IV. Conclusion

Our Constitution charges the Governor with the duty to take care that the laws be faithfully executed. By entirely removing from the Governor's control the

administration and appointment power of the State Board and County Boards, SB 382 prevents the exercise of powers expressly reserved to the Governor by the Constitution. *See Harper v. Hall*, 384 N.C. 292, 322 (2023).

I acknowledge the General Assembly has the authority under Article III, Section 5(10) to prescribe the functions, powers, and duties of the administrative departments. Here, however, the duties the General Assembly prescribed to the Auditor are inconsistent with the executive power vested in the Governor. Accordingly, the trial court was correct to conclude SB 382 is unconstitutional and violates the separation of powers.

The majority opinion at times frames this case as a question of policy preferences between the Governor and the Auditor. In my view, the more pertinent prism through which to view this case is the constitutional duties that are expressly prescribed, and the extent to which they are limited or prevented from being carried out. It is not a matter of giving precedence to the Governor's policy preferences over the Auditor or the General Assembly; it is a matter of recognizing the duties reserved by the Constitution. I respectfully dissent.

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