

No. COAP25-298

NO. _____

TENTH DISTRICT

NORTH CAROLINA COURT OF APPEALS

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

Plaintiff-Appellee,

v.

PHILIP E. BERGER, in his official
capacity as PRESIDENT PRO TEMPORE
OF THE NORTH CAROLINA SENATE;
DESTIN C. HALL, in his official capacity
as SPEAKER OF THE NORTH
CAROLINA HOUSE OF
REPRESENTATIVES; and THE STATE
OF NORTH CAROLINA,

Defendants-Appellants.

From Wake County
Case No. 23-CV-029308-910

**PETITION FOR WRIT OF SUPERSEDEAS
AND
MOTION FOR TEMPORARY STAY OR EXPEDITED CONSIDERATION**

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**PETITION FOR WRIT OF SUPERSEDEAS
AND
MOTION FOR TEMPORARY STAY OR EXPEDITED CONSIDERATION**

TO THE HONORABLE NORTH CAROLINA COURT OF APPEALS:

Defendants-Appellants Philip E. Berger, in his official capacity as President
Pro Tempore of the North Carolina Senate and Destin C. Hall, in his official capacity
as Speaker of the North Carolina House of Representatives (together, the “Legislative
Defendants”) petition the Court under Rules 8 and 23 of the Rules of Appellate

Procedure to issue a writ of *supersedeas* staying the 23 April 2025 Order by the three-judge panel assigned in this case (“Order”). That Order granted the Governor’s motion for summary judgment and wrongfully enjoined provisions of Session Law 2024-57, also known as “Senate Bill 382,” that administratively transfer the Board of Elections to the Department of the State Auditor and charge the Auditor with responsibility for appointing the Board’s members. The Board still maintains its independence.

Although Senate Bill 382 allocates all appointments to a constitutionally elected officer within the *executive branch*, the majority below inexplicably held the legislation violates the “separation of powers” and enjoined it just one week before May 1st, when the Board’s current terms were set to expire and the Auditor was to appoint their replacements. In doing so, the panel blocked the People from exercising any control over the Board’s structure and composition at a time when its function and accountability are critical, instead insisting that such power be consolidated in the Governor alone. This creates a matter of significant urgency and profound, if not paramount, public interest: The People, acting through their popular elected representatives in the General Assembly, have chosen to limit the current Board of Elections’ terms to May 1st. Every day the panel’s injunction extends past that date thwarts the People’s will and the laws they have enacted to Govern its structure.

Given the exigencies of this case, Legislative Defendants ask the Court to grant a writ of a *supersedeas* to stay the trial court’s order and permit the law—which of course is presumptively valid—to remain in effect during the pendency of this appeal. Legislative Defendants likewise move for a temporary stay pending the Court’s

decision on this Petition or, alternatively, ask that the Court require responses to this Petition be submitted on an expedited timeline, for the Court to address this Petition before it effectively prevents implementation of the duly enacted statutes governing the Board's structure.

INTRODUCTION

The panel's decision below represents a radical break from the multi-member executive branch that has been a feature of this State's government since its founding, and replaces it with a regime that requires all power vest in the Governor "alone."

Our Constitution grants the General Assembly power to make such decisions. Unlike its federal counterpart, which vests all executive power in a president, North Carolina's Constitution establishes a *plural executive*. Thus, in addition to the Governor, our Constitution provides that the executive branch shall include nine "other elective officers" who serve as members of the Council of State, *see* N.C. Const. art. III, §§ 2 and 7(1), and then grants the General Assembly power to assign their duties, stating "their respective duties shall be prescribed by law." N.C. Const. art. III, § 7(2). This reflects a deliberate decision by our founders, who intended it as a check against the consolidation of power in one man.

The majority below, however, helped the Governor effectively write these provisions out the Constitution. Reading just two clauses in isolation, the majority

accepted his argument that the Vesting Clause¹ and Take Care Clause² require that all executive power must be “exclusively assigned to the Governor” and that the Auditor and the “other elective officers” established by the Constitution serve merely an “advisory” role. (Order at 15). In doing so, the majority erroneously concluded that the Supreme Court’s decisions in *State v. Berger*, 368 N.C. 633, 781 S.E.2d 248 (2016) (“*McCrorry*”), *Cooper v. Berger*, 370 N.C. 392, 809 S.E.2d 98 (2018) (“*Cooper I*”), and *Cooper v. Berger*, 371 N.C. 799, 822 S.E.2d 286 (2018) (“*Cooper Confirmation*”), stand for the proposition that “the Governor and no one else” must have control over statutory boards and commissions created by the General Assembly, including the State and county boards of elections. (Order at 15).

But, as the dissent rightly recognized, those decisions **do not** apply here. Indeed, the Supreme Court stressed in each decision that “[a]s in *McCrorry*, ‘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 *McCrorry*, 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).

In short, the panel below ignored the text of the Constitution and relied on precedent the Supreme Court itself has said is inapplicable to block legislation enacted to eliminate the Governor’s stranglehold over the Board of Elections. That is

¹ N.C. Const. art. III, § 1 (“The executive power of the State shall be vested in the Governor.”)

² N.C. Const. art. III, § 5(4) (“The Governor shall take care that the laws be faithfully executed.”)

an abuse of judicial review. There is a reason our Supreme Court has repeatedly stressed that laws must be presumed valid, and that courts may only strike a law down if the plaintiff can show *beyond a reasonable doubt* it is prohibited by another, express provision of the Constitution. To do otherwise would permit judges to usurp the People’s power to decide how statutory duties should be allocated within the executive branch. *See McKinney v. Goins*, 387 N.C. 35, 43, (2025) (Newby, C.J.) (the presumption of constitutionality serves as “a critical safeguard that preserves the delicate balance between this Court’s role as the interpreter of our [c]onstitution and the legislature’s role as the voice through which the people exercise their ultimate power.” (quotation omitted) (brackets in original)).

This Court should accordingly grant *supersedeas* to stay the trial court’s order and allow the provisions of Senate Bill 382 to remain in effect until the Court can address the merits of the panel’s erroneous decision below.

PROCEDURAL AND FACTUAL HISTORY

This action was commenced on 17 October 2023, when then-Governor Cooper filed a complaint seeking a declaratory judgment and injunction declaring Parts II, IV, and VIII of Senate Bill 749, 2023 N.C. Sess. L. 139, unconstitutional on their face and thus void and of no effect. On 8 November 2023, this matter was assigned to the three-judge panel below for a determination of the facial validity of Parts II, IV, and VIII of Senate Bill 749. On 9 February 2024, Governor Cooper moved for summary judgment, and Legislative Defendants moved to dismiss, or in the alternative, for judgment on the pleadings.

On 11 March 2024, a three-judge panel consisting of the Superior Court Judges Edwin Wilson, Lori Hamilton, and Andrew Womble granted the Governor’s motion for summary judgment and denied Legislative Defendants’ motions. Legislative Defendants appealed the Panel’s decision on 12 March 2024.

On 11 December 2024, the General Assembly passed, over Governor Cooper’s veto, Senate Bill 382, which repealed many of the challenged portions of Senate Bill 749 and revised the oversight and operation of the State and county Boards of Elections.

On 20 December 2024, Legislative Defendants moved to dismiss the appeal as moot in light of the passage of Senate Bill 382 and repeal of Senate Bill 749. On 23 December 2024, Governor Cooper moved for leave to file a Supplemental Complaint challenging Sections 3A.3.(b), (c), (d), (f), (g), and (h) of Senate Bill 382 as unconstitutional and seeking a preliminary injunction, permanent injunction, and declaration of same (the “Supplemental Complaint”).

On 28 January 2025, Governor Cooper and Legislative Defendants filed a Joint Motion to Vacate the Judgment, Supplement the Complaint, and Establish a Briefing Schedule, which was granted. The same day the joint motion was filed, Governor Cooper dismissed his claims against the State of North Carolina without prejudice.

Senate Bill 382 transfers the Board of Elections to the Department of the State Auditor. *See* N.C. Sess. L. 2024-57, §3A.2(a). It also provides that terms of the existing five-member board will expire on 30 April 2025, after which time the Board’s members will be appointed by the Auditor. *See* N.C. Sess. L. 2024-57, §§ 3A.3(c)

(amending N.C. Gen. Stat. § 163-19) and 3A.3(g). Senate Bill 382 limits the State Auditor's discretion in making these appointments. *Id.* § 3A.3(b) (adding subsection (23) to N.C. Gen. Stat. § 147-64.6(c)). Those appointments must meet the following criteria: (1) no more than three members of the Board of Elections may be members of the same political party; (2) the appointments must come 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; and (3) no person may serve more than two full consecutive four-year terms.

Senate Bill 382 also makes corresponding changes to county boards of elections. Under the bill, the Board of Elections will appoint four members of each county board, two from each major political party. The State Auditor will then appoint the fifth member of the county board and the chair. *Id.* § 3A.3.(f), (h).

The Governor's supplemental complaint sought a declaration that Sections 3A.3(b), (c), (d), (f), (g), and (h) of Senate Bill 382 violate the Separation of Powers as well as a permanent injunction preventing their implementation. (Supp. Compl., ¶¶ 94, 96.c). Because the Supplemental Complaint presented only facial challenges, the parties consented to the assignment of the three-judge panel that decided the challenge to Senate Bill 749. This agreement was later confirmed by order entered 11 February 2025 by Senior Resident Superior Court Judge Paul Ridgeway.

On 6 March 2025, State Auditor Dave Boliek moved to permissively intervene in this action. The Auditor's motion was granted by consent on 11 March 2025. On 14 March 2025, the Governor moved for a temporary restraining order and preliminary

injunction.

On 14 April 2025, the three-judge panel heard the Governor’s and Legislative Defendants’ cross-motions for summary judgment. On 23 April 2025, the panel issued its decision. By a 2-1 vote, and over a vigorous dissent, the majority granted the Governor’s motion for summary judgment, denied the Legislative Defendants’ motion, and permanently enjoined the challenged portions of Senate Bill 382.

Despite the Supreme Court’s warnings that *McCrorry*, *Cooper I*, and *Cooper Confirmation*, should not be applied to such a case, the majority nonetheless concluded that the fact “Senate Bill 382 transfers the Governor’s authority to the Auditor, rather than the General Assembly (as was the case under Senate Bill 749), *makes no difference.*” (Order at p. 11 (emphasis added)). It thus, concluded that “*McCrorry*, *Cooper I*, and *Cooper Confirmation* control the panel’s decision” and that those cases somehow hold that “[i]t is the Governor, and no one else, who must have sufficient control over executive boards, including the State Board of Elections and county boards.” (Order at p. 15).

Judge Womble dissented. While he agreed the case is justiciable, (Order at p. 19), he strenuously objected to the majority’s conclusion that Senate Bill 382 implicates the Separation of Powers because Senate Bill 382 “keep[s] the appointment power within the Executive Branch, which is still subject to the supervision and direction of the Governor.” (Order at p. 20).

On 24 April 2025, Legislative Defendants filed a motion asking the trial court to stay its summary judgment order pending appeal under N.C. Gen. Stat. §§ 1-294,

and N.C. R. Civ. Proc. 62. On 25 April 2025, the panel rendered a decision denying the motion to stay but is currently in the process of entering a formal order. Legislative Defendants now file this petition.

REASONS WHY THE WRIT SHOULD ISSUE

The purpose of a temporary stay and writ of *supersedeas* is to preserve the *status quo* while a case is on appeal. See *Craver v. Craver*, 298 N.C. 231, 237-38, 258 S.E.2d 357, 362 (1979) (explaining that the purpose of the writ of *supersedeas* “is to preserve the *status quo* pending the exercise of appellate jurisdiction”) (citing *City of New Bern v. Walker*, 255 N.C. 355, 121 S.E.2d 544 (1961) (*per curiam*)). In other words, *supersedeas* holds a “matter in abeyance pending [appellate] review.” *New Bern*, 255 N.C. at 545-46. The Rules of Appellate Procedure confer broad discretion on the appellate courts to protect the rights of litigants while a case is on appeal. The rules thus ask only whether “the writ should issue *in justice* to the applicant.” N.C. R. App. P. 23(c) (emphasis added).

Here, the need for a stay is readily apparent. The Board of Elections is a creation of statute. No provision of the Constitution grants the Governor exclusive power to appoint statutory offices created by the General Assembly. Indeed, as the Court explained in *McCrorry*, the People have repeatedly rejected amendments that would have given the Governor the exclusive power to do so, and thus the General Assembly retains the power to choose who appoints the members of statutory boards and commissions, subject only to the requirements of the Separation of Powers. *McCrorry*, 368 N.C. at 641-45, 648 781 S.E.2d at 253-55, 258.

But this case is not like *McCrorry* or *Cooper I*. Those cases involved the allocation of power between executive and legislative branches. Senate Bill 382, by contrast, allocates all the relevant appointments to a constitutional officer *within the executive branch*. The case therefore does not even implicate the Separation of Powers, which deals with the allocation of power between the branches, not intramural disputes about the allocation of power within a single branch. See 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)).

The Governor’s only retort is that Senate Bill 382 violates the Vesting Clause and Take Care Clause. But, contrary to the Governor’s arguments, the Vesting Clause does not require that “all” power vest solely in the Governor “alone.” Adopting that reading would require the Court to ignore the later provisions in Article III, Section 7(1), which establishes the Auditor and “other elective officers” as members of the executive branch, and Section 7(2), which expressly states that they shall “have those duties prescribed by law.” N.C. Const. art. III, §§ 7(1), 7(2). Similarly, the Take Care Clause does not create an “exclusive” power in the Governor that prevents the General Assembly from assigning duties to other constitutional officers. Instead, the Take Care Clause only does what it says—it requires the Governor to use those duties that are assigned to him to effectuate the laws enacted by the General Assembly. Nothing about that charge nullifies the General Assembly’s express power to assign

duties to the other members of the executive branch in Article III, Section 7(2).

In short, Senate Bill 382 should never have been enjoined. There has been no transfer of power away from the executive branch. Nor has the Governor been prevented from carrying out any duty assigned to him. Instead, the General Assembly has merely exercised its authority to assign duties to the Auditor—something it expressly empowered to do under Article III, Section 7(2). There is no precedent (much less “binding precedent” as the panel indicated) that holds it is unconstitutional to do so. Nor could there be. If the Governor really had to hold all executive power, there would be no duties left to assign the other members of the executive branch. The panel’s decision would thus upend the plural executive model, which is one of the key, distinguishing features of our constitutional system.

With no cognizable restraint, the People should not be denied the power to structure the State and county boards of elections as they see fit.

I. THE CIRCUMSTANCES WARRANT A STAY.

A stay is necessary to preserve the *status quo* and the rights of the parties pending appeal. Senate Bill 382 reflects a valid exercise of the People’s authority to assign duties to members of the Council of State and to ensure accountability of the (unelected) individuals appointed to the Board of Elections.

Senate Bill 382 became effective on 11 December 2024, the date it was enacted into law. It thus reflects the current state of the law and must be treated as presumptively valid unless or until the Governor can show it is constitutional beyond a reasonable doubt. *See McKinney*, 387 N.C. at 43; *State v. Strudwick*, 379 N.C. 94,

105, 864 S.E.2d 231, 240 (2021) (“[W]e presume that laws enacted by the General Assembly are constitutional.”); *Harper v. Hall*, 384 N.C. 292, 298, 886 S.E.2d 393, 399 (2023) (the judiciary cannot declare an act invalid unless the plaintiff can show that an “express provision” of the Constitution “explicitly” prohibits that act, “beyond a reasonable doubt.”)). That presumption reflects fundamental principle that “[a]ll power which is not expressly limited by the people in our State Constitution remains with the people, and an act of the people through their representatives in the legislature is valid unless prohibited by that Constitution.” *State ex rel. Martin v. Preston*, 325 N.C. 438, 448, 385 S.E.2d 473 (1989). This is because “a restriction on the General Assembly is in fact a restriction on the people.” *McCrorry*, 368 N.C. 633, 651, 781 S.E.2d 248, 259 (2016) (Newby, J., concurring in part and dissenting in part).

The need for that presumption is all the greater here. Senate Bill 382 reflects the exercise of a power the Constitution expressly reserves for the General Assembly as a *check* against the Governor. One must infer that when the drafters of our constitution chose to maintain a plural executive, provided for multiple elected officers within the executive branch, and expressly empowered the General Assembly duties to those officers, that they anticipated the General Assembly would, in fact, assign duties to executive officers other than the Governor.

The People should not have to wait for a duly enacted law restructuring the Board of Elections to go into effect. As our Supreme 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).

The panel’s erroneous restraint of the People’s ability to hold the Board of Elections accountable, through a presumptively valid law enacted pursuant to express constitutional authority, should not continue during the pendency of this appeal. To hold otherwise would effectively place the State Board of Elections beyond democratic control until this litigation concludes.

II. LEGISLATIVE DEFENDANTS ARE LIKELY TO SUCCEED ON THE MERITS OF THEIR APPEAL.

A writ of *supersedeas* should also issue because Legislative Defendants are likely to succeed on the merits. The majority opinion suffers from three fundamental flaws: (1) it ignores the plain text of our Constitution; (2) it treats this lawsuit as a separation of powers case; and (3) it applies a test derived from cases that explicitly state they do not apply to the appointment structures at issue here. Each error alone would require reversal. But together they leave no doubt. The majority’s opinion cannot stand.

A. The Majority Opinion Ignores the Plain Text of Our Constitution.

To begin, the majority opinion ignores the plain text of our Constitution.

It is axiomatic that Courts must interpret our Constitution based on its plain language. *Harper*, 384 N.C. at 297, 886 S.E.2d at 399. This is because it contains “no hidden meanings or opaque understandings—the kind that can only be found by the most astute justice or academic.” *Id.* What is more, the Court must read relevant

provisions of the Constitution *in pari materia* and in a manner that gives effect to each provision. *Stephenson*, 355 N.C. at 378, 562 S.E.2d at 394.

The majority decision, however, ignores these principles. It erroneously concludes that the Vesting Clause, which was first added more than 150 years ago, contained a hidden meaning and was thus meant to secretly establish a *unitary* executive. It then reads that clause in a manner that ignores other provisions, which were added at the same time, that expressly allow the General Assembly to assign executive duties to other members of the Council of State.

The panel’s decision marks an astounding break from precedent and history. While the federal Constitution creates a so-called “unitary executive,” under which all executive power vests in the President, *see, e.g., Touby v. United States*, 500 U.S. 160, 168 (1991) (“The Constitution vests all executive power in the President”), North Carolina’s Constitution is significantly different. Indeed, North Carolina has always had a *plural* executive in the form of a multi-member executive branch. True, the Governor may serve as our “chief executive.” *Cooper Confirmation*, 371 N.C. at 799-800, 822 S.E.2d at 289-90. And, in that role, he must use those powers granted to him to “take care that the laws be faithfully executed.” N.C. Const. art. III, § 5(4). **“But the Governor is not alone in this task.”** *Cooper Confirmation*, 371 N.C. at 799–800, 822 S.E.2d at 289–90 (emphasis added) (tracing the Council of State to the founding of the State). Instead, our Constitution establishes nine other statewide elected officials in the executive branch. *Id.*

With that in mind, our Constitution *expressly* reserves for the People—acting

through their representatives in the General Assembly—the power to assign the duties of these “other elective officers.” Article III, Section 7(2) grants the General Assembly this authority by providing that these officers’ “respective duties shall be prescribed by law.” N.C. Const. art. III, § 7(2). Simply put, laws that assign duties to the “other elective officers” within our plural executive system are nothing new. In fact, they are commonplace.³ And they are exactly what the drafters of our Constitution intended when they provided that these officers’ “respective duties shall be prescribed by law.” N.C. Const. art. III, § 7(2).

Yet the majority opinion ignores these later provisions. Instead, it reads the Vesting and Take Care as if they were the only clauses regarding the allocation of executive power in Article III. Put another way, the majority opinion effectively reads Article III, Section 7(2), as well as the provisions establishing the Auditor and other elective officers as part of the executive branch, out of the Constitution. What other than executive power can the General Assembly assign executive branch officials?⁴

³ For example, the General Assembly has assigned the Commissioner of Insurance the duty to see “that all laws of this State that the Commissioner is responsible for administering . . . are faithfully executed.” N.C. Gen. Stat. § 58-2-40 (1). Take the Commissioner of Labor: he is charged with the duty “to secure the enforcement of all laws relating to the inspection of factories, mercantile establishments, public eating places, and commercial institution in the State.” N.C. Gen. Stat. § 95-4 (4) (further providing that the Commissioner of Labor shall have the power to “appoint inspectors and other assistants”). The Secretary of State is similarly charged with authority to issue charters, certificates of incorporation, and other corporate documents, “as may be required by the corporation laws of the State,” as well as to “administer the Securities Laws of the State.” N.C. Gen. Stat. § 147-36(7) and (12).

⁴ The Governor contends the Take Care Clause grants a power “exclusive” to him and requires that he be able to ensure all laws are implemented in a manner that reflects his “views and priorities.” Those assertions, however, are wrong. While the Constitution no doubt assigns some duties exclusively to the Governor, such as

A Constitution cannot violate itself. *Stephenson v. Bartlett*, 355 N.C. 354, 378, 562 S.E.2d 377, 394 (2002) (citing *Leandro v. State*, 346 N.C. 336, 352, 488 S.E.2d 249, 258 (1997)). Our Constitution explicitly gives the General Assembly the power to assign the Auditor, and other executive officers, executive duties. The majority opinion held that the General Assembly violated our Constitution by exercising this constitutional authority. That cannot be.

B. The Majority Opinion Mistakenly Treated this Case as a Separation of Powers Case.

The majority also erred by treating this as a Separation of Powers Case when it is most certainly 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

naming him 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.

Moreover, as a matter of plain text, Take Care Clause serves as a limit, not a power. It obligates the Governor to exercise those powers delegated to him in a manner consistent with the laws enacted by the General Assembly. To the extent *McCrorry* and *Cooper I* suggest otherwise, they hold only 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). The Governor, however, has no 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 regarding questions the General Assembly has not delegated to him).

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. Furrage*, 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 *intrabran*ch 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 *McCrorry*, the Court explained a violation of the separation of powers only occurs when legislation “unreasonably disrupts a *core power of the executive.*” *McCrorry*, 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 panel below 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 panel 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 of the relevant appointments to an elected, constitutional officer in the executive branch. That cannot violate the separation of powers.

C. The Majority Opinion Relies on Cases that Explicitly Do Not Apply.

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

Indeed, the Court stressed each time that, “[a]s in *McCrorry*, ‘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 *McCrorry*, 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 *McCrorry* 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 majority, however, sped right past the Supreme Court’s warnings. It thus concluded, without any hesitation, that “*McCrorry*, *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 panel’s refusal to recognize the limits the Supreme Court has imposed on its own opinions constitutes clear and unmistakable error.

III. THE INTERESTS OF JUSTICE REQUIRE A STAY.

As explained above, the interests of justice require the issuance of *supersedeas* to stay the trial court’s opinion. That opinion upends a key feature of our State’s Constitutional structure—the establishment of a plural executive—in a manner that cannot be squared with Constitutional text, history, or precedent. In doing so, it removes control over the Board of Elections from democratic control for the foreseeable future by allowing the Governor to control the administration of elections, effectively unchecked by the political process. That is not what our Constitution intends.

IV. THE COURT SHOULD CONSIDER THIS PETITION ON AN EXPEDITED BASIS.

Given the exigencies of this case, if the Court denies Legislative Defendants’ motion for a temporary stay, Legislative Defendants ask that, if the Court does not issue a temporary stay while it considers this Petition, that it alternatively shorten the time for responses and consider the Petition on an expedited basis so that it may issue appropriate relief without delaying the May 1st expiration of the current board’s terms set under the current statute.

MOTION TO STAY

Pursuant to Rule 23(e) of the North Carolina Rules of Appellate Procedure, Legislative Defendants respectfully move this Court to issue a temporary stay of the trial court’s 23 April 2025 Order. Legislative Defendants further incorporate and rely on the arguments presented in the foregoing Petition for Writ of Supersedeas in support of this Motion for Temporary Stay.

CONCLUSION

For each of the foregoing reasons, pray that the Court (i) grant a temporary stay of the trial court's Order while it considers this petition, or alternatively shorten the time for responses and consider this Petition on an expedited basis; and (ii) issue its writ of supersedeas to stay the trial court's Order during the pendency of this Appeal.

This the 25th day of April, 2025.

WOMBLE BOND DICKINSON (US) LLP

/s/ Matthew F. Tilley

Matthew F. Tilley (N.C. Bar No. 40125)

Pursuant to Rule 33(b) I certify that all of the attorneys listed below have authorized me to list their names on this document as if they had personally signed it.

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ATTACHMENTS

Attached to this Petition for Writ of Supersedeas and Motion for Temporary Stay are copies of the following documents:

11 February 2025 Supplemental Complaint

11 February 2025 Amended Consent Order

25 February 2025 Plaintiff's Motion for Summary Judgment

25 February 2025 Legislative Defendants' Motion for Summary Judgment

23 April 2025 Order Granting Plaintiff's Motion for Summary Judgment

VERIFICATION

The undersigned counsel for Legislative Defendants verifies that (a) the factual contents of the foregoing Petition for Writ of Supersedeas are true to the best of my knowledge and belief; and (b) the documents attached to this Petition for Writ of Supersedeas are true and correct copies of the pleadings and papers filed with the Wake County Superior Court.

I verify under penalty of perjury under the laws of North Carolina that the foregoing is true and correct. Executed on 25 April 2025.

/s/ Matthew F. Tilley
Matthew F. Tilley

CERTIFICATE OF SERVICE

I hereby certify that on 25 April 2025, I caused a copy of the foregoing document to be served upon all parties via email as follows:

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ATTACHMENT

11 February 2025
Supplemental Complaint

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
23CV029308-910

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

Plaintiff,

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.

SUPPLEMENTAL COMPLAINT

Plaintiff Joshua H. Stein, pursuant to N.C. Gen. Stat. § 1A-1, Rules 15(d) and 19, seeking (a) a declaratory judgment, and (b) preliminary and permanent injunctions, hereby alleges and says:

63. Plaintiffs re-allege and incorporate by reference all allegations of the initial Complaint in this action as if fully set forth herein.

SUPPLEMENTAL INTRODUCTION

64. In December 2024, while Legislative Defendants' appeal of their trial court loss in this case was pending, Legislative Defendants tried, for the sixth time in eight years, to wrest executive authority over the State Board of Elections away from the Governor.

65. This time, they are trying to change a structure of gubernatorial authority that has existed for nearly 100 years by transferring the power to appoint every member of the State Board to the newly elected State Auditor of North Carolina, a Republican.

66. They have done so not because the State Auditor has any expertise or knowledge of election law or election administration. Indeed, the State Auditor has never had any role in North Carolina elections; it appears that North Carolina is the only state that commits elections administration to the State Auditor.

67. The State Auditor's only qualification for this newly assigned role is obvious—he's a Republican with demonstrated fealty to Legislative Defendants.

68. This blatantly partisan restructuring of the State Board is—once again—unconstitutional. It will undermine confidence in elections, and it contravenes the democratic principles on which our State government rests. It cannot stand.

SUPPLEMENTAL PROCEDURAL HISTORY

69. On 17 October 2023, Governor Cooper filed this lawsuit against Legislative Defendants and the State, challenging the constitutionality of Parts II, IV, and VIII of Senate Bill 749 on grounds that those provisions violate the separation of powers guaranteed by Article I, Section 6, and interfere with his exclusive executive authority delineated in Article III, Section 1, and Article III, Section 5(4) of the North Carolina Constitution. The Governor sought declaratory relief, a preliminary injunction, and a permanent injunction.

70. On 30 November 2023, a three-judge panel appointed under N.C. Gen. Stat. § 1-267.1 heard arguments on the Governor’s motion for preliminary injunction. That same day, the three-judge panel unanimously entered an order granting the Governor’s Motion for Preliminary Injunction, holding that the challenged provisions of Senate Bill 749 were unconstitutional.

71. The Governor moved for summary judgment. Legislative Defendants moved to dismiss, or in the alternative, for judgment on the pleadings.

72. On 11 March 2024, the three-judge panel entered a unanimous order granting the Governor’s motion and denying Legislative Defendants’ motions. The panel rejected Legislative Defendants’ political question doctrine argument and held that the Supreme Court’s decisions in *Cooper I* and *McCrorry* controlled the analysis and compelled the invalidation of the challenged portions of Senate Bill 749.

73. Legislative Defendants appealed the three-judge panel’s decision; briefing closed in the Court of Appeals on 18 November 2024.

74. On 20 December 2024, Legislative Defendants moved to dismiss the appeal as moot in light of the repeal of most of the challenged portions of Senate Bill 749. *See* Session Law 2024-57, §§ 3.A.3.(b), 4.2.¹

¹ Sections 2.3 and 2.4 of Senate Bill 749, respectively, recite the State Board’s duty to appoint members of county boards of elections (also found in N.C. Gen. Stat. § 163-30, prior to the amendment by Section 4.1 of Senate Bill 749 and amended by Section 3A.3.(f) of SB 382) and require the General Assembly’s approval—instead of the Governor’s—to hire private counsel. Those provisions were not repealed by Session Law 2024-57 but remain permanently enjoined by this Court’s March 8, 2024 Order on Summary Judgment.

SUPPLEMENTAL FACTS

75. On 5 November 2024, North Carolina voters elected Plaintiff Joshua H. Stein to be their Governor for the next four years. Governor-Elect Stein is a resident of Wake County, North Carolina.

II. FOR THE SIXTH TIME, LEGISLATIVE DEFENDANTS UNCONSTITUTIONALLY ALTER THE STATE BOARD OF ELECTIONS.

76. Just days after the voters overwhelmingly chose Governor-Elect Stein to be their chief executive for the next four years, the leadership of the North Carolina General Assembly used a purported hurricane relief bill to curtail, in significant ways, the core executive responsibilities that, under our Constitution, pass to Governor Stein on January 1, 2025.

77. In addition to electing Governor Stein, the voters in the November 2024 election deprived the General Assembly’s partisan majority of super-majority control sufficient to override the Governor’s veto in a party-line vote in the legislative session beginning in January 2025.

78. Despite Governor Stein’s clear mandate from the voters, Legislative Defendants ran a similar play to the one they tried unsuccessfully in December 2016 against then-Governor-Elect Cooper, using the lame duck legislative session to strip the incoming Governor of executive authority before our system of representative government deprived them of the partisan legislative membership necessary to accomplish such underhanded tactics without any support from another party.

79. Under the direction of Defendants Moore and Berger—and without notice, transparency, or time for public input—Senate Bill 382 (“SB 382”) was

introduced in its current form on November 19, 2024 by gutting a preexisting Senate bill that amended the laws of dentistry. Because it was a conference report, no amendments were allowed. SB 382, which received no public hearing and extremely limited committee consideration, then passed both chambers of the General Assembly on 19 and 20 November, 2024 and was presented to the Governor later that day.

80. Governor Cooper vetoed SB 382 on 26 November 2024. On December 11, Legislative Defendants led partisan supermajorities in completing their override of the Governor's veto on strict party lines to enact the bill as Session Law 2024-57. As relevant here, Section 3A of SB 382, attached as **Exhibit A**, contains various amendments to the State's election laws.

81. The lame duck General Assembly's attempt to redefine the Governor's powers after their preferred candidate lost the election directly conflicts with the people's selection of Governor as the State's chief executive with the authority granted to him by our Constitution. *See Young v. Bailey*, 368 N.C. 665, 671 (2016) ("The election of a particular candidate signifies public support for that candidate's platform, policies, and ideology.").

82. Moreover, Section 3A of SB 382 is Legislative Defendants' sixth attempt in eight years to deprive the Governor of constitutionally sufficient authority over the State Board of Elections. They have been rebuffed five times by the courts and once, in overwhelming fashion, by the voters.

83. **First attempt:** "On 16 December, 2016, the General Assembly enacted Senate Bill 4 and House Bill 17 [Session Laws 2016-125 and 2016-126]." *Cooper v.*

Berger, 370 N.C. at 395. Had they taken effect, these laws would have abolished the existing State Board of Elections and created a new “Bipartisan State Board of Elections and Ethics Enforcement.” *Id.* The new board would have consisted of four members appointed by the Governor, two members appointed by the General Assembly upon the recommendation of the Speaker, and two members appointed by the General Assembly upon recommendation of the President Pro Tempore. Session Law 2016-125 § 2.(c). The Governor, Speaker, and President Pro Tempore were each required to make their appointments from a list of nominees provided by the State chairs of the two largest political parties, and were required to divide their appointments equally between the two parties. *Id.* As a result, the new board’s membership would have been equally divided between the two largest parties, each of whom would have had four members. That legislation, and its recipe for executive deadlock, was struck down by a three-judge panel of the Superior Court, Wake County. *Cooper BOE*, 370 N.C. at 395.

84. **Second Attempt:** The General Assembly then enacted Session Law 2017-6, which, among other things, required the Governor to appoint eight members to a new version of the state elections board by selecting four members each from lists supplied by the chairs of the Republican and Democratic parties. *Cooper BOE*, 370 N.C. at 396. Thus, although the Governor had the nominal authority to appoint all eight members of the board, the legislation once again ensured executive deadlock by preventing the Governor from appointing a majority of members.

85. The Supreme Court found the restructured elections board unconstitutional because it

le[ft] 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, 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.

370 N.C. at 416 (cleaned up).

86. **Third Attempt:** After *Cooper BOE*, the General Assembly enacted the “2018 Legislation” (i.e., Part VII of Session Law 2018-2 and the portions of Session Law 2017-6 that were not struck down in *Cooper BOE*), which sought to establish a nine-member State Board with all members appointed by the Governor: four from a list of six nominees supplied by the State Democratic party chair; four from a list of six nominees supplied by the State Republican party chair; and one from a list of two nominees (not registered as a Democrat or Republican) made by the other eight members. The 2018 Legislation also created evenly split county boards of election appointed by the State Board, containing two members from each major party, and mandated that the chair of each county board be a Republican in every year that Presidential, gubernatorial, and Council of State elections are held.

87. A three-judge trial court panel held that, “when analyzed collectively and in their entirety, all of the foregoing provisions combine to strip the Governor of the requisite control mandated by *Cooper* and *McCrorry*, and that the Acts thus

prevent the Governor from fulfilling his core duty of taking care that the State’s election laws are faithfully executed.” *See* Order ¶ 79, *Cooper v. Berger*, 18 CVS 3348 (N.C. Super. Ct. Wake Cnty., Oct. 16, 2018).

88. **Fourth Attempt:** In the summer of 2018, the General Assembly proposed constitutional amendments. *See* Session Law 2018-117. Among other things, the General Assembly submitted an amendment creating a new State Board echoing the board structure invalidated in *Cooper BOE*—i.e., an eight-member board with the Governor appointing four members recommended by the Democratic and Republican Senate leaders and four members recommended by the Democratic and Republican House leaders. Session Law 2018-133. The voters rejected that amendment by a vote of 2,199,787 against (62%) and 1,371,446 for (38%).

89. **Fifth Attempt:** In the now-repealed provisions of Senate Bill 749, the General Assembly granted itself authority to appoint all members of an eight-member State Board and all members of four-member county boards of election. All vacancies in board membership were to be filled by the General Assembly or its leadership. In the event of board deadlock in the selection of the Chair of the State Board, Executive Director of the State Board, or chair of a county board, Legislative Defendants would make the selection. *See* Summary Judgment Order, *Cooper v. Berger*, No. 23CV029308-910, (N.C. Super. Ct. Wake Cnty., Mar. 11, 2024). This Court unanimously enjoined those provisions because Senate Bill 749 was “the most stark and blatant removal of appointment power from the Governor since *McCrory* and *Cooper I*,” which controlled, and mandated a permanent injunction. *See id.* ¶ 14.

90. Legislative Defendants' latest attempt to restructure the State Board of Election and county boards of election fares no better under our Constitution than their prior five attempts.

91. Before turning to the specific provisions of SB 382, however, it is important to emphasize the provisions of the North Carolina Constitution that prevent the General Assembly from restructuring executive agencies to deprive the Governor of constitutionally sufficient control. Legislative Defendants, persistently failing to heed the limits our constitutional order places on them, continue their attempts to reorder our State's constitutional balance of powers through statutory enactments. But mere statutes cannot override or rewrite the North Carolina Constitution.

92. The Governor is the only executive branch officer vested with the executive power of the State. N.C. CONST. art. III, § 1 ("The executive power of the State shall be vested in the Governor.").

93. The Governor is also the sole executive branch officer with a constitutional duty to "take care that the laws be faithfully executed." N.C. CONST. art. III, § 5(4).

94. In contrast to the express vesting of executive authority in the Governor, the North Carolina Constitution does not expressly vest any powers or duties in the other executive officers² who comprise the Council of State. N.C. CONST. art. III, §§ 7,

² The Lieutenant Governor, Secretary of State, State Auditor, State Treasurer, Superintendent of Public Instruction, Attorney General, Commissioner of Agriculture, Commissioner of Labor, and Commissioner of Insurance.

8; N.C. CONST. art. III, § 7(2) (providing that the duties of the elected members of the Council of State “shall be prescribed by law.”). Thus, the executive power is vested solely in the Governor, N.C. CONST. art. III, § 1, while the particular duties of the other Council of State members are granted, removed, or modified by legislative act. *See id.* art. III, § 7(2).

95. The holdings and teachings of *Wallace*, *McCrorry*, and *Cooper BOE* are clear: the separation of powers clause of the North Carolina Constitution requires that the Governor have the authority to appoint a majority of members of a State board, commission, or council that exercises final executive authority. That is necessary so that the Governor, through his appointees, can fulfill his constitutional duty to “take care that the laws be faithfully executed,” N.C. CONST. art. III, § 5(4), and may, as our state’s Chief Executive, implement executive policy consistent with his views and priorities on issues assigned by the General Assembly to executive agencies.

96. Contrary to those teachings and to the plain restrictions of the Separation of Powers and Faithful Execution clauses, SB 382 does the following:

- a. Effectively repeals all portions of Session Law 2023-139 (SB 749) that were challenged and enjoined in this case. *See* Session Law 2024-57, §§ 3.A.3.(a).

- b. Transfers the “North Carolina State Board of Elections . . . administratively to the Department of the State Auditor.” *See id.* § 3.A.2.³
- c. Removes executive authority over the State Board of Elections and gives it to the State Auditor (a Republican elected in November 2024). The State Auditor appoints all five members of the State Board of Elections; no more than three of those five can be from the same political party. The State Auditor is required to choose the board members from lists of four nominees submitted to the State Auditor by the state party chair of each of the two largest political parties. *Id.* §§ 3A.3.(b), (c), (g).
- d. The State Board appoints four members of each county board of elections (two from each major political party), and the State Auditor appoints the fifth member of the county board, as well as the chair. *Id.* § 3A.3.(f), (h).

97. In sum, under Sections 3A.3.(b), (c), (d), (f), (g), and (h) of SB 382 (“the Challenged Elections Board Provisions”), the State Board remains a five-member board, with each member appointed by the State Auditor, not the Governor. County boards are five-member boards, with the State Auditor having the unfettered right to select the critical fifth member, as well as the chair.

³ To avoid doubt: Plaintiffs do not challenge Sections 3A.1, 3A.2, and 3A.3.(a) of SB 382.

98. The Challenged Elections Board Provisions treat the State Auditor and Governor as if they were interchangeable for constitutional purposes.

99. Unlike the State Auditor, however, who is expressly vested with no authority under the Constitution, the Governor is vested with the executive power of the State and the constitutional duty to “take care that the laws be faithfully executed.” N.C. CONST. art. III, §§ 1, 5(4).

100. As a result of the Challenged Elections Board Provisions, the Governor cannot fulfill either of these constitutionally assigned roles, because he has no ability to appoint, remove, or supervise any member of the State Board of Elections or the 100 county boards of elections.

101. It 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.

102. As our Supreme Court instructs:

The General Assembly cannot, however, consistent with the textual command contained in Article III, Section 5(4) of the North Carolina Constitution, 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.

Cooper BOE, 370 N.C. at 418.

103. “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.* (quoting *McCrorry*, 368 N.C. at 647). Any statute structuring an executive board in that 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.” *Id.*

104. Here, the Governor does not have any direct or indirect powers of appointment, supervision, or removal over any members—let alone a constitutionally sufficient majority—of the State and county boards of elections.

105. Thus, the Challenged Elections Board Provisions, “in their statutory context, prevent the Governor from performing his constitutional duty to take care that the laws are faithfully executed. By doing so, these provisions violate the separation of powers clause.” *McCrorry*, 368 N.C. at 649.

COUNT 2: DECLARATORY JUDGMENT

The Challenged Elections Board Provisions Violate the Separation of Powers and Faithful Execution Clauses of the North Carolina Constitution

106. The Governor restates and incorporates by reference the preceding paragraphs of this Complaint and Supplemental Complaint, as if fully set forth herein.

107. A present and real controversy exists between the parties as to the constitutionality of the Challenged Elections Board Provisions.

108. Individually, and as whole, the Challenged Elections Board Provisions unconstitutionally violate the Separate of Powers Clause that is “a cornerstone of our state and federal governments.” *State ex rel. Wallace v. Bone*, 304 N.C. 591, 601 (1982).

109. Individually, and as whole, the Challenged Elections Board Provisions prevent the Governor from performing his core executive function of ensuring that the laws are faithfully executed. *McCrorry*, 368 N.C. at 635 (“[T]he separation of powers clause requires that, as the three branches of government carry out their duties, one branch will not prevent another branch from performing its core functions.”).

110. Accordingly, individually, and as whole, the Challenged Elections Board Provisions facially violate the Separation of Powers Clause (Article I, Section 6) and the Faithful Execution Clause (Article III, Section 5(4)) of the North Carolina Constitution.

111. Pursuant to N.C. Gen. Stat. §§ 1-253, *et seq.*, and North Carolina Rules of Civil Procedure 57 and 65, the Governor is entitled to a judgment and permanent injunction declaring that the Challenged Elections Board Provisions are unconstitutional and are therefore void and of no effect.

SUPPLEMENTAL PRAYER FOR JUDGMENT

WHEREFORE, Plaintiffs pray as follows, in addition to the prayer for judgment in the initial Complaint:

1. That the Court enter a declaratory judgment and preliminary and permanent injunction, pursuant to N.C. Gen. Stat. § 1-253, *et seq.*, and North Carolina Rules of Civil Procedure 57 and 65, declaring that Sections 3A.3.(b), (c), (d), (f), (g), and (h) of SB 382 are unconstitutional and are therefore void and of no effect;

2. That the Court grant such other and further relief as the Court deems just and proper.

Respectfully submitted this the 11th day of February, 2025.

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CERTIFICATE OF SERVICE

I hereby certify that on this day a copy of the foregoing document was served on the following parties via email as follows:

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This the 11th day of February, 2025.

BROOKS, PIERCE, McLENDON,
HUMPHREY & LEONARD, L.L.P.

By: /s/ Amanda S. Hawkins
Amanda S. Hawkins

EXHIBIT A

SECTION 3A OF SENATE BILL 382

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2023

SESSION LAW 2024-57
SENATE BILL 382

AN ACT TO MAKE MODIFICATIONS TO AND PROVIDE ADDITIONAL APPROPRIATIONS FOR DISASTER RECOVERY; TO MAKE TECHNICAL, CLARIFYING, AND OTHER MODIFICATIONS TO THE CURRENT OPERATIONS APPROPRIATIONS ACT OF 2023; AND TO MAKE VARIOUS CHANGES TO THE LAW.

The General Assembly of North Carolina enacts:

PART I. DISASTER RELIEF

SUBPART I-A. GENERAL PROVISIONS

SECTION 1A.1. Title. – This Part shall be known as "The Disaster Recovery Act of 2024 – Part III."

SECTION 1A.2. Maximum Amounts; Effectuate Savings. – The appropriations and allocations made in this Part are for maximum amounts necessary to implement this Part. Savings shall be effected where the total amounts appropriated or allocated are not required to implement this Part.

SECTION 1A.3. Scope. – Unless otherwise provided, this Part applies to the North Carolina counties in the affected area, as defined in Section 1A.4 of this Part.

SECTION 1A.4. Definitions. – Unless otherwise provided, the following definitions apply in this Part:

- (1) Affected area. – The counties designated before, on, or after the effective date of this act under a major disaster declaration by the President of the United States under the Stafford Act (P.L. 93-288) as a result of Hurricane Helene.
- (2) FEMA. – The Federal Emergency Management Agency.
- (3) Helene Fund. – The Hurricane Helene Disaster Recovery Fund established in Section 4.1 of S.L. 2024-51.
- (4) OSBM. – The Office of State Budget and Management.
- (5) Recipient. – A State agency or a non-State entity, as those terms are defined in G.S. 143C-1-1.
- (6) Savings Reserve. – The Savings Reserve established in G.S. 143C-4-2.
- (7) SERDRF. – The State Emergency Response and Disaster Relief Fund established in G.S. 166A-19.42.

SECTION 1A.5. Transfer of Additional Disaster Relief Funds. – Notwithstanding G.S. 143C-4-2, the State Controller shall transfer the sum of two hundred twenty-seven million dollars (\$227,000,000) from the Savings Reserve to the Helene Fund and, except as otherwise provided in this act, the funds shall remain unspent until appropriated by an act of the General Assembly. It is the intent of the General Assembly to review funding and to consider actions needed to address remaining unmet needs.

SUBPART I-B. EDUCATION



costs. The Department shall provide the funds allocated by this subdivision to the Conservancy upon the earlier of (i) January 1, 2025, or (ii) the date the Department completes the study required by subdivision (c)(4) of Section 14.7 of S.L. 2023-134 and notifies the Office of State Budget and Management that it has done so.

- (2) Seven hundred fifty thousand dollars (\$750,000) to be divided equally between the 15 eligible entities previously funded for capacity-building grants pursuant to Section 14.7(c)(1) of S.L. 2023-134.
- (3) Two hundred thousand dollars (\$200,000) to the Great Trails State Coalition, a nonprofit corporation, for (i) a time-limited position to assist and coordinate trail planning and implementation for the nonprofit organizations in the State, (ii) marketing for trail events, and (iii) promoting outdoor trail recreation.

SUBPART II-I. TRANSPORTATION

AIRPORT IMPROVEMENT FUNDS SHALL NOT REVERT

SECTION 2I.1. Notwithstanding G.S. 143C-1-2(b), G.S. 63-74(d), Section 41.4 of S.L. 2022-74, or any other provision of law to the contrary, funds allocated for airport improvements on or after July 1, 2019, by Section 4.7 of S.L. 2019-231, Section 2.2(j) of S.L. 2023-134, or any other act of the General Assembly for projects that are active as of November 18, 2024, shall not revert but shall remain available to expend until completion of the improvement.

REALLOCATE ROCKINGHAM SPEEDWAY PEDESTRIAN BRIDGE FUNDS

SECTION 2I.2. Notwithstanding the Committee Report described in Section 43.2 of S.L. 2023-134 or any provision of law to the contrary, of the sum of two million dollars (\$2,000,000) in nonrecurring funds for the 2023-2024 fiscal year allocated for the construction of a pedestrian bridge over Highway 1 at the Rockingham Speedway in Richmond County, one million seven hundred thousand dollars (\$1,700,000) shall be allocated as a grant to the Rockingham Dragway and three hundred thousand dollars (\$300,000) shall be allocated as a grant to the Rockingham Speedway. The funds reallocated in this section shall be used for facility improvements.

SUBPART II-J. FINANCE

ELIMINATE ADDITIONAL MEANS OF NOTICE TO ADVERTISE PROPERTY TAX LIENS CURRENTLY REQUIRED BY LAW

SECTION 2J.1. Section 22 of S.L. 2024-45 is repealed.

SUBPART II-K. GENERAL PROVISIONS

STORMWATER AND STREAM REHABILITATION ALLOCATION CHANGE

SECTION 2K.1. The funds allocated by Section 5.6(f)(16)a. of S.L. 2023-134 to the Office of State Budget and Management to provide a directed grant to Pilot View Resource Conservation and Development, Inc., for stormwater and stream rehabilitation shall instead be allocated to the Davie County Economic Development Commission, Inc., as a directed grant for the same purposes.

PART III. VARIOUS LAW CHANGES

SUBPART III-A. ELECTIONS

TRANSFER STATE BOARD OF ELECTIONS TO STATE AUDITOR

SECTION 3A.1. Part I of S.L. 2023-139 is repealed.

SECTION 3A.2.(a) The North Carolina State Board of Elections is transferred administratively to the Department of the State Auditor. This transfer has all of the elements of a Type II transfer, as described in G.S. 143A-6, except that the management functions of the State Board of Elections shall not be performed under the direction and supervision of the State Auditor except as provided in this section. Under this transfer, the State Board of Elections shall exercise all its prescribed statutory powers independently of the State Auditor, except that budgeting functions shall be performed under the direction and supervision of the State Auditor.

SECTION 3A.2.(b) No action or proceeding pending on July 1, 2025, brought by or against the State Board of Elections shall be affected by any provision of this section. Any business or other matter undertaken or commanded by any State program or office or contract transferred by this section pertaining to or connected with the functions, powers, obligations, and duties set forth herein, which is pending on July 1, 2025, may be conducted and completed in the same manner and under the same terms and conditions and with the same effect as if conducted and completed by the original program, office, or commissioners or directors thereof.

SECTION 3A.2.(c) The transfer provided for under this section shall not affect any ongoing investigation or audit. Prosecutions for offenses or violations committed before July 1, 2025, are not abated or affected by this section.

SECTION 3A.2.(d) Rules and forms adopted by the State Board of Elections shall remain in effect until amended or repealed.

SECTION 3A.2.(e) G.S. 163-28 is repealed.

SECTION 3A.2.(f) This section becomes effective July 1, 2025.

SECTION 3A.3.(a) Section 2.1, Section 2.2, Section 2.5, Section 4.1, Part V, Section 8.1, Section 8.2, and Section 8.3 of S.L. 2023-139 are repealed.

SECTION 3A.3.(b) G.S. 147-64.6(c) is amended by adding a new subdivision to read:

"(23) The Auditor shall make appointments to the State Board of Elections."

SECTION 3A.3.(c) G.S. 163-19 reads as rewritten:

"§ 163-19. State Board of Elections; appointment; term of office; vacancies; oath of office.

(a) There is established the State Board of Elections, which may be referred to as the "State Board" in this Chapter.

(b) ~~The State Board of Elections shall consist of five registered voters whose terms of office shall begin on May 1, 2019, May 1 of the year following the election of the President of the United States and shall continue for four years, and until their successors are appointed and qualified. The Governor-State Auditor shall appoint the members of the State Board and likewise shall appoint their successors every four years at the expiration of each four-year term. Not more than three members of the State Board shall be members of the same political party. The Governor-State Auditor shall appoint the members from a list of nominees submitted to the Governor-State Auditor 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. Each State party chair shall submit a list of four nominees who are affiliated with that political party. No person may serve more than two full consecutive four-year terms.~~

(c) Any vacancy occurring in the State Board shall be filled by the ~~Governor-State Auditor~~, and the person so appointed shall ~~fill-serve the remainder of the unexpired term~~. The ~~Governor-State Auditor~~ shall fill the vacancy from a list of three nominees submitted to the ~~Governor-State Auditor~~ by the State party chair of the political party that nominated the vacating member as provided in subsection (b) of this section. The State party chair shall submit a list of three nominees must be who are affiliated with that political party.

...."

SECTION 3A.3.(d) G.S. 163-20 reads as rewritten:

"§ 163-20. Meetings of Board; quorum; minutes.

(a) Call of meeting. – The State Board of Elections shall meet at the call of the ~~chairman~~ chair whenever necessary to discharge the duties and functions imposed upon it by this Chapter. The ~~chairman~~ chair shall call a meeting of the State Board upon the written application or applications of any two members thereof. If there is no ~~chairman~~ chair, or if the ~~chairman~~ chair does not call a meeting within three days after receiving a written request or requests from two members, any three members of the State Board shall have power to call a meeting of the State Board, and any duties imposed or powers conferred on the State Board by this Chapter may be performed or exercised at that meeting, although the time for performing or exercising the same prescribed by this Chapter may have expired.

(b) Place of Meeting. – Except as provided in ~~subsection (e), below, subsection (c) of this section~~, the State Board of Elections shall meet in its offices in the City of Raleigh, or at another place in the City of Raleigh to be designated by the ~~chairman~~ chair. However, subject to the limitation imposed by ~~subsection (e), below, subsection (c) of this section~~ upon the prior written request of any four members, the State Board of Elections shall meet at any other place in the State designated by the four members.

(c) Meetings to Investigate Alleged Violations of This Chapter. – When called upon to investigate or hear sworn alleged violations of this Chapter, the State Board of Elections shall meet and hear the matter in the county in which the violations are alleged to have occurred.

(d) Quorum. – A majority of the members constitutes a quorum for the transaction of business by the State ~~Board of Elections~~ Board. If any member of the State Board fails to attend a meeting, and by reason thereof there is no quorum, the members present shall adjourn from day to day for not more than three days, by the end of which time, if there is no quorum, the ~~Governor~~ State Auditor may summarily remove any member failing to attend and appoint ~~his~~ a successor.

(e) Minutes. – The State Board of Elections shall keep minutes recording all proceedings and findings at each of its meetings. The minutes shall be recorded in a book which shall be kept in the office of the State Board in the City of Raleigh."

SECTION 3A.3.(e) G.S. 163-22(c) reads as rewritten:

"(c) The State Board shall advise the county boards of elections as to the proper methods of conducting primaries and elections. The State Board shall require all reports from the county boards of elections and election officers as provided by law, or as are deemed necessary by the State Board, and shall compel observance of the requirements of the election laws by county boards of elections and other election officers. In performing these duties, the State Board shall have the right to hear and act on complaints arising by petition or otherwise, on the failure or neglect of a county board of elections to comply with any part of the election laws imposing duties upon a county ~~board of elections~~ board. The State Board shall have power to remove from office any member of a county board of elections for incompetency, neglect or failure to perform duties, fraud, or for any other satisfactory cause. Before exercising this power, the State Board shall notify the county board of elections member affected and give that member an opportunity to be heard."

SECTION 3A.3.(f) G.S. 163-30 reads as rewritten:

"§ 163-30. County boards of elections; appointments; terms of office; qualifications; vacancies; oath of office; instructional meetings.

(a) In every county of the State there shall be a county board of elections, ~~to which may be referred to as "county board" in this Chapter~~. Each county board shall consist of five persons of good moral character who are registered voters in the county in which they are to act. Members of county boards of elections shall be appointed by the State Board of Elections on the last Tuesday in June, and every two years thereafter, and their terms of office shall continue for two years from the specified date of appointment and until their successors are appointed and qualified. Four members of each county boards of elections board shall be appointed by the State

Board on the last Tuesday in June ~~and every two years thereafter, and their terms of office of each odd-numbered year and shall continue for two years from the specified date of appointment and to serve until their successors are appointed and qualified.~~ One member of ~~the each county boards of elections board~~ shall be appointed by the ~~Governor State Auditor~~ to be the chair of the county board on the last Tuesday in June ~~and every two years thereafter, of each odd-numbered year~~ and that member's term of office shall continue ~~for two years from the specified date of appointment and until a successor is appointed and qualified.~~ Of the appointments to each county board ~~of elections~~ by the State Board, two members each shall belong to the two political parties having the highest number of registered affiliates as reflected by the latest registration statistics published by the State Board.

(b) No person shall be eligible to serve as a member of a county board ~~of elections~~ who meets any of the following criteria:

- (1) Holds any elective office under the government of the United States, or of the State of North Carolina or any political subdivision thereof.
- (2) Holds any office in a state, congressional district, county or precinct political party or organization. Provided, however, that the position of delegate to a political party convention shall not be considered an office for the purpose of this subdivision.
- (3) Is a campaign manager or treasurer of any candidate or political party in a primary or election.
- (4) Is a candidate for nomination or election.
- (5) Is the wife, husband, son, son in law, daughter, daughter in law, mother, mother in law, father, father in law, sister, sister in law, brother, brother in law, aunt, uncle, niece, or nephew of any candidate for nomination or election. Upon any member of the county board of elections becoming ineligible, that member's seat shall be declared vacant. This subdivision only applies if the county board ~~of elections~~ is conducting the election for which the relative is a candidate.

(c) The State chair of the two political parties having the highest number of registered affiliates as reflected by the latest registration statistics published by the State Board shall have the right to recommend to the State Board three registered voters in each county for appointment to the county board of elections for that county. If such recommendations are received by the State Board 15 or more days before the last Tuesday in June 2019, ~~and each two years thereafter, of each odd-numbered year,~~ it shall be the duty of the State Board to appoint the county boards from the names thus recommended.

(d) Whenever a vacancy occurs in the membership of a county board ~~of elections~~ for any cause the State chair of the political party of the vacating member shall have the right to recommend two registered voters of the affected county for such office, and it shall be the duty of the State Board to fill the vacancy from the names thus recommended.

(e) At the meeting of the county board ~~of elections~~ required by G.S. 163-31 to be held on Tuesday following the third Monday in July in the year of their appointment the members shall take the following oath of office:

"I, _____, do solemnly swear (or affirm) that I will support the Constitution of the United States; that I will be faithful and bear true allegiance to the State of North Carolina and to the constitutional powers and authorities which are or may be established for the government thereof; that I will endeavor to support, maintain and defend the Constitution of said State, not inconsistent with the Constitution of the United States; and that I will well and truly execute the duties of the office of member of the _____ County Board of Elections to the best of my knowledge and ability, according to law; so help me God."

(f) Each member of the county board ~~of elections~~ shall attend each instructional meeting held pursuant to G.S. 163-46, unless excused for good cause by the chair of the county board,

and shall be paid the sum of twenty five dollars (\$25.00) per day for attending each of those meetings."

SECTION 3A.3.(g) Notwithstanding any other provision of law, the current terms of office of the members of the State Board of Elections shall terminate on April 30, 2025, and members shall be appointed to the State Board of Elections in accordance with G.S. 163-19, as amended by this section, for a term to begin May 1, 2025.

SECTION 3A.3.(h) Notwithstanding any other provision of law, the current terms of office of the members of the county boards of elections shall terminate on June 24, 2025, and members of each county board of election shall be appointed in accordance with G.S. 163-30, as amended by this section, for a term beginning on June 25, 2025, and expiring on July 19, 2027.

VARIOUS ELECTION CHANGES

SECTION 3A.4.(a) G.S. 163-82.4(f) reads as rewritten:

"(f) Correcting Registration Forms. – If the voter fails to complete any required item on the voter registration form but provides enough information on the form to enable the county board of elections to identify and contact the voter, the voter shall be notified of the omission and given the opportunity to complete the form at least by 5:00 P.M.–12:00 P.M. on the third business day before the county canvass as set in G.S. 163-182.5(b). after the election. If the voter corrects that omission within that time and is determined by the county board of elections to be eligible to vote, the county board shall permit the voter to vote. If the information is not corrected by election day, the voter shall be allowed to vote a provisional official ballot. If the correct information is provided to the county board of elections by at least 5:00 P.M.–12:00 P.M. on the third business day before the county canvass, after the election, the county board shall count any portion of the provisional official ballot that the voter is eligible to vote."

SECTION 3A.4.(b) G.S. 163-166.8(d) reads as rewritten:

"(d) Precinct officials shall maintain a log of any individual, other than a minor child under the age of 18 in the care of a voter, who enters the voting place pursuant to this section and is not seeking to vote in that voting place. The Precinct officials shall use the log provided by the State Board, which shall include the printed name and address of the individual entering the voting place, the time the individual entered the voting place, and a space for that individual's signature. This subsection shall not apply to observers and runners appointed pursuant to G.S. 163-45.1 and G.S. 163-45.2."

SECTION 3A.4.(c) G.S. 163-166.12 reads as rewritten:

"§ 163-166.12. Requirements for certain voters who register by mail.

...

(d) Voting When Identification Numbers Do Not Match. – Regardless of whether an individual has registered by mail or by another method, if the individual has provided with the registration form a drivers license number or last four digits of a Social Security number but the computer validation of the number as required by G.S. 163-82.12 did not result in a match, and the number has not been otherwise validated by the ~~board of elections,~~ county board, in the first election in which the individual votes that individual shall submit with the ballot the form of identification described in subsection (a) or subsection (b) of this section, depending upon whether the ballot is voted in person or absentee. If that identification is provided no later than 12:00 P.M. on the third business day after the election and the county board of elections does not determine that the individual is otherwise ineligible to vote a ballot, the failure of identification numbers to match shall not prevent that individual from registering to vote and having that individual's vote counted.

(e) The Right to Vote Provisionally. – If an individual is required under subsection (a), (b), or (d) of this section to present identification in order to vote, but that individual does not present the required identification, that individual may vote a provisional official ballot. If the voter is at the voting place, the voter may vote provisionally there without unnecessary delay. If

the voter is voting by ~~mail-in~~ absentee ballot, the ~~mailed~~ absentee ballot without the required identification shall be treated as a provisional official ballot.

...."

SECTION 3A.4.(d) G.S. 163-166.16(c) reads as rewritten:

"(c) Provisional Ballot Required Without Photo Identification. – If the registered voter cannot produce the identification as required in subsection (a) of this section, the registered voter may cast a provisional ballot that is counted only if the registered voter brings an acceptable form of photograph identification listed in subsection (a) of this section to the county board of elections no later than ~~the end of business on the business day prior to the canvass by the county board of elections as provided in G.S. 163-182.5.~~ 12:00 P.M. on the third business day after the election. The State Board shall provide the registered voter casting a provisional ballot due to failure to provide photo identification an information sheet on the deadline to return to the county board of elections to present photo identification, and what forms of photo identification are acceptable, in order for the voter's provisional ballot to be counted."

SECTION 3A.4.(e) G.S. 163-182.2(a)(4) reads as rewritten:

"(4) If the county board of elections finds that an individual voting a provisional official ballot (i) was registered in the county as provided in 163-82.1, (ii) voted in the proper precinct under G.S. 163-55 and G.S. 163-57, and (iii) was otherwise eligible to vote, the provisional official ballots shall be counted by the county board of elections ~~before the canvass.~~ no later than 5:00 P.M. on the third business day after the election. Except as provided in G.S. 163-82.15(e), if the county board finds that an individual voting a provisional official ballot (i) did not vote in the proper precinct under G.S. 163-55 and G.S. 163-57, (ii) is not registered in the county as provided in G.S. 163-82.1, or (iii) is otherwise not eligible to vote, the ballot shall not be counted. If a voter was properly registered to vote in the election by the county board, no mistake of an election official in giving the voter a ballot or in failing to comply with G.S. 163-82.15 or G.S. 163-166.11 shall serve to prevent the counting of the vote on any ballot item the voter was eligible by registration and qualified by residency to vote."

SECTION 3A.4.(f) G.S. 163-230.1 reads as rewritten:

"§ 163-230.1. Simultaneous issuance of absentee ballots with application.

(a) Written Request. – A qualified voter who is eligible to vote by absentee ballot under G.S. 163-226, or that voter's near relative or verifiable legal guardian, shall complete a request form for an absentee application and absentee ballots so that the county board of elections receives that completed request form not later than 5:00 P.M. on the second Tuesday before the election. That completed written request form shall be in compliance with G.S. 163-230.2. The county board of elections shall enter in the register of absentee requests, applications, and ballots issued the information required in G.S. 163-228 as soon as each item of that information becomes available. Upon receiving the completed request form, the county board of elections shall cause to be mailed to that voter a single package that includes all of the following:

- (1) The official ballots the voter is entitled to vote.
- (2) A container-return envelope for the ballots, printed in accordance with G.S. 163-229.
- (3) An instruction sheet.
- (4) A clear statement of the requirement for a photocopy of identification described in G.S. 163-166.16(a) or an affidavit as described in G.S. 163-166.16(d)(1), (d)(2), or (d)(3) with the returned ballot.

(a1) Mailing of Application and Ballots. – The ballots, envelope, and instructions shall be mailed to the voter by the county board's chair, member, officer, or employee as determined by the county board and entered in the register as provided by this Article.

(a2) Publish Deadline for Written Request and Ballot. – At least once per primary or election, each county board of elections and the State Board shall publish on its website or in any mailing sent to voters the following information:

- (1) The date by which a completed request form as described in subsection (a) of this section must be received by a county ~~board of elections~~ board.
- (2) The means by which the voter's marked absentee ballot must be returned to the county ~~board of elections~~ board.
- (3) The date and time the voter's completed absentee ballot must be received by the county board of elections in order to be counted.

(b) Absence for Sickness or Physical Disability. – Notwithstanding the provisions of subsection (a) of this section, if a voter expects to be unable to go to the voting place to vote in person on election day because of that voter's sickness or other physical disability, that voter or that voter's near relative or verifiable legal guardian may make the request for absentee ballots in person to the county board of elections of the county in which the voter is registered after 5:00 P.M. on the second Tuesday before the election but not later than 5:00 P.M. on the last business day before the election. The county board of elections shall treat that completed request form in the same manner as a request under subsection (a) of this section but may personally deliver the application and ballots to the voter or that voter's near relative or verifiable legal guardian, and shall enter in the register of absentee requests, applications, and ballots issued the information required in G.S. 163-228 as soon as each item of that information becomes available. The county board of elections shall personally deliver to the requester in a single package:

- (1) The official ballots the voter is entitled to vote.
- (2) A container-return envelope for the ballots, printed in accordance with G.S. 163-229.
- (3) An instruction sheet.
- (4) A clear statement of the requirement for a photocopy of identification described in G.S. 163-166.16(a) or an affidavit as described in G.S. 163-166.16(d)(1), (d)(2), or (d)(3) with the returned application and voted ballots.

(c) Delivery of Absentee Ballots and Container-Return Envelope to Applicant. – When the county board of elections receives a completed request form for applications and absentee ballots from the voter, or the near relative or the verifiable legal guardian of that voter, the county board shall promptly issue and transmit them to the voter in accordance with the following instructions:

- (1) On the top margin of each absentee ballot the applicant is entitled to vote, the chair, a member, officer, or employee of the county board of elections shall write or type the words "Absentee Ballot No. ____ " or an abbreviation approved by the State Board and insert in the blank space the number assigned the applicant's application in the register of absentee requests, applications, and absentee ballots issued. That person shall not write, type, or print any other matter upon the absentee ballots transmitted to the absentee voter. Alternatively, the county board of elections may cause to be barcoded on the absentee ballot the voter's application number, if that barcoding system is approved by the State Board.
- (2) The chair, member, officer, or employee of the county board of elections shall fold and place the absentee ballots (identified in accordance with the preceding instruction) in a container-return envelope and write or type in the appropriate blanks thereon, in accordance with the terms of G.S. 163-229(b), the absentee voter's name, the absentee voter's application number, and the designation of the precinct in which the voter is registered. If the absentee ballot is barcoded under this section, the envelope may be barcoded rather

than having the actual number appear. The person placing the absentee ballots in the envelopes shall leave the container-return envelope holding the absentee ballots unsealed.

- (3) The chair, member, officer, or employee of the county board of ~~elections~~ shall then place the unsealed container-return envelope holding the absentee ballots together with printed instructions for voting and returning the absentee ballots, in an envelope addressed to the voter at the post office address stated in the request, seal the envelope, and mail it at the expense of the county ~~board of elections~~ ~~board~~. Provided, that in case of a request received after 5:00 P.M. on the second Tuesday before the election under the provisions of subsection (b) of this section, in lieu of transmitting the absentee ballots to the voter in person or by mail, the chair, member, officer, or employee of the county board of ~~elections~~ may deliver the sealed envelope containing the instruction sheet and the container-return envelope holding the absentee ballots to a near relative or verifiable legal guardian of the voter.

The county board of ~~elections~~ may receive completed written request forms for applications at any time prior to the election but shall not mail applications and absentee ballots to the voter or issue applications and absentee ballots in person earlier than 60 days prior to the statewide general election in an even-numbered year, or earlier than 50 days prior to any other election. No election official shall issue applications for absentee ballots except in compliance with this Article.

(d) Voter to Complete. – The application shall be completed and signed by the voter personally, the absentee ballots marked, the absentee ballots sealed in the container-return envelope, and the certificate completed as provided in G.S. 163-231.

(e) Approval of Applications. – At its next official meeting prior to election day after the return of the completed container-return envelope with the voter's absentee ballots, the county board of ~~elections~~ shall determine whether the container-return envelope has been properly executed. If the county board determines that the container-return envelope has been properly executed, it shall approve the application and deposit the container-return envelope with other container-return envelopes for the envelope to be opened and the absentee ballots counted at the same time as all other container-return envelopes and absentee ballots.

(e1) Curable Deficiencies. – If a container-return envelope contains a curable deficiency, the county board of ~~elections~~ shall promptly notify the voter of the deficiency and the manner in which the voter may cure the deficiency. Curable deficiencies are deficiencies that can be cured with supplemental documentation or attestation provided by the voter, including when any of the following occurs:

- (1) The voter did not sign the voter certification as required by G.S. 163-231(a)(4).
- (2) The voter signed the application in the wrong place on the application.
- (3) The voter failed to include with the container-return envelope a photocopy of identification described in G.S. 163-166.16(a) or an affidavit as described in G.S. 163-166.16(d)(1), (d)(2), or (d)(3), as required by subsection (f1) of this section.

The identification of the two persons witnessing the casting of the absentee ballot in accordance with G.S. 163-231(a) is not a curable deficiency. Any container-return envelope with a curable deficiency that is transmitted to the county board shall be considered timely if cure documentation is received no later than ~~the end of business 12:00 P.M.~~ on the third business day ~~before the canvass conducted by the county board of elections held pursuant to G.S. 163-182.5.~~ after the election. Cure documentation may be transmitted via ~~e-mail~~ email to the county board of ~~elections~~ if the deficiency is one described in subdivision (3) of this subsection. The notification of voters regarding curable deficiencies is an administrative task that may be

performed by county board staff and is not required to be performed at an absentee meeting as provided for in subsection (f) of this section. The voter shall be notified of curable deficiencies by mail, and by telephone or email if the telephone number or email address was provided by the voter on the request form for absentee ballots.

(f) Required Meeting of County Board of Elections. – During the period commencing on the fifth Tuesday before an election, in which absentee ballots are authorized, the county board ~~of elections~~ shall hold one or more public meetings each Tuesday at 5:00 P.M. for the purpose of action on applications for absentee ballots. At these meetings, the county board ~~of elections~~ shall pass upon applications for absentee ballots.

If the county board ~~of elections~~ changes the time of holding its meetings or provides for additional meetings in accordance with the terms of this subsection, notice of the change in hour and notice of the schedule of additional meetings, if any, shall be published in a newspaper circulated in the county at least 30 days prior to the election.

At the time the county board ~~of elections~~ makes its decision on an application for absentee ballots, the county board shall enter in the appropriate column in the register of absentee requests, applications, and ballots issued opposite the name of the applicant a notation of whether the applicant's application was "Approved" or "Disapproved".

The decision of the county board on the validity of an application for absentee ballots shall be final subject only to such review as may be necessary in the event of an election contest. The county board ~~of elections~~ shall constitute the proper official body to pass upon the validity of all applications for absentee ballots received in the county; this function shall not be performed by the chair or any other member of the county board individually.

(f1) Each container-return envelope returned to the county board with application and voted ballots under this section shall be accompanied by a photocopy of identification described in G.S. 163-166.16(a) or an affidavit as described in G.S. 163-166.16(d)(1), (d)(2), or (d)(3).

(g) Rules. – The State Board, by rule or by instruction to the county ~~board~~ boards of elections, shall establish procedures to provide appropriate safeguards in the implementation of this section. The State Board shall adopt rules to provide for the forms of identification that shall be included with returned application and voted absentee ballots. At a minimum, the rules shall include the following:

- (1) Acceptable photocopies of forms of readable identification, as described in G.S. 163-166.16(a).
- (2) A process for a voter without acceptable photocopies of forms of readable identification under subdivision (1) of this subsection to complete an alternative affidavit in accordance with G.S. 163-166.16(d)(1), (d)(2), or (d)(3) that includes inability to attach a physical copy of the voter's identification with the returned application and voted ballots as a reasonable impediment to compliance with the identification requirement, provided the reasonable impediment includes one of the following:
 - a. The number of the voter's North Carolina drivers license issued under Article 2 of Chapter 20 of the General Statutes, including a learner's permit or a provisional license.
 - b. The number of the voter's special identification card for nonoperators issued under G.S. 20-37.7.
 - c. The last four digits of the voter's social security number.

(h) Recodified as G.S. 163-226(f) by Session Laws 2019-239, s. 1.2(a), effective January 1, 2020, and applicable to elections conducted on or after that date."

SECTION 3A.4.(g) G.S. 163-234 reads as rewritten:

"§ 163-234. Counting absentee ballots by county ~~board of elections~~ board.

All absentee ballots returned to the county board of elections in the container-return envelopes shall be retained by the county board of elections to be counted by the county board of elections as follows:

- (1) Only those absentee ballots returned to the county board of elections in a properly executed container-return envelope and received pursuant to G.S. 163-231 shall be counted. Absentee ballots not received pursuant to all requirements in G.S. 163-231 shall not be deemed to be valid and shall not be counted. ~~Absentee ballots received prior to election day shall be counted on election day.~~ An absentee ballot returned in an executed container-return envelope containing a deficiency listed in G.S. 163-230.1(e) shall be counted if documentation curing the deficiency is timely received by the county board of elections in accordance with the requirements of G.S. 163-230.1(e).
- (2) The county board of elections shall meet at 5:00 P.M. on election day in the county board office or other public location in the county courthouse for the purpose of counting all absentee ballots except those which have been challenged before 5:00 P.M. on election day, ~~those received on election day, day~~ and those received pursuant to G.S. 163-231(b)(2). Any elector of the county shall be permitted to attend the meeting and allowed to observe the counting process, so long as the elector does not in any manner interfere with the election officials in the discharge of their duties. The count of these absentee ballots shall be continuous until completed, and the members shall not separate or leave the counting place except for unavoidable necessity.

The county board of elections may begin counting absentee ballots issued under Article 21A of this Chapter between the hours of 9:00 A.M. and 5:00 P.M. and may begin counting all absentee ballots between the hours of 2:00 P.M. and 5:00 P.M. upon the adoption of a resolution at least two weeks prior to the election in which the hour and place of counting absentee ballots shall be stated. ~~The resolution also may provide for an additional meeting following the day of the election and prior to the day of canvass to count absentee ballots received on election day as provided in subdivision (11) of this section.~~ A copy of the resolution shall be published once a week for two weeks prior to the election, in a newspaper having general circulation in the county. Notice may additionally be made on a radio or television station or both, but the notice shall be in addition to the newspaper and other required notice. The count shall be continuous until completed and the members shall not separate or leave the counting place except for unavoidable necessity, except that if the count has been completed prior to the time the polls close, it shall be suspended until that time pending receipt of any additional ballots. Nothing in this section prohibits a county board of elections from taking preparatory steps for the count earlier than the times specified in this section, as long as the preparatory steps do not reveal to any individual not engaged in the actual count election results before the times specified in this subdivision for the count to begin. By way of illustration and not limitation, a preparatory step for the count would be the entry of tally cards from direct record electronic voting units into a computer for processing. The county board shall not announce the result of the count before 7:30 P.M.

- (3) Notwithstanding subdivision (2) of this section, a county board of elections may, at each meeting at which it approves absentee ballot applications pursuant to G.S. 163-230.1(e) and (f), remove those absentee ballots from their envelopes and have them read by an optical scanning machine, without printing the totals on the scanner. The county board shall complete the

counting of these absentee ballots at the times provided in subdivision (2) of this section. The State Board shall provide instructions to county boards ~~of elections~~ for executing this procedure, and the instructions shall be designed to ensure the accuracy of the count, the participation of county board members of both parties, and the secrecy of the results before election day. This subdivision applies only in counties that use optical scan devices to count absentee ballots.

- (4) The counting of absentee ballots shall not commence until a majority and at least one county board member of each political party represented on the county board is present and that fact is publicly declared and entered in the official minutes of the county board.
- (5) The county board ~~of elections~~ may employ such assistants as deemed necessary to count the absentee ballots, but each county board member present shall be responsible for and observe and supervise the opening and tallying of the absentee ballots.
- (6) As each ballot envelope is opened, the county board shall cause to be entered into a pollbook designated "Pollbook of Absentee Voters" the name of the absentee voter, or if the pollbook is computer-generated, the county board shall check off the name. Preserving secrecy, the absentee ballots shall be placed in the appropriate ballot boxes, at least one of which shall be provided for each type of ballot.

After all absentee ballots have been placed in the boxes, the counting process shall begin.

If a challenge transmitted to the county board on canvass day by a chief judge is sustained, the absentee ballots challenged and sustained shall be withdrawn from the appropriate boxes, as provided in G.S. 163-89(e).

As soon as the absentee ballots have been counted and the names of the absentee voters entered in the pollbook as required in this subdivision, the county board members and assistants employed to count the absentee ballots shall each sign the pollbook immediately beneath the last absentee voter's name entered in the pollbook. The county board ~~of elections~~ is responsible for the safekeeping of the pollbook of absentee voters.

- (7) Upon completion of the counting process the county board members shall cause the results of the tally to be entered on the absentee abstract prescribed by the State Board. The abstract shall be signed by the members of the county board in attendance and the original mailed immediately to the State Board.
- (8) One copy of the absentee abstract shall be retained by the county board ~~of elections~~ and the totals appearing on the absentee abstract shall be added to the final totals of all votes cast in the county for each office as determined on the official canvass.
- (9) In the event a political party does not have a member of the county board ~~of elections~~ present at the meeting to count absentee ballots due to illness or other cause of the member, the counting shall not commence until the county party chair of the absent member, or a member of the party's county executive committee, is in attendance. The person shall act as an official witness to the counting and shall include his or her printed name and signature on the absentee ballot abstract, along with the name of who designated him or her to attend.
- (10) The county board ~~of elections~~ shall retain all container-return envelopes and absentee ballots, in a safe place, for at least 22 months, and longer if any contest is pending concerning the validity of any ballot.

- (11) ~~The county board of elections shall meet after election day and prior to the date of canvass to determine whether the container return envelopes for absentee ballots received on election day pursuant to G.S. 163-231(b) have been properly executed. The county board of elections shall comply with the requirements of G.S. 163-230.1 for approval of applications. Any absentee ballots received pursuant to G.S. 163-231(b)(2) shall be counted by the county board of elections on the day of canvass. The county board of elections may also shall meet following after the day of the election and prior to the day of canvass to count absentee ballots received pursuant to G.S. 163-231(b)(2) upon the adoption of a resolution pursuant to subdivision (2) of this section. The county board of elections shall comply with all other requirements of this section and G.S. 163-230.1 for the counting of these absentee ballots.~~
- (12) No later than 5:00 P.M. on the third business day after the election, the county board shall announce the tally of all absentee ballots, except those subject to a challenge or those cast in accordance with Article 21A of this Chapter."

SECTION 3A.4.(h) This section becomes effective January 1, 2025, and applies to elections conducted on or after that date.

SECTION 3A.5.(a) G.S. 163-278.19B reads as rewritten:

"§ 163-278.19B. Political party headquarters building funds.

(a) Notwithstanding the provisions of G.S. 163-278.19, a person prohibited by that section from making a contribution may donate to political ~~parties~~ parties, and affiliated party committees and political parties and affiliated party committees may accept from such a ~~person~~ person, money and other things of value donated to a political party headquarters building fund.

(b) Donations made to the political party headquarters building fund in accordance with this section shall be subject to all the following rules:

- (1) The donations solicited and accepted are designated to the political party headquarters building fund.
- (2) Potential donors to ~~that the political party headquarters building fund~~ are advised that all donations will be exclusively for the political party headquarters building fund.
- (3) The political party or affiliated party committee establishes a separate segregated bank account into which shall be deposited only donations for the political party headquarters building fund from persons prohibited by G.S. 163-278.19 from making contributions.
- (4) The donations deposited in the separate segregated bank account for the political party headquarters building fund ~~will~~ shall be spent only as follows:
 - a. ~~to~~ To purchase a principal headquarters building, to construct a principal headquarters building, to renovate a principal headquarters building, or to pay a mortgage on a principal headquarters building, ~~to repay donors if a principal headquarters building is not purchased, constructed, or renovated, or building.~~
 - b. ~~to~~ To pay building rent or monthly or bimonthly utility expenses incurred to operate the principal headquarters building. ~~Donations deposited into that account shall be used solely for the purposes set forth in the preceding sentence, and specifically shall not be used for headquarters equipment other than fixtures, personnel compensation, or travel or fundraising expenses or requirements of any kind.~~
 - c. Notwithstanding the above, To compensate personnel compensation ~~and including~~ in-kind benefits ~~may be paid to for~~ no more than three personnel whose functions are primarily administrative in nature, such as providing accounting, payroll, or campaign finance reporting

services, for the party and whose job functions require no more than ten percent (10%) of work time to be spent on political advocacy each calendar year.

- d. To repay donors if a principal headquarters building is not purchased, constructed, renovated, or rented.
- e. To fund legal actions as defined in G.S. 163-278.300(4).
- f. To make a legal expense donation to a legal expense fund under Article 22M of this Chapter.

- (5) The political party executive committee or affiliated party committee shall report donations to and spending by a political party headquarters building fund on every report required to be made by G.S. 163-278.9. If a committee is excused from making general campaign finance reports under G.S. 163-278.10A, that committee shall nonetheless report donations in any amount to and spending in any amount by the political party headquarters building fund at the times required for reports in G.S. 163-278.9.

(c) Donations deposited into a political party headquarters building fund shall be used solely for the purposes set forth in this section. Except as otherwise provided in this section, the political party headquarters building fund shall not be used for headquarters equipment other than fixtures, personnel compensation, travel, fundraising expenses, or other expenses of any kind.

(d) If all the criteria set forth in subdivisions (1) through (5) of this section are complied with, then donations to Donations made to, and spending by by, a political party headquarters building fund do fund in accordance with this section shall not constitute contributions or expenditures as defined in G.S. 163-278.6. If those criteria are complied with, then donations may be made to a political party headquarters building fund."

SECTION 3A.5.(b) G.S. 163-278.316 is amended by adding a new subsection to read:

"(f) A legal expense fund may accept a legal expense donation from a political party headquarters building fund."

SECTION 3A.5.(c) This section becomes effective January 1, 2025, and applies to donations made and expenses paid on or after that date.

SUBPART III-B. GENERAL GOVERNMENT

MODIFY CERTAIN PROCEDURES RELATED TO APPOINTMENTS

SECTION 3B.1.(a) G.S. 120-122 reads as rewritten:

"§ 120-122. Vacancies in legislative appointments.

When a vacancy occurs in any office subject to appointment by the General Assembly upon the recommendation of the Speaker of the House of Representatives, upon the recommendation of the President Pro Tempore of the Senate, or upon the recommendation of the President of the Senate, and the vacancy occurs either: (i) after election of the General Assembly but before convening of the regular session; (ii) when the General Assembly has adjourned to a date certain, which date is more than 20 days after the date of adjournment; (iii) after sine die adjournment of the regular session; or (iv) when the term of office expires and a successor has not been appointed, then the Governor may appoint a person to serve until the expiration of the term or until the General Assembly fills the vacancy, whichever occurs first. The General Assembly may fill the vacancy in accordance with G.S. 120-121 during a regular or extra session. When a person is holding over in office after the expiration of the term, for the purpose of this section that office may be filled as if it were vacant. Before making an ~~appointment~~, appointment in accordance with this section, the Governor shall consult the officer who recommended the original appointment to the General Assembly (the Speaker of the House of Representatives, the President Pro Tempore of the Senate, or the President of the Senate), and ask for a written recommendation.

ATTACHMENT

11 February 2025
Amended Consent Order

FILED

DATE: February 11, 2025

TIME: 02/11/2025 2:18:28 PM

WAKE COUNTY

SUPERIOR COURT JUDGES OFFICE

STATE OF NORTH CAROLINA ^{BY: S. Smallwood} IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
COUNTY OF WAKE 23CV029308-910

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

Plaintiff,

vs.

DESTIN C. HALL, in his official capacity as SPEAKER OF THE NORTH CAROLINA HOUSE OF REPRESENTATIVES; and PHILIP E. BERGER, in his official capacity as PRESIDENT PRO TEMPORE OF THE NORTH CAROLINA SENATE,

Defendants.

AMENDED CONSENT ORDER

These matters are before the undersigned pursuant to the parties' joint motion for an order vacating this Court's 11 March 2024 final judgment; to permit supplemental amendment of Plaintiff's complaint as requested in the Governor's 23 December 2024 motion; and to establish a briefing schedule for dispositive motions on Plaintiff's supplemental complaint challenging the aspects of 2024 Session Law 57 related to the State Board of Elections. This Order follows a hearing on 10 February 2025, at which counsel for all parties appeared.

Having reviewed the motion, the authorities cited therein, and with the understanding that parties are jointly requesting this relief, this Court hereby GRANTS the Motion and by consent order determines and decrees as follows:

1. This Court's 11 March 2024 opinion, as well as its 20 November 2023 order on preliminary injunction, are hereby vacated and are of no effect;
2. Plaintiff's motion to supplement the complaint is allowed and Exhibit 1 to the 23 December 2024 Motion to Supplement is ordered to be filed with the exception that the Governor, in his official capacity, be noted as Joshua H. Stein and the Speaker of the North Carolina House of Representatives, in his official capacity, be noted as Destin C. Hall, pursuant to Rule 25(f) of the North Carolina Rules of Civil Procedure;
3. The Clerk's Office of the Wake County Superior Court shall update the docket of this action to reflect the substituted Plaintiff and Defendant as noted;
4. Count 1 of the Complaint as supplemented is moot, but Defendants should file a response to the Supplemental Complaint within 14 days of a file-stamped copy being served on them;
5. If the parties intend to file dispositive motions, then those motions (if not already filed in response to the supplemental complaint) and corresponding briefs in support are due on 24 February 2025 and any responses are due 17 March 2025, with a hearing on the motions scheduled at or after 24 March 2025 before a three-judge panel;
6. The Court determines that pursuant to N.C. Gen. Stat. § 1-267.1, this matter shall be heard by a three-judge panel. The parties all consent to

the three-judge panel previously appointed in this matter on 14
November 2023 continuing to preside; and

7. All aspects of case management orders previously entered remain in effect unless amended herein.

SO ORDERED.

This the 10th day of February, 2025.
2/10/2025 5:52:25 PM



The Honorable Judge Paul Ridgeway
Senior Resident Superior Court Judge

ATTACHMENT

25 February 2025

Plaintiff's Motion for Summary Judgment

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
23CV029308-910

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

Plaintiff,

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.

**PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT AS TO
SUPPLEMENTAL COMPLAINT**

Plaintiff Joshua H. Stein, in his official capacity as Governor of the State of North Carolina, pursuant to N.C. Gen. Stat. § 1A-1, Rule 56, moves for summary judgment in his favor on all claims he has asserted in this action because, viewing the evidence in the light most favorable to Defendants, there is no genuine issue as to any material fact and Plaintiff is entitled to judgment as a matter of law.

In support of this Motion, Plaintiff relies on the pleadings, including the Supplemental Complaint, and any other evidence of record.

WHEREFORE, Plaintiff respectfully requests that the Court enter an order granting this Motion and granting such other relief as the Court deems appropriate.

This the 25th day of February, 2025.

/s/ Eric M. David

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CERTIFICATE OF SERVICE

I hereby certify that on this day a copy of the foregoing document was served on the following parties via email as follows:

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Attorney for Plaintiff

This the 25th day of February, 2025.

By: /s/ Eric M. David
Eric M. David

ATTACHMENT

25 February 2025

Legislative Defendants' Motion for Summary Judgment

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
23CV029308-910

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

Plaintiff,

v.

PHILIP E. BERGER, in his official
capacity as PRESIDENT PRO TEMPORE
OF THE NORTH CAROLINA SENATE;
DESTIN C. HALL, in his official capacity
as SPEAKER OF THE NORTH
CAROLINA HOUSE OF
REPRESENTATIVES; and THE STATE
OF NORTH CAROLINA,

Defendants.

**LEGISLATIVE DEFENDANTS'
MOTION FOR SUMMARY
JUDGMENT**

NOW COME Defendants Philp 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 (together, “Legislative Defendants”), through undersigned counsel and pursuant to North Carolina Rule of Civil Procedure 56, and hereby move for summary judgment on all claims raised in Plaintiff’s Supplemental Complaint.¹ For the reasons stated in Legislative Defendants’ brief submitted to the Court and served on all parties contemporaneously herewith, there are no genuine issues of material fact as to any of Plaintiff’s claims, and Legislative Defendants are entitled to judgment as a matter of law.

¹ All parties have consented to 24-hour an extension of the deadline to file dispositive motions previously set by consent order.

This the 25th day of February, 2025.

WOMBLE BOND DICKINSON (US) LLP

/s/ Matthew F. Tilley

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North Carolina Senate, and Destin C. Hall, in
his official capacity as Speaker of the North
Carolina House of Representatives*

CERTIFICATE OF SERVICE

I hereby certify that on February 25, 2025, I caused a copy of the foregoing document to be served upon all parties via email as follows:

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/s/ Matthew F. Tilley
Matthew F. Tilley

ATTACHMENT

23 April 2025

Order Granting Plaintiff's Motion for Summary Judgment

NORTH CAROLINA
WAKE COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
23CV029308-910

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

Plaintiff,

v.

DESTIN C. HALL, in his official
capacity as SPEAKER OF THE
NORTH CAROLINA HOUSE OF
REPRESENTATIVES; and PHILIP E.
BERGER, in his official capacity as
PRESIDENT PRO TEMPORE OF
THE NORTH CAROLINA SENATE,

Defendants,

and

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

Intervenor-Defendant.

**ORDER GRANTING PLAINTIFF'S
MOTION FOR
SUMMARY JUDGMENT**

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

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

SUMMARY OF UNDISPUTED FACTS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSIONS OF LAW

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

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

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

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

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

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

I. Legal Standard

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

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

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

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

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

II. Justiciability

10. As an initial matter, the Panel must evaluate Defendants’ contention that this case presents a nonjusticiable political question. The Auditor argues that Article III, § 5(10) of the Constitution exclusively commits to the General Assembly and Governor the process for organizing the executive branch, rendering any question related to executive organization a non-justiciable political question. Recognizing that the Panel is bound by controlling appellate precedent, Legislative Defendants simply “reserve” this argument.

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

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

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

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

In other words,

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

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

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

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

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

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

III. Application of Text, History, and Precedent

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

It is therefore ORDERED, ADJUDGED, AND DECREED that:

1. Plaintiff's Motion for Summary Judgment is GRANTED;
2. Plaintiff's Motion for a Temporary Restraining Order and Preliminary Injunction is DENIED as moot;
3. Legislative Defendants' Motion for Summary Judgment is DENIED;
4. Pursuant to N.C. Gen. Stat. § 1-253 *et seq.* and North Carolina Rules of Civil Procedure 57 and 65, the Court hereby enters final judgment declaring that the following are unconstitutional and are therefore void and permanently enjoined: Sections 3A.3.(b), (c), (d), (f), (g), and (h) of Session Law 2024-57; and
5. The parties shall bear their own costs.

4/23/2025 10:18:29 AM

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



4/23/2025 10:43:17 AM

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



The Honorable Lori I. Hamilton
Superior Court Judge

Judge Womble respectfully dissents from the majority's order.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

This the 4/23/2025 day of April, 2025.
4/23/2025 11:17:39 AM



The Honorable R. Andrew Womble
Superior Court Judge