

NORTH CAROLINA COURT OF APPEALS

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

Plaintiff-Appellant,

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-Appellants.

and

BRAD BRINER, in his official capacity as STATE TREASURER OF NORTH CAROLINA,

Intervenor-Appellee.

From Wake County

GOVERNOR JOSHUA H. STEIN'S APPELLANT BRIEF

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ISSUES PRESENTED

- I. Does Senate Bill 166's restructuring of the Building Code Council's quorum and voting requirements violate separation of powers by depriving the Governor of constitutionally sufficient control over the Council?
- II. Does Senate Bill 382's transfer of an appointment to the State Treasurer and restructuring of the chair-selection process for the Utilities Commission violate separation of powers by depriving the Governor of constitutionally sufficient control?

INTRODUCTION

North Carolina's Constitution expressly requires that the State's legislative, executive, and judicial powers remain separate and distinct. N.C. CONST. art. I, § 6; *see also* 1776 N.C. CONST., Decl. of Rights, § IV; 1868 N.C. CONST. art. I, § 8. Our Separation of Powers Clause not only forbids one branch from exercising powers belonging to another, but also prohibits one branch from preventing another branch from exercising its authority.

Although the Separation of Powers Clause has changed very little since 1776, "the powers that the current constitution allocates to the legislative and executive branches have changed significantly." *State ex rel. McCrory v. Berger*, 368 N.C. 633, 645 (2016). The executive branch of 1776 was composed of a Governor and Council of State who were selected by the General Assembly and served one-year terms. That structure ensured a weak executive and allowed the legislature to not only write the laws but control their enforcement. Experience taught North Carolinians that this approach did not sufficiently protect their liberty. Realizing the full promise of the Separation of Powers Clause required strengthening the executive branch, and the people did so in subsequent constitutions and amendments.

Today's executive branch is led by the Governor—"the State's chief executive"—aided by nine other constitutionally-created executive officers, chosen by the people to fulfill their offices' core constitutional "functions and duties." *Cooper v. Berger*, 371 N.C. 799, 799 (2018) ("*Cooper Confirmation*"); *Martin v. Thornburg*, 320 N.C. 533, 546 (1987); *Stein v. Berger*, 387 N.C. 575, 581-82 (2025) (Dietz, J., concurring). The Separation of Powers Clause requires that this multi-member executive branch, not the General Assembly, "faithfully execute[], or give[] effect to" the State's laws. *McCrorry*, 368 N.C. at 635.

The trial court's order in this case ignores the Separation of Powers Clause and the changes North Carolinians have made to their constitution to empower the executive branch. First, the court wrongly rejected the Governor's challenge to Senate Bill 382's changes to the Utilities Commission. Section 3F.1(a) of Senate Bill 382 transfers to the State Treasurer one of the Governor's three appointments to the five-member Utilities Commission and grants the General Assembly the power to reject or remove the Governor's and Treasurer's appointees. The Commission's structure—especially in light of the General Assembly's purportedly unlimited authority to reassign the Treasurer's appointment to any other executive officer at any time—places the legislature, not the executive, in functional control of the Commission.

The trial court similarly erred by rejecting the Governor's challenge to Senate Bill 166. That law allows the General Assembly to appoint enough members to the Building Code Council to prevent it from operating at all, while at the same time

restricting the Governor's ability to remove members from the Council including his own appointees. Such a structure prevents the Governor from fulfilling his constitutional function and therefore violates the Separation of Powers Clause. *Hart v. State*, 368 N.C. 122, 126-27 (2015).

Ultimately, the challenged provisions permit the General Assembly to control executive bodies, or at least to prevent the executive branch from controlling them. That violates the Separation of Powers Clause. The trial court erred in concluding otherwise. Accordingly, this Court should reverse the trial court's order granting summary judgment on these claims to the Treasurer and Legislative Defendants.

STATEMENT OF THE CASE

At the end of 2024, the General Assembly passed laws governing judicial vacancies and altering the composition of the Building Code Council and the Utilities Commission. *See* N.C. Sess. L. 2024-49 (Senate Bill 166); N.C. Sess. L. 2024-57 (Senate Bill 382). Earlier this year, the Governor filed a verified complaint challenging the constitutionality of that legislation. (R pp 3-28). Later, State Treasurer Bradford B. Briner, who Senate Bill 382 tasks with appointing a member of the Utilities Commission, intervened as a defendant. (*See* R pp 62-81).

The Governor then moved for an order transferring this case to a three-judge panel and temporarily restraining and preliminarily enjoining Senate Bill 382's changes to the Utilities Commission. (R pp 31-38). Soon after, the trial court transferred the case to a three-judge panel. (R pp 59-60). Both the Governor and Legislative Defendants moved for summary judgment. (R pp 85-85, 88-92).

Following a hearing, the trial court granted in part and denied in part the Governor's motion. (R pp 93-94). The trial court agreed that the changes to the judicial vacancies statute violated our Constitution. (R p 93). But it rejected the Governor's challenge to the changes to the Building Code Council and the Utilities Commission and granted summary judgment to Legislative Defendants on those claims. (R pp 93-94). The Governor timely appealed this aspect of the three-judge panel's ruling. (R pp 101-102).

STATEMENT OF THE FACTS

This appeal concerns the Governor's facial challenges to provisions in two recently enacted laws, Senate Bill 166 and Senate Bill 382, which alter the structure of the Building Code Council and the Utilities Commission. Before the trial court, the parties agreed that the Governor's claims involved no dispute of material fact. The undisputed facts were as follows.

A. Senate Bill 382 strips the Governor of control over the Utilities Commission just five days after Governor Stein is certified as Governor-elect.

The North Carolina Utilities Commission was "created for the principal purpose of carrying out the administration and enforcement of the [Public Utilities Act]." N.C. Gen. Stat. § 62-23. The Commission is "an administrative board or agency," housed in the Department of Commerce. *Id.* §§ 62-23, 143B-433(1)(b). The Utilities Commission regulates "public utilities generally, their rates, services and operations, and their expansion in relation to long-term energy conservation and management policies and statewide development requirements." *Id.* § 62-2(b).

The Commission's regulatory authority is "broad." *State ex rel. Utilities Comm'n v. S. Bell Tel. & Tel. Co.*, 88 N.C. App. 153, 169 (1987). It includes the power to promulgate any rule or regulation "reasonable and necessary" to administer the Public Utilities Act; to set "standards, classification, regulations, practices, or service to be furnished, imposed, observed or followed by any or all public utilities;" and to make rules governing the operations of motor carriers and bus companies. N.C. Gen. Stat. §§ 62-31, 62-43(a), 62-261, 62-262, 62-263. The Commission may "investigate the books and papers," as well as "the condition and management," of any public utility to enforce compliance with the Act. *Id.* §§ 62-34, 62-37(a).

The Utilities Commission also exercises final executive authority. It issues certificates of public convenience for the construction, operation, acquisition, or control of public utilities. *Id.* §§ 62-110, 62-110.1. And it approves or denies the sale, assignment, pledge, or transfer of a utility franchise to a new owner. *Id.* § 62-111.

The Utilities Commission is led by a chair, who is "the chief executive and administrative officer of the Commission." N.C. Gen. Stat. § 62-13(a). The chair decides whether matters are heard by the full Commission or a panel of three Commissioners and dictates the composition of any such panels. *Id.* § 62-13(b). She also rules on procedural motions and petitions. *Id.* § 62-13(c). And she may unilaterally initiate investigations, complaints, or any other proceedings. *Id.* § 62-13(d).

Before Senate Bill 382, the Governor was authorized to appoint three of the Commission's five members, including a Commissioner whose term would begin July

1, 2025. The Governor was also authorized to designate the Commission's chair. Legislative Defendants were authorized to appoint the other two members. N.C. Gen. Stat. § 62-10 (2024).

Senate Bill 382 transferred one of the Governor's appointments to the Utilities Commission to the State Treasurer. N.C. Sess. L. 2024-57, § 3F.1(a) (amending N.C. Gen. Stat. § 62-10(a)). The Treasurer is independently elected and not subject to appointment or removal by the Governor. N.C. CONST. art. III, § 7(1); N.C. Gen. Stat. § 147-4. Like the Governor's appointees, the Treasurer's appointee is subject to confirmation by the General Assembly. N.C. Gen. Stat. § 62-10. The Treasurer has no authority to remove his or any other appointee.

The specific appointment transferred from the Governor to the Treasurer was for a Commissioner whose term began July 1, 2025. N.C. Sess. L. 2024-57, § 3F.1(b). If not for Senate Bill 382, the Governor would have submitted the name of his appointee to the General Assembly for confirmation by May 1, 2025. *See* N.C. Gen. Stat. § 62.10(a). Instead, the General Assembly confirmed the Treasurer's appointee in May. *See* N.C. Resolution 2025-4, § 1.

Section 3F.1(a) also eliminates the Governor's authority to appoint the Utilities Commission's chair. Instead, the chair is now selected by a majority of the Commission's members.

B. Senate Bill 166 dilutes the Governor's control over the Building Code Council.

The Building Code Council is an executive agency housed tasked with preparing, adopting, revising, and amending the North Carolina State Building Code,

our State's regulations governing commercial and multi-family construction. N.C. Gen. Stat. §§ 143-137(c), 143-138. The Building Code includes specific Code volumes for, *inter alia*, Energy Conservation, Electrical, Fuel Gas, Plumbing, Mechanical, and Existing Building[s]. N.C. Gen. Stat. §§ 143-136, 143-138. The Council is charged with adopting procedural requirements necessary to ensure "enforcement of the Code while safeguarding the rights of persons subject to the Code." N.C. Gen. Stat. § 143-139.

Before Senate Bill 166, the Building Code Council consisted of 17 members, all of whom were appointed by the Governor. *See* N.C. Sess. L. 2024-49, § 5.1.(a) (amending N.C. Gen. Stat. § 143-136(a)). The appointees were not subject to confirmation or approval by the General Assembly, but many were required to hold certain professional licenses. *Id.* The Governor could remove Council members without cause, at any time, and the Council could act upon the vote of a majority of its members. *Id.* (amending N.C. Gen. Stat. § 143-136(a1)).

The General Assembly enacted Senate Bill 166 over then-Governor Cooper's veto on September 11, 2024. Senate Bill 166 reduces the size of the Council to thirteen members, with the Governor retaining seven of the appointments and the General Assembly claiming six. *Id.* (amending N.C. Gen. Stat. § 143-136). As before, many appointees must possess certain professional licenses. *Id.* But Senate Bill 166 imposes a new requirement that the Governor's appointees must be confirmed by the General Assembly, and it restricts the Governor's removal power to his own

appointees, and only for “misfeasance, malfeasance, or nonfeasance.” *Id.* (amending N.C. Gen. Stat. §§ 143-136(a), (a1)).

Finally, Senate Bill 166 adds new quorum and voting requirements for the Council. *Id.* § 5.1.(c) (amending N.C. Gen. Stat. § 143-137). Now, nine of the thirteen members must be present for the Council to reach quorum and transact business. *Id.* Further, a vote of a least nine members is required for the Council to act, including making “any amendment or revision” to the Code. *Id.*

After the legislature enacted Senate Bill 382, the Governor challenged the changes Senate Bill 166 made to the Building Code Council, as well as Senate Bill 382’s changes to the Utilities Commission. The trial court rejected both challenges.

STATEMENT OF THE GROUNDS FOR APPELLATE REVIEW

The three-judge panel’s decision granting Legislative Defendants’ motion for summary judgment in part and the Treasurer’s motion for summary judgment in full is a final judgment appealable under N.C. Gen. Stat. § 7A-27(b).

SUMMARY OF ARGUMENT

The trial court erred when it denied the Governor summary judgment on his challenges to the General Assembly’s changes to the Building Code Council and Utilities Commission. The Building Code Council and Utilities Commission primarily perform executive functions. Because the executive branch—and, for the two bodies at issue, the Governor—is responsible for ensuring that the law is faithfully executed, the Separation of Powers Clause dictates that the executive branch maintain not only formal but functional control of both bodies. Functional

control turns on the executive branch's ability to appoint, supervise, and remove members.

Senate Bill 382 deprives the executive branch of the ability to ensure that the Utilities Commission faithfully enforces the Public Utilities Act. The Governor's ability to control the Commission was already limited by the requirement that his nominees be confirmed by the General Assembly and by his apparent lack of removal authority. But Senate Bill 382 entirely prevents the Governor from ensuring the Commission faithfully executes the law by affording him only a minority of seats on the Commission and depriving him of the ability to supervise the Commission by selecting its chair.

The fact that one of the Governor's appointments has been transferred to the Treasurer does not save the Act. Although the Governor sometimes shares responsibility for ensuring faithful execution of the law with Council of State members, our Supreme Court has held that executive agencies within the Governor's cabinet—like the Department of Commerce, which houses the Utilities Commission—“unquestionably fall[] under the Governor's purview.” *McCrorry*, 368 N.C. at 646 n.5. Moreover, transferring authority over the Utilities Commission to the Treasurer runs afoul of Article III, Section 11, which requires the General Assembly to group executive functions according to major purposes. The historical understanding of the Treasurer's role did not include regulating public utilities, and the Treasurer has heretofore played no role in the Utilities Commission's work.

Even if the Treasurer was fungible with the Governor, Senate Bill 382 still violates the Separation of Powers Clause. The Treasurer and Legislative Defendants assert that the General Assembly has plenary authority to alter the duties of Council of State members. That is incorrect. But even if they were right, the General Assembly cannot exercise its authority to reassign duties among the Council of State in ways that violate the Constitution. If the legislature has unconstrained power to transfer appointments to the Commission among the executive branch, then the legislature has functional control of the Commission. After all, if the Treasurer believes (unlike the Governor) that the General Assembly can not only refuse to confirm his nominee, but also transfer his authority to appoint a nominee altogether, then the Treasurer has an overwhelming incentive to do as the General Assembly pleases.

Finally, the timing of Senate Bill 382 heightens constitutional concerns. If the General Assembly can—as they assert here—shuffle the duties of Council of State members just five days after elections for those members are certified, then the General Assembly, not the people, decides who exercises executive functions. Early in North Carolina’s history, the General Assembly was empowered to select members of the Council of State, but the people long ago amended the Constitution to reserve that power for themselves. The trial court overlooked the General Assembly’s attempt to thwart the people’s power to directly elect their Council of State members.

Senate Bill 166 similarly constrains the Governor’s appointment authority by requiring that his nominees—the only ones from the executive branch—be confirmed

by the General Assembly. And it limits his authority to remove members as well. But its most concerning change is the one imposing a supermajority requirement for the Council to achieve quorum or take action. Although the Governor appoints a majority of members (again, subject to legislative confirmation), he does not appoint a supermajority. Functionally, then, the General Assembly appoints enough members to prevent the Council from ever meeting or, if they meet, ever acting. The Constitution, through its Separation of Powers and Take Care Clauses, precludes the legislature from establishing an executive branch body and then controlling its function. The trial court therefore erred by granting Legislative Defendants summary judgment on the Governor's challenge to Senate Bill 166.

For all these reasons, the trial court's order should be reversed.

ARGUMENT

Standard of Review

This Court reviews a trial court's decision to grant summary judgment *de novo*. *N.C. Farm Bureau Mut. Ins. Co. v. Herring*, 385 N.C. 419, 422 (2023). North Carolina courts have the power and the duty to determine the constitutionality of statutes. *E.g., Bayard v. Singleton*, 1 N.C. (Mart.) 5, 6-7 (1787). Although legislative acts are presumptively constitutional,¹ that presumption is not conclusive. *Moore v. Knightdale Bd. of Elections*, 331 N.C. 1, 4 (1992). Instead, courts must determine

¹ This Court is bound by our Supreme Court's holdings. If this matter reaches the Supreme Court, however, the Governor preserves his argument that the legislature is not entitled to a presumption of constitutionality in separation-of-powers cases.

whether a challenged action “exceeds constitutional limits.” *Leandro v. State*, 346 N.C. 336, 345 (1997) (citations omitted).

When a statute “plain[ly] and clear[ly]” exceeds constitutional limits, a court must declare it invalid. *McCrorry*, 368 N.C. at 639. A statute permitting a branch to violate the separation of powers is facially invalid. *Cooper v. Berger*, 370 N.C. 392, 416 n.12 (2018) (“*Cooper I*”); *see also* *McCrorry*, 368 N.C. at 645-46. Courts look to constitutional text, history, and precedent to determine a statute’s constitutionality. *Cooper I*, 370 N.C. at 413.

I. The North Carolina Constitution expressly protects the separation of powers and requires that the executive branch control enforcement of our State’s laws.

The trial court’s order below gave short shrift to constitutional text, history, and precedent. Our Constitution contains an express Separation of Powers Clause. Over time, the people of North Carolina strengthened the executive branch to more fully realize the liberty promised by that Clause. Precedents interpreting the Clause teach that the executive branch must not only maintain functional control of executive bodies, but that the General Assembly may not prevent the executive branch from ensuring faithful execution of the laws. Properly understood, the Separation of Powers Clause does not permit the legislature to structure the Building Code Council or Utilities Commission as it has here. The trial court erred in concluding otherwise, and this Court should reverse that decision.

A. North Carolina government is founded in separation of powers.

The separation of powers “is fundamental to our form of government.” *McCrorry*, 368 N.C. at 645. North Carolina’s Constitution expressly guarantees the separation of powers: “The legislative, executive, and supreme judicial powers of the State Government shall be forever separate and distinct from each other.” N.C. CONST. art. I, § 6. That provision is as old as our State. “Our founders believed that separating the legislative, executive, and judicial powers of state government was necessary for the preservation of liberty.” *McCrorry*, 368 N.C. at 635; *see also* 1776 N.C. CONST., Decl. of Rights, § IV; 1868 N.C. CONST. art. I, § 8.

The separation of powers prevents one branch of government from interfering with another branch, either directly or indirectly. A statute that allows one branch to “exercise[] power that the constitution vests exclusively in another branch” *per se* violates the Separation of Powers Clause. *McCrorry*, 368 N.C. at 645; *see also State ex rel. Wallace v. Bone*, 304 N.C. 591, 608 (1982). But the Clause equally forbids one branch from “prevent[ing] another branch from performing its constitutional duties.” *McCrorry*, 368 N.C. at 645; *see also Bacon v. Lee*, 353 N.C. 696, 715 (2001). This second, “more nuanced” offense is not governed by a “categorical rule,” but instead requires a “functional” analysis of the statutory scheme that examines the “specific factual and legal context” of the alleged violation. *Cooper Confirmation*, 371 N.C. at 806.

The Constitution vests the State’s executive power in the Governor and tasks him with the duty to “take care that the laws be faithfully executed.” N.C. CONST. art. III, §§ 1, 5(4). “But the Governor is not alone in this task”; nine additional

executive officers, who are collectively known as the Council of State, are also part of the executive branch. *Id.* §§ 2, 7(1), 8; *Cooper Confirmation*, 371 N.C. at 800.² Like the Governor, the Council of State members are directly elected by the people and are entitled to compensation for their services, which the General Assembly cannot reduce during their terms. *Id.* §§ 2, 7(1), 9.

“Each member of the Council of State has core ‘functions and duties under the constitution’ that can be performed only by that official and no one else.” *Stein*, 387 N.C. at 581 (Dietz, J. concurring); *e.g.*, N.C. CONST. art. IX, § 4 (Superintendent of Public Instruction is chief administrator of the State Board of Education); *id.* art. III, § 6 (Lieutenant Governor breaks ties in the Senate); *id.* art. V, § 7 (Treasurer ensures money is not withdrawn from state treasury absent an appropriation); *Martin*, 320 N.C. at 545 (representing the State’s legal interests is the Attorney General’s core constitutional function). Council of State members have an obligation to ensure faithful enforcement of the law within their core constitutional functions. *See, e.g.*, N.C. CONST. art. VI, § 7; *Stein*, 387 N.C. at 578 n.4 (majority opinion); *id.* at 583 (Dietz, J. concurring).

B. Responding to legislative tyranny, North Carolinians strengthened the powers and independence of the Governor and the executive branch.

Our executive branch was not always so robust. As originally conceived, the Governor and other Council of State members were short-term, legislatively

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

appointed offices almost entirely beholden to the General Assembly. 1776 N.C. CONST., art. XIII, XV.

Experience taught North Carolinians that a weak executive could not effectively check the other branches to the extent necessary to preserve liberty. *See, e.g.,* Arch T. Allen, *A Study in Separation of Powers: Executive Power in North Carolina*, 77 N.C. L. REV. 2049, 2054 (1999) (“The early experience in North Carolina and other states ‘evinced a powerful tendency in the legislature to absorb all power into its vortex.’” (quoting Sam J. Ervin, Jr., *Separation of Powers: Judicial Independence*, 35 LAW & CONTEMP. PROBS. 108, 113 (1970))). So, over the history of North Carolina, the people shifted power away from the General Assembly while enhancing and reinforcing executive authority. *See, e.g.,* John L. Sanders, *Our Constitutions: A Historical Perspective*, in NORTH CAROLINA MANUAL 2011-2012 at 73, 73-91, available at <https://digital.ncdcr.gov/Documents/Detail/north-carolina-manual-2011-2012/4384827>.

The 1868 Constitution established a strong, independent executive. It provided for an “Executive Department” composed of a Governor and other executive officers, each of whom were directly elected by the people for terms of four years. 1868 N.C. CONST. art. III, § 1; *see also* John V. Orth & Paul M. Newby, THE NORTH CAROLINA STATE CONSTITUTION 123 (2d ed. 2013).

Within this Executive Department, the Governor was vested with “the Supreme executive power of the State.” 1868 N.C. CONST. art. III § 1. As relevant here, the 1868 Constitution was the first to provide that the Governor “shall take care

that the laws be faithfully executed.” 1868 N.C. CONST. art. III, § 7. Indeed, “[t]he history of the duties of the governor of North Carolina is of an ever-lengthening list.” Orth & Newby, *supra* at 118.

The 1971 Constitution carried forward the modern executive branch that the 1868 Constitution established and introduced new provisions to ensure efficient and accountable government power. See REPORT OF THE NORTH CAROLINA STATE CONSTITUTION STUDY COMMISSION (1968) 10-12 (hereinafter “*Study Commission*”). To curb the General Assembly’s habit of creating an ever-increasing number of state agencies “subject to little or no effective coordination or direction by” the Governor or the other elected executives, voters amended Article III to add Section 11. See N.C. Sess. Laws 1969, ch. 932; John L. Sanders & John F. Lomax, Jr. AMENDMENTS TO THE CONSTITUTION OF NORTH CAROLINA 1776-1996 at 16 (UNC Institute of Government 1997). Article III, § 11 prohibits the General Assembly from creating more than 25 executive branch agencies, and requires the General Assembly to group “functions, powers, and duties . . . according to major purposes.” Thus, while the General Assembly enjoys some discretion to reassign duties across the executive branch, the legislature can assign a Council of State member only duties that are sufficiently related to a “major purpose” of the member’s core constitutional functions. See N.C. CONST. art. III, § 11; *Stein*, 387 N.C. at 581-82 (Dietz, J. concurring). Section 11, the Constitution Study Commission explained, would not only streamline the executive branch, but also ensure that it was responsive to the people of the State. *Study Commission* at 130-131.

Voters adopted Article III, § 5(10) at the same time and for similar reasons, specifically to grant the Governor the power to initiate changes to the structure of the executive branch. *See* N.C. Sess. Laws 1969, ch. 932; Sanders & Lomax, *supra*, at 16. Although the amendment recognized the General Assembly’s power to assign functions, powers, and duties to executive agencies, it did not grant the legislature any *additional* authority. Quite the opposite; the amendment recognized that the people had “settle[d] on the Governor the responsibility and authority for” organizing the executive branch. *Id.* at 131.

As this history illustrates, today’s executive branch is defined by its independence from the General Assembly and accountability to the people. The Governor and Council of State’s “constitutional creation, composition, purpose, and functions set [them] apart from agencies created and defined by statute.” *Conner v. N.C. Council of State*, 365 N.C. 242, 250 (2011). The Governor and the Council of State have their own core constitutional duties, which the legislature cannot take away, and the people—not the General Assembly—choose the individuals who carry out those duties.

C. The Constitution requires that the executive branch, led by the Governor, control enforcement of the State’s laws.

Our Supreme Court has explained that the “distinctive purpose” of North Carolina’s modern executive branch is to “faithfully execute[], or give[] effect to” the State’s laws. *McCrorry*, 368 N.C. at 635. Accordingly, the executive branch, not the legislature, must control any bodies that enforce the State’s law.

In *McCrorry v. Berger*, our Supreme Court invalidated a statute that left the Governor with a minority of appointments to three environmental commissions. 368 N.C. 633 (2016). The three commissions were primarily administrative or executive in character—each promulgated regulations or set standards—and exercised final executive authority by, for example, assessing civil penalties or granting permits. *Id.* at 636-37, 646. Because the executive branch’s “distinctive purpose” is to “faithfully execute[], or give[] effect to” the laws, the legislature could not deprive the Governor of constitutionally sufficient control over that kind of executive commission. *Id.* at 636, 645-47.

Whether the Governor has sufficient control, the Court explained, “depends on his ability to appoint the commissioners, to supervise their day-to-day activities, and to remove them from office.” *Id.* at 646. The challenged statutes “limit[ed] each of these methods of control.” *Id.* The Governor’s appointment authority was constrained because the Governor could not appoint a majority of members. *Id.* His removal authority was also “sharply constrained,” because he could remove members only for cause. *Id.* As a result of his limited appointment and removal powers, the Governor’s ability to supervise the commissions was minimized. *Id.* When officers who the Governor did not appoint and over whom he has little supervisory or removal authority “form a majority on a commission that has the final say on how to execute the laws,” the Court held, the separation of powers is violated because “the Governor cannot take care that the laws are faithfully executed.” *Id.* at 647.

Next, in *Cooper I*, the Court held that a statute requiring the Governor to select half the members of the State Board of Elections from a list provided by leadership of the opposing political party violated the separation of powers, at least where the Governor could not select the Board's executive director and had limited removal authority. 370 N.C. at 422. That structure was impermissible, the Court explained, because to satisfy his obligation to faithfully execute laws, the Governor must be able to have a say on how the laws are executed "within a reasonable period of time." *Id.* at 418. The constraints on the Governor's appointing, removal, and supervisory powers prevented him from timely ensuring faithful execution of the law.

Finally, in *Cooper Confirmation*, the Court rejected the Governor's challenge to a law requiring Senate confirmation for cabinet secretaries. 371 N.C. at 801. As in *McCrorry*, the Court recognized that the Governor's constitutional role required exclusive control over cabinet agencies. *Id.* at 807 ("Cabinet members are some of the Governor's closest deputies."); *McCrorry*, 368 N.C. at 646 n.5 (explaining that cabinet agencies "unquestionably fall[] under the Governor's purview"). But Senate confirmation, the Court explained, did not rise to the level of constitutional interference with the Governor's executive authority because the Governor's appointee will ultimately "be a person that he alone has chosen" and he "may select his nominees from a virtually unlimited pool of qualified people." *Cooper Confirmation*, 371 N.C. at 801, 808. Moreover, the Court emphasized, the Governor retained expansive authority to supervise and remove cabinet heads. *Id.* at 808.

These precedents teach that the executive branch's responsibility to ensure faithful execution of the laws requires that the executive branch be able to effectively supervise, timely remove, and, without undue legislative interference, appoint members of executive bodies. Those requirements flow from the Constitution's text and history. The trial court's order below conflicts with these precedents.

II. Senate Bill 382's changes to the Utilities Commission violate separation of powers.

The trial court erred when it upheld Senate Bill 382's changes to the Utilities Commission. The bill's changes deprive the Governor of control over an executive body that resides in his own cabinet agency. *McCrorry* already held that this structure violates the Separation of Powers Clause. Legislative Defendants and the Treasurer point to a footnote in *McCrorry* that they argue demonstrates *McCrorry's* inapplicability. But that footnote confirms that Senate Bill 382 is unconstitutional. And, in any event, transferring the Governor's appointment to the Treasurer runs afoul of other provisions of the Constitution. The trial court erred in concluding otherwise.

A. The Utilities Commission performs primarily executive functions.

The Separation of Powers Clause requires that the executive branch control bodies that perform primarily administrative or executive functions or that exercise final authority over executive branch decisions. *McCrorry*, 368 N.C. at 645. In *McCrorry*, our Supreme Court concluded that three boards with authority to "promulgate rules"; "make," "affirm, modify, or overrule" agency determinations; or

“issue orders” to enforce violations of law performed primarily executive functions. *Id.* at 636-37, 645-46. Moreover, the fact that a body is housed within an executive branch agency is at least some evidence that the body is primarily executive or administrative in character.

The Utilities Commission primarily performs executive functions. North Carolina’s statutes confirm—by their own terms—that the Utilities Commission is an executive entity. The Public Utilities Act explicitly states that the Utilities Commission was “created for the *principal purpose* of carrying out the *administration and enforcement* of [the Public Utilities Act].” N.C. Gen. Stat. § 62-23 (emphases added). Those same statutes further provide that the Commission is “an *administrative* board or agency.” *Id.* (emphasis added). And the General Assembly’s decision to house the Commission in the Department of Commerce, one of the executive branch’s principal departments,³ is further evidence of the Commission’s administrative or executive character. N.C. Gen. Stat. §§ 143B-6(9); 143-431(a)(2)(b); 143B-433(1)(b). It is difficult to imagine how the legislature could be clearer than this in stating that it understands the Commission to be an executive entity.

The Commission’s responsibilities are also largely executive. It has investigatory authority—a hallmark of law enforcement. The Commission may

³ Principal departments are, unlike the Council of State, executive and administrative departments created by statute. *See* N.C. Gen. Stat. § 143B-6 (enumerating the principal departments). They are generally led by an official who is appointed by and serves at pleasure of the Governor. *Id.* § 143B-9(a). And the Governor may allocate functions to them or reallocate functions among them, in many instances without the approval of the General Assembly. *Id.* § 143B-12(a).

“investigate the books and papers,” as well as “the condition and management,” of public utilities to ensure compliance with the Public Utilities Act. *Id.* §§ 62-34, 62-37(a). And it exercises final executive authority by issuing certificates of public convenience for the construction, operation, acquisition, or control of public utilities or by approving or denying the sale, assignment, pledge, or transfer of a utility franchise to a new owner. *Id.* §§ 62-110, 62-110.1, 62-111. In that way, the Commission is indistinguishable from the executive commissions in *McCrorry*, 368 N.C. at 645-46.

Because it performs primarily executive and administrative functions, the executive branch (and for a body housed in one of the Governor’s principal departments, the Governor himself) must have constitutionally sufficient control to ensure that the Commission faithfully enforces the law. As shown below, the Governor and executive branch functionally lack such control.

B. Senate Bill 382 deprives the Governor (and the executive branch) of constitutionally sufficient control over the Utilities Commission.

1. Senate Bill 382 fails the *McCrorry* test.

Because the Utilities Commission is an executive entity in a principal cabinet agency, the Governor must have sufficient control over it to ensure that the Commissioners faithfully execute the law. *Id.* at 646 & n.5. But Senate Bill 382 deprives the Governor of that control.

The Governor has little, and possibly no, authority to remove Commissioners. The Public Utilities Act does not mention removal of members by the Governor.

Instead, the Act provides that “[m]embers of the Commission shall be liable to impeachment for the causes and in the manner provided for judges.” N.C. Gen. Stat. § 62-10(i). If the Governor has any removal authority, it is limited to removal for misfeasance, malfeasance, or nonfeasance. *See* N.C. Gen. Stat. § 143B-13(d). Thus, the Governor’s removal authority is at best “sharply constrain[ed]” and at worst non-existent. *McCrory*, 368 N.C. at 646; *see also Cooper I*, 370 N.C. at 416.

The Governor’s powers of supervision are also limited under the new law. Senate Bill 382 eliminates the Governor’s authority to appoint the Commission’s chair, who exercises significant supervisory authority over the Commission’s work. N.C. Sess. L. 2025-57, § 3.F.1.(a) (amending N.C. Gen. Stat. § 62-10(e)). The Commission now elects its chair by majority vote, but the Governor does not appoint a majority of Commissioners. *Id.* And although the Utilities Commission is administratively housed within the Department of Commerce, the Commerce Secretary has no authority over the Commission. N.C. Gen. Stat. § 143B-431(a)(2); *see McCrory*, 368 N.C. at 645 (explaining that a commission’s independence from its cabinet agency demonstrates lack of supervisory control).

Finally, Senate Bill 382 imposes significant new limits on the Governor’s already constrained appointment authority. The Governor’s appointees to the Commission are already subject to legislative confirmation. N.C. Gen. Stat. § 62-10(a). Appointees generally cannot begin serving until they are confirmed. *Id.*; *but see id.* § 62-10(g) (allowing recess appointments to serve in an interim capacity).

Senate Bill 382 exacerbates the limits on the Governor's appointment authority by transferring one of the Governor's three appointees to the five-member Commission to the Treasurer, depriving the Governor—and the executive branch—of a majority of appointees. N.C. Sess. L. 2024-57, § 3F.1.(a) (amending N.C. Gen. Stat. § 62-10(a)). The Treasurer is an independently elected member of the Council of State not subject to appointment or removal by the Governor. N.C. CONST. art. III, § 7(1); N.C. Gen. Stat. § 147-4. The Governor therefore has no control over who the Treasurer appoints. But, as shown below, the legislature does.

Because Senate Bill 382 deprives the Governor of the ability to ensure that a body that is housed in one of his principal departments and primarily performs executive functions is faithfully executing the law, it violates the Separation of Powers Clause. The trial court's decision to the contrary should be reversed.

2. The Treasurer is not fungible with the Governor.

In their briefing below, Legislative Defendants argued that Senate Bill 382's changes to the Utilities Commission are constitutional because the law *merely* transfers appointment authority from one executive branch official (the Governor) to another (the Treasurer). Retaining appointment authority in the executive branch, they argued, could not possibly amount to a separation-of-powers violation. This argument is misguided. Although the Treasurer is also an executive branch official, when it comes to the appointment of Utilities Commissioners, he is not fungible with the Governor, for three main reasons that the trial court ignored or rejected.

First, the legislature cannot reassign one Council of State member's core constitutional duties to another. Binding precedent establishes that the Governor's

core constitutional duties include ensuring that his cabinet agencies faithfully execute the law. *McCrorry*, 368 N.C. at 646 n.5. Second, to the extent the General Assembly can reallocate functions within the executive branch, it must group those functions together “according to major purposes.” N.C. CONST. art. III, § 11. Regulating public utilities does not relate to a major purpose of the Treasurer. Finally, the trial court overlooked how Senate Bill 382 functionally gives the General Assembly control of the Treasurer’s appointment to the Commission.

The trial court’s first mistake was forgetting that the General Assembly may not assign a core constitutional function of the Governor to another executive branch official. *McCrorry* held that there are certain circumstances where the Governor alone is responsible for ensuring faithful execution of the law and where, therefore, the Governor alone must have sufficient control. *McCrorry*, 368 N.C. at 646 n.5. The Governor’s cabinet agencies are the quintessential example. *Id.* Entities within those departments, *McCrorry* explained, “unquestionably fall[] under the Governor’s purview,” and must be subject to gubernatorial control. *Id.*

Here, the Utilities Commission is housed within the Department of Commerce, one of the Governor’s cabinet agencies. N.C. Gen. Stat. §§ 143B-431(a)(2)(b); 143B-433(1)(b), 143B-6(9). Accordingly, the responsibility to ensure the Utilities Commission faithfully executes the law falls to the Governor alone. *See McCrorry*, 368 N.C. at 646 n. 5.

Legislative Defendants and the Treasurer noted to the trial court that *McCrorry* expressly declined to hold that the General Assembly can *never* deny the Governor

control of an entity exercising executive authority by transferring some of his authority to another executive branch official. *See McCrory*, 368 N.C. at 646 n.5. True, but in the very next sentence of the opinion, *McCrory* explained that Governor must control executive bodies that are organized like the Utilities Commission. *Id.* The trial court erred by ignoring *McCrory's* holding that the Governor is alone is responsible for ensuring the faithful execution of the laws by his cabinet agencies. *Cf. Stein*, 387 N.C. at 576-77.

In its second error, the trial court ignored Article III, Section 11's limits on the General Assembly's authority to reallocate statutory duties in the executive branch. Article III, Section 11 requires the legislature to group executive functions according to "major purposes." Thus, although the General Assembly enjoys some discretion to reassign duties across the executive branch, the legislature can assign a Council of State member only duties that are sufficiently related to a "major purpose" of the member's core constitutional functions. *Stein*, 387 N.C. at 581-82 (Dietz, J. concurring).

But the work of the Utilities Commission does not relate to any "major purpose" of the Treasurer's core constitutional functions. N.C. CONST. art. III, § 11. The Treasurer's primary responsibilities are ensuring that "[n]o money shall be drawn down from the State treasury but in consequence of appropriations made by law" and to "publish annually" "an accurate account of the receipts and expenditures of State funds." N.C. CONST. art. V, § 7; *Cooper v. Berger*, 376 N.C. 22, 43 (2020) ("*Cooper Block Grants*") (describing Article V, Section 7 as the "definition[] of the . . .

State Treasurer found in the State constitution”). Those responsibilities are consistent with the common understanding of the duties of a treasurer, which include “prudently depositing (or, if authorized, investing) and safeguarding the organization’s funds and otherwise managing its finances; . . . disbursing money as authorized; and reporting . . . on the state of the treasury.” *Treasurer*, BLACK’S LAW DICTIONARY (11th ed. 2011). Regulating public utilities has little to do with managing the state’s accounts.

Nor has the Treasurer’s “role typically involve[d]” regulating public utilities. *See Stein*, 387 N.C. at 582 (Dietz, J. concurring). The State Treasurer became a constitutional officer in 1868. N.C. CONST. of 1868, art. III, § 13. His initial duties were simply to receive payments to and make payments from the State and to keep a record of such payments, not to regulate public utilities. *See Battle’s Revisal of the Public Statutes of North Carolina, adopted by the General Assembly at the Session of 1872-73*, Chap. 78 § 64 (William H. Battle ed., 1873). Neither Legislative Defendants nor the Treasurer could identify for the trial court examples of the Treasurer regulating public utilities.

Finally, the trial court overlooked how Senate Bill 382 *functionally* gives the General Assembly control of a majority of appointments to the Utilities Commission.

Legislative Defendants assert—and the Treasurer appears to agree—that the General Assembly has the authority to reassign appointment authority to any Council of State member at any time. But if that is true, then the General Assembly

effectively controls the Treasurer's appointment, and, by extension, a majority of appointments.

The appointment power typically confers significant control, even when it is subject to legislative confirmation. *Cooper Confirmation*, 371 N.C. at 801. But that is only because the appointing official has a "virtually unlimited pool of qualified people" from which to select and the nominee will ultimately "be a person that he alone has chosen." *Id.* Even if an official's first appointee is rejected, the official retains the ability to select another person.

As a practical matter, none of that is the case if the General Assembly can reassign the appointment authority at any time. Instead, the ever-present specter of the General Assembly reassigning appointment authority gives the appointing official little choice but to appoint the General Assembly's preferred candidate. An official who does otherwise risks not only having her nominee rejected, but also having her authority to make an appointment reassigned to a more pliant Council of State member.

As a result, the General Assembly will have an extraordinary amount of control over who the Treasurer appoints, while also making two appointments of its own (without subjecting them to confirmation by the Governor or any other executive official). Because the separation of powers analysis is a "functional" one that depends on the "specific factual and legal context" of the challenged structure, the Court must consider this practical, functional reality. *Cooper Confirmation*, 371 N.C. at 806.

The fact that the General Assembly asserts the authority to reassign appointment authority in legislation enacted just weeks after elections for Council of State members took place heightens the constitutional concerns. North Carolinians adopted a Constitution that requires direct election of Council of State members because that democratic accountability gives Council of State members independence from the legislature. Senate Bill 382 undermines this democratic accountability by substituting the people's choice about who should exercise executive power with that of a lame-duck General Assembly.

Senate Bill 382 specifically damages the democratic accountability and independence of the Treasurer. Assume that voters support the Treasurer's appointment to the Utilities Commission. Should they reelect Treasurer Briner to the same post, hoping that he will make similar appointments in the future? Should they elect him Lieutenant Governor? Auditor? Even if the State Treasurer has the authority to appoint a Commissioner on election day 2028, that authority might have shifted elsewhere come inauguration day 2029.

Or consider the Board of Directors of the North Carolina Investment Authority, a body created within the Department of the State Treasurer by legislation Governor Stein signed into law earlier this summer. *See* N.C. Sess. L. 2025-6, § 2.2 (codifying N.C. Gen. Stat. § 147-71.1); *see also id.* (codifying N.C. Gen. Stat. § 147-70.1). Legislative Defendants and the Treasurer appear to believe that the General Assembly could deprive Treasurer Briner of any say in the composition of this board within his own department by transferring his appointments to, say, the

Commissioner of Agriculture. And if voters responded by electing Treasurer Briner Commissioner of Agriculture in the next election, Legislative Defendants and the Treasurer contend that a lame duck General Assembly could reject the voters' will and yet again reassign the appointments, this time to, say, the Commissioner of Labor.

The Constitution does not tolerate this destabilizing gamesmanship. Senate Bill 382's changes to the Utilities Commission violate the Separation of Powers Clause. This Court should reverse the trial court's contrary order.

III. Senate Bill 166's changes to the Building Code Council violate the separation of powers.

The trial court erred when it upheld Senate Bill 166's changes to the composition of the Building Code Council. The bill's changes afford the General Assembly a degree of control that allows the legislature to supervise the Council's executive actions. Such a structure is unconstitutional.

A. The Building Code Council performs primarily executive functions.

Like the Utilities Commission, the Building Code Council's functions are primarily administrative or executive. *See supra* II.A.1. It is housed within and staffed by an executive department, the Department of Insurance. N.C. Gen. Stat. § 143-137(c). The Council "promulgates rules." Specifically, it prepares, adopts, revises, and amends the North Carolina State Building Code, including the North Carolina Energy Code, the North Carolina Electrical Code, the North Carolina Fuel Gas Code, the North Carolina Plumbing Code, the North Carolina Mechanical Code,

the North Carolina Existing Building Code, and any other code applicable to commercial or multi-family construction. N.C. Gen. Stat. §§ 143-136, -138. And it plays an essential role in “enforcement of the [Building] Code.” N.C. Gen. Stat. § 143-139(a) (conferring authority to adopt procedural requirements for Code enforcement on the Council).

Because the Building Code Council primarily performs executive and administrative functions, the executive branch must have enough control over that entity to ensure that it faithfully enforces the law.

B. Senate Bill 166’s changes to the Building Code Council functionally give the General Assembly control over the Council’s execution of laws.

Because the Building Code Council’s functions are primarily administrative and executive, the trial court erred by concluding that Senate Bill 166’s changes to the Council were constitutional.

Whether the executive branch retains sufficient control over an executive body turns on the executive’s ability to appoint members, to supervise their day-to-day activities, and to remove them from office. *McCrorry*, 368 N.C. at 646. The test is functional, not formal; courts examine the factual and legal context of each challenged law. *Id.*

Here, the General Assembly has, through Senate Bill 166, deprived the executive branch of control sufficient to ensure that the laws administered by the Council are faithfully executed. First, Senate Bill 166 gives the Governor (the only executive who appoints members to the Council) a bare majority of appointments—

seven, to the General Assembly's six. N.C. Sess. L. 2024-49, § 5.1(a) (amending N.C. Gen. Stat. §§ 143-136(a)). But unlike other boards that can take action by majority vote, Senate Bill 166 imposes a supermajority requirement on the Council. *Id.* Thus, it takes nine Council members to (a) establish a quorum and (b) take any action. *Id.*

Through the supermajority requirement, the General Assembly has granted itself control over *all* Council activity. Even if all seven of the Governor's appointees are present at every meeting and vote in the affirmative on the Council's activities, nothing can happen without additional support—at least two of the General Assembly's nominees are indispensable. The General Assembly could render the Council useless by failing to appoint members, directing its appointees to avoid Council meetings, or causing them to vote against any action.

Not only does Senate Bill 166 give the Legislative Defendants functional control over the operations of the Council, it also sharply curtails the Governor's ability to remove its members. Prior to enactment of Senate Bill 166, the Governor could remove any member at his pleasure. This gave the Governor the ability to quickly replace any member who was not faithfully executing the law. Senate Bill 166 limits the Governor's removal authority in two ways. First, it changed the law such that now the Governor may remove only those members he appointed. N.C. Sess. L. 2024-49, §§ 5.2(a) (amending N.C. Gen. Stat. §§ 143-136.1(b)). Second, it permits the Governor to remove those appointees only for "misfeasance, malfeasance, or nonfeasance." So, if the legislature appoints members who never attend meetings, the Governor is powerless to threaten removal (or to actually remove someone) as a

means of ensuring the Council can perform its statutory duties and execute the relevant laws.⁴

Taken together, the changes made by the Legislative Defendants in Senate Bill 166 to the operation of the Building Code Council usurp the authority of the executive over one of its bodies, in favor of the legislative branch. The changes therefore violate the Separation of Powers Clause. This Court should reverse the trial court's erroneous decision holding otherwise.

CONCLUSION

For the forgoing reasons, this Court should reverse the trial court's decision and enjoin the challenged provisions of Senate Bill 166 and Senate Bill 382.

⁴In contrast, the Governor maintains attendance requirements for appointees, and absence is a basis for removal of his appointees. See Office of Governor Beverly Perdue, *Ethics and Attendance Standards for Gubernatorial Appointees to Boards*, Executive Order 34. No. 4 (2009). (This Executive Order is still effective today). No such requirements exist for the General Assembly appointments to the Council.

Respectfully submitted, this the 12th day of September, 2025.

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CERTIFICATION OF WORD COUNT

Pursuant to Rule 33(b) of the North Carolina Rules of Appellate Procedure, the undersigned counsel certifies that this brief contains fewer than 8,750 words, excluding covers, captions, indexes, tables of authorities, certificates of service, certificates of compliance with this rule, counsel's signature block, and appendixes.

This the 12th day of September, 2025.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was served upon all parties set forth hereunder by e-mail addressed as follows:

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