No. 114P25 TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

* * * * * * * * * * * * * * *

JOSHUA H. STEIN, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF NORTH CAROLINA

v.

PHILIP E. BERGER, IN HIS OFFICIAL CAPACITY AS PRESIDENT PRO TEMPORE OF THE NORTH CAROLINA SENATE; DESTIN C. HALL, IN HIS OFFICIAL CAPACITY AS SPEAKER OF THE NORTH CAROLINA HOUSE OF REPRESENTATIVES; AND THE STATE OF NORTH CAROLINA

and

DAVE BOLIEK, IN HIS OFFICIAL CAPACITY AS NORTH CAROLINA STATE AUDITOR

From N.C. Court of Appeals
P25-298

From Wake
23CV029308-910

* * * * * * * * * * * * * * *

ORDER OF THE COURT

This case arises from a legislative enactment altering the structure of the State Board of Elections and county boards of elections by transferring oversight of these administrative boards to the State Auditor. A divided three-judge panel of the Superior Court, Wake County, ruled that the law at issue, Session Law 2024-57, was unconstitutional. Defendants appealed to the Court of Appeals, which stayed

enforcement of the three-judge panel's order by issuing the writ of supersedeas. Plaintiff Governor Joshua H. Stein, seeking review of the Court of Appeals' ruling, filed a Motion For Temporary Stay, Petition for Writ of Supersedeas, and Petition for Writ of Certiorari with this Court.

Importantly, the Governor's filings do not ask this Court to decide the substantive constitutional issue, nor do we decide it here. Instead, we must weigh the likelihood that the Court of Appeals made some error of law when it blocked enforcement of the three-judge panel's order. *See Cryan v. Nat'l Council of YMCAs*, 384 N.C. 569, 572, 887 S.E.2d 848, 851 (2023). We are therefore tasked with determining whether the Court of Appeals likely erred by allowing Session Law 2024-57 to remain intact pending appellate review.

We review the Court of Appeals' order solely for abuse of discretion. *Cf. id.* at 573, 887 S.E.2d at 851 (applying this standard when reviewing a Court of Appeals order on the writ of certiorari). An abuse of discretion occurs when the ruling below was "manifestly unsupported by reason, or so arbitrary that it could not have been the result of a reasoned decision." *Id.* (quoting *State v. Locklear*, 331 N.C. 239, 248, 415 S.E.2d 726, 732 (1992)). Even if the Governor were to show error likely occurred at the Court of Appeals, he must also demonstrate "extraordinary circumstances" warranting the writ of certiorari, such as "a showing of substantial harm, considerable waste of judicial resources, or 'wide-reaching issues of justice and liberty at stake.' " *Id.* at 572–73, 887 S.E.2d at 851 (quoting *Doe v. City of Charlotte*, 273 N.C.

App. 10, 23, 848 S.E.2d 1, 11 (2020)).

The Governor's filings fail at the first step. There are multiple grounds upon which the Court of Appeals could have made a reasoned decision to stay the three-judge panel's order here. *See, e.g.*, *McKinney v. Goins*, No. 109PA22-2, slip op. at 10–18 (N.C. 2025) (explaining the fundamental approach according to which North Carolina's courts evaluate a law's constitutionality); *Harper v. Hall*, 384 N.C. 292, 325–350, 886 S.E.2d 393, 415–31 (2023) (exploring the political question doctrine and non-justiciability). For purposes of this order, however, it suffices to point out just one: the three-judge panel unambiguously misapplied this Court's precedent.

It is well settled that the state constitution apportions executive power among the ten individually elected officers of the Council of State,[1] led by the Governor.[2] In other words, the Governor heads the executive branch but does not unilaterally exercise the executive power. Given the constitution's distribution of executive power among a multi-member executive branch, this Court's decisions interpreting the

[1] These officers are the Governor, Lieutenant Governor, Secretary of State, Auditor, Treasurer, Superintendent of Public Instruction, Attorney General, Commissioner of Agriculture, Commissioner of Labor, and Commissioner of Insurance. *See* N.C. Const. art. III, §§ 7–8.

[2] *See*, *e.g.*, *Tice v. Dep't of Transp.*, 67 N.C. App. 48, 55, 312 S.E.2d 241, 245 (1984); *Martin v. Thornburg*, 320 N.C. 533, 546, 359 S.E.2d 472, 480 (1987); *Atkinson v. State*, No. 09-CVS-006655, slip op. at 1–3 (N.C. Super. Ct. July 17, 2009) (order); *Conner v. N.C. Council of State*, 365 N.C. 242, 250, 716 S.E.2d 836, 841–42 (2011); *State ex rel. McCrory v. Berger*, 368 N.C. 633, 655–57, 781 S.E.2d 248, 262–63 (2016) (Newby, J., concurring in part and dissenting in part); *Cooper v. Berger* (*Cooper Confirmation*), 371 N.C. 799, 800 n.1, 822 S.E.2d 286, 290 n.1 (2018); John V. Orth & Paul Martin Newby, *The North Carolina State Constitution* 124–25 (2d ed. 2013) ("Under the 1868 constitution, the Council of State became a body of directly elected officers, with executive duties of their own.").

scope of that power have carefully and deliberately explained that they "take[ ] no position on how the [S]eparation of [P]owers [C]lause applies to those executive departments that are headed by the independently elected members of the Council of State." *State ex rel. McCrory v. Berger*, 368 N.C. 633, 646 n.5,781 S.E.2d 248, 256 n.5 (2016); *Cooper v. Berger* (*Cooper I*), 370 N.C. 392, 407 n.4, 809 S.E.2d 98, 107 n.4 (2018); *Cooper v. Berger* (*Cooper Confirmation*), 371 N.C. 799, 806 n.5, 822 S.E.2d 286, 293 n.5 (2018).

The above-quoted language—which appears verbatim in all of these opinions—demonstrates that the present case is one of first impression. In cases of first impression, the presumption of constitutionality is especially strong.[3] The present case concerns the General Assembly's ability to reassign certain duties *among* executive constitutional officers *within* the executive branch. It does not implicate the classic separation of powers question of whether certain functions belong in the executive or legislative branches. This renders *McCrory*, *Cooper I*, and *Cooper Confirmation* inapposite, as each case explicitly noted.

Despite the direct caveats of *McCrory*, *Cooper I*, and *Cooper Confirmation*, the

[3] This is because cases of first impression inherently lack precedential guidance and require the reviewing court to conduct a novel constitutional analysis. Accordingly, it is particularly inappropriate for courts in such cases to declare an act of the General Assembly unconstitutional unless a rigorous examination of text and history reveals a constitutional violation beyond a reasonable doubt. *See McKinney*, slip op. at 10, 15 (explaining that enacted laws are presumptively constitutional and must be proven otherwise beyond a reasonable doubt, which courts evaluate by "examin[ing] the text of the relevant [constitutional] provision, the historical context in which the people of North Carolina enacted it, and this Court's precedents interpreting it").

three-judge panel treated those cases as dispositive:

> 14. This [p]anel cannot look past *Cooper I*, *the controlling authority for this specific separation of powers issue*. . . .
>
> 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 [Session Law 2024-57] violates limits established by Article III, [Sections] 1 and 5(4). Our Supreme Court has repeatedly recognized this claim as a justiciable question.
>
> **III. Application of Text, History, and Precedent**
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> 16. Having determined that *Cooper I* is on point with the facts of this case as to justiciability, the [p]anel now turns to applying the functional *McCrory* test.
>
> 17. Legislative [d]efendants contend that this case is different, and that *McCrory* and *Cooper I* are not controlling. But this argument, like the one [l]egislative [d]efendants raised in *Cooper I*, "rests upon an overly narrow reading of *McCrory* . . . ."
>
> . . . .
>
> 23. That [Session Law 2024-57] transfers the Governor's authority to the Auditor, rather than the General Assembly . . . *makes no difference to the constitutional analysis*.

Stein v. Hall, No. 23-CV-029308-910, slip op. at 9, 11 (N.C. Super. Ct. Apr. 23, 2025) (order) (emphases added) (quoting *Cooper I*, 370 N.C. at 417, 809 S.E.2d at 113).

But again, *McCrory*, *Cooper I*, and *Cooper Confirmation* all recognized that the General Assembly's decision to transfer an executive power "to those executive departments that are headed by the independently elected members of the Council of

State," like the Auditor, *does* make a difference to the constitutional analysis—one of such magnitude that each of those opinions added an explicit disclaimer to its holding. The three-judge panel mistakenly concluded that *McCrory*, *Cooper I*, and *Cooper Confirmation* controlled this case. Having noted the three-judge panel's plain misapplication of our caselaw, we cannot conclude that the Court of Appeals abused its discretion by temporarily staying the order pending full appellate review.

We also take this opportunity to briefly outline the constitutional assignment of executive functions, powers, and duties. *See* N.C. Const. art. III. Although some executive functions, powers, and duties are exclusive to one of the ten Council of State members, others could plausibly be assigned to several, or even all, of the ten.[4]

[4] For the sake of clarity, the Governor's duty to "take care that the laws be faithfully executed," N.C. Const. art. III, § 5(4), is a nonexclusive duty conferred upon all ten Council of State members. This Court's caselaw has already recognized that fact. *See Cooper Confirmation*, 371 N.C. at 800, 822 S.E.2d at 289–90 (" 'The Governor shall take care that the laws be faithfully executed.' But the Governor is not alone in this task. Our state constitution establishes nine other offices in the executive branch. . . . Collectively, these ten offices are known as the Council of State." (first quoting N.C. Const. art. III, § 5(4); and then citing N.C. Const. art. III, §§ 2, 7, 8)).

While it is unnecessary here to explain that conclusion from a historical perspective, we note that the non-exclusivity of this duty is plainly apparent from the constitutional text. In addition to Article III, Section 5(4), Article III, Section 4 requires the Governor to "take an oath or affirmation that he will support the Constitution and laws of the United States and of the State of North Carolina, and that *he will faithfully perform the duties pertaining to the office of Governor*." N.C. Const. art. III, § 4 (emphasis added). Likewise, Article VI, Section 7 mandates a similar oath for all "elected or appointed" officers, including the members of the Council of State: "I . . . swear (or affirm) that I will support and maintain the Constitution and laws of the United States, and the Constitution and laws of North Carolina not inconsistent therewith, and that *I will faithfully discharge the duties of my office . . . .*" *Id.* art. VI, § 7 (emphasis added). As individually elected officers, all ten members of the Council of State therefore bear the burden to faithfully discharge—that is, execute—the laws as they relate to their respective executive offices.

Executive functions, powers, and duties fall into three categories. The first type consists of those prescribed by the constitutional text itself. *See, e.g.*, *id.* art. III, § 5(5) ("The Governor shall be Commander in Chief of the military forces of the State except when they shall be called into the service of the United States."). The second consists of those assigned by law. *See, e.g.*, *id.* § 6 ("The Lieutenant Governor . . . . shall perform such additional duties as the General Assembly or the Governor may assign to him."). The final category comprises those functions, powers, and duties inherent in a given executive role.[5] Any unassigned and noninherent executive functions, powers, and duties fall to the Governor. *See id.* § 1 ("The executive power of the State shall be vested in the Governor."). Notably, the constitution grants the General Assembly broad authority to reorganize the executive branch. *See id.* § 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 . . . .").

The constitutionality of Session Law 2024-57 remains vigorously contested. Given that defendants have already exercised their appeal as of right to the Court of Appeals—and that the outcome of their appeal is still pending—the three-judge panel will not have the final say on the law's enforceability. Accordingly, the Court of

[5] For instance, the Attorney General has a duty to represent the State in legal proceedings even if that duty is not statutorily prescribed. *See Martin*, 320 N.C. at 545–46, 359 S.E.2d at 479.

Appeals' ruling was not manifestly unsupported by reason or so arbitrary that it could not have been the result of a reasoned decision.

The Governor's Petition for Writ of Supersedeas and Petition for Writ of Certiorari are denied, and his Motion for Temporary Stay is dismissed as moot.

By order of the Court this the 21st of May 2025.

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 23rd day of May 2025.

Grant E. Buckner
Clerk of the Supreme Court

Copy to:
North Carolina Court of Appeals
Mr. Matthew F. Tilley, Attorney at Law, For Berger, Philip E., et al - (By Email)
Mr. Emmett Whelan, Attorney at Law, For Berger, Philip E., et al - (By Email)
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Justice BERGER concurring.

Executive power in North Carolina is not concentrated in one individual or office. The governor does indeed wield the bulk of what is considered executive authority. Art. III, section 1. But unlike the federal system, our constitutional structure is designed to scatter executive power amongst the governor and nine other statewide elected officials, collectively known as the Council of State. Art. III, § 8. Thus, the intent of the people as expressed in the constitution was and is the diffusion of power in the Executive Branch.

Unless a function or power is constitutionally committed to a particular executive branch office, it is the constitutional responsibility of the legislature to "assign executive duties to the constitutional executive officers and organize executive departments." *State v. Berger*, 368 N.C. 633, 664 (2016) (Newby, J., concurring in part); *see* N.C. Const. art. III, §§ 5 and 7. Even if the legislature "assigned a particular function to a constitutional executive officer at present, the constitution provides that the legislature can assign that function elsewhere." *Id.* While our constitution permits these types of changes to be undertaken by the Governor as well, any change initiated by that office which impacts existing law requires legislative approval. Art. III, § 5. Thus, unless prohibited by our constitution, the legislature retains the prerogative to alter the supervisory structure of the executive branch, including that of the governor. Art III §§ 5, 11. Put another

way, the ultimate responsibility for assigning duties among executive branch officials, absent an express commitment by the constitution, "has indeed been squarely placed in the hands of the General Assembly." *Hoke Cnty. Bd. of Educ. v. State*, 358 N.C. 605, 639 (2004).

In such circumstances, this Court declines to exercise its judicial power. *See Harper v. Hall*, 384 N.C. 292, 298 (2023) ("when the constitution assigns the matter to another branch . . . or resolution of the matter involves policy choices, [the issues are] political questions and are nonjusticiable."). This form of judicial discipline respects the people's express directives as to the form and function of their government, thus preventing the judiciary from impermissible encroachment on the political branches. *Bacon v. Lee*, 353 N.C. 696, 716–17 (2001).

Here, the intra-branch transfer of the Board of Elections to the State Auditor does not appear to delegate a core function of the office of the governor; nor does the transfer of authority disable the executive branch from functioning. Because the mere reallocation of this authority within the Council of State is expressly contemplated in the constitution, we may lack the authority to limit the legislature's actions here. *Harper*, 384 N.C. at 300.

But the weighty constitutional questions are for another day. The question before us currently is a limited one: did the Court of Appeals abuse its discretion? While the order of the lower court could have provided some roadmap, it is not devoid of reason. As seen in the order here and the concurrence by Justice Dietz, most of

which I agree with, there are a host of arguments that support the Court of Appeals' determination, and it cannot objectively be said to have abused its discretion.

Justice DIETZ concurring.

In my view, this case presents a much closer legal question than either the Governor or the General Assembly seems to think it does. North Carolina does not have a unitary executive. Under the North Carolina Constitution, executive power is distributed among a group of statewide elected officials known as the Council of State. N.C. Const. art. III, §§ 2, 5, 7, 8. 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. *Martin v. Thornburg*, 320 N.C. 533, 546 (1987). So, for example, when then-Governor Bev Perdue sought to appoint a "CEO of the Public Schools" who would report to the State Board of Education, the courts struck it down because that role overlapped with core functions of another Council of State member, the Superintendent of Public Instruction. *Atkinson v. State*, No. 09 CVS 006655, 2009 WL 8597173 (N.C. Super. Ct. Wake County July 17, 2009) (order); *see also N.C. State Bd. of Educ. v. State*, 371 N.C. 170, 185 n.1 (2018) (approving the reasoning of *Atkinson*).

In addition to each Council of State member's core constitutional roles, the General Assembly has long assigned other executive duties to each Council of State member that are related to that member's core functions. The authority to do so comes from the constitutional provisions authorizing the General Assembly to reorganize the executive branch however it sees fit, so long as administrative functions and

duties are grouped together "as far as practicable according to major purposes." N.C. Const. art. III, §§ 5(10), 11.

So, for example, although the Attorney General is our State's top lawyer, he also administers the State Crime Lab because of the overlap between the lab's criminal investigatory work and the need to present that evidence in court. *See* N.C.G.S. §§ 114-60, 114-61(a), 15A-266.1. But the crime lab is likely not a core part of the Attorney General's constitutional role. Indeed, in the past, the crime lab was part of the State Bureau of Investigation, which was once overseen by the Attorney General but has since been moved to the Governor. *See* N.C.G.S. §§ 114-12, 114-13 (2013); N.C.G.S. § 143B-1208.12(a).

Likewise, the duties of the State Fire Marshal were long handled by the Commissioner of Insurance because of the relationship between insurance and our state's fire and safety codes. *See* N.C.G.S. § 58-80-1 (2023); N.C.G.S. § 58-78A-1(c) (Interim Supp. 2024). But again, those duties likely are not a core constitutional role of the Commissioner of Insurance, and other responsibilities of the fire marshal, such as training and certifying fire and rescue personnel, are not closely related to insurance. *See* N.C.G.S. § 58-78A-1(b).

With this background in mind, I view the dispositive issue in this case—and the question the trial court should have examined—to be whether the work of the

State Board of Elections is sufficiently related to a "major purpose" of the State Auditor's core constitutional role. N.C. Const. art. III, § 11.

I see arguments on both sides here. In my view, the core constitutional role of the State Auditor is to conduct financial audits, internal control reviews, legal compliance checks, and other investigations of state government as authorized by law. On the one hand, overseeing elections could be a reasonable fit with these core roles because of the need to conduct our elections "without taint of fraud or corruption and without irregularities." *Bouvier v. Porter*, 386 N.C. 1, 3 (2024). On the other hand, in my historical research, the State Auditor's role typically involves ensuring that agencies run by *other* Council of State members are complying with the law, rather than being the one in charge of those agencies. So, as I said, it seems like a close legal question.

Unfortunately, the trial court's order did not grasp any of this legal complexity, or any of the constitutional doctrine that underpins it. The trial court sided entirely with the Governor's extreme position, reasoning that it "makes no difference to the constitutional analysis" that the challenged law "transfers the Governor's authority to the Auditor, rather than the General Assembly." *Stein v. Hall*, No. 23CV029308-910, order at 11 (N.C. Super Ct. Wake County April 23, 2025). The trial court emphasized that the North Carolina Constitution "makes no mention of the nongubernatorial members of the Council of State" when it describes "the

constitutional duty to take care that the laws be faithfully executed." *Id.* at 12. Thus, the trial court reasoned, the State Auditor cannot oversee the State Board of Elections because the elections board is tasked with faithfully executing our election laws and only the Governor can take care that laws are faithfully executed. *Id.*

This reasoning is plainly wrong; all Council of State members have a constitutional duty to ensure that the laws for which they are responsible are faithfully executed. *See* N.C. Const. art. VI, § 7. Indeed, when this Court last addressed the Governor's constitutional duty to "take care that the laws be faithfully executed," we emphasized that "the Governor is not alone in this task" because of the other Council of State members. *Cooper v. Berger*, 371 N.C. 799, 800 (2018).

More importantly, the trial court's reasoning could create an executive-branch earthquake that forcibly reorganizes huge portions of the administrative state. If the Governor were truly the only constitutional officer who can ensure that laws passed by the General Assembly are faithfully executed, it could upend everything from the Commissioner of Labor overseeing elevator inspections to the Commissioner of Agriculture presiding over the State Fair.

That brings me to the Court of Appeals order issuing a writ of supersedeas. Although I have huge concerns with the trial court's order, I have a hard time defending the Court of Appeals order for two reasons. First, and frustratingly, the order includes no reasoning. By tradition, routine orders of the Court of Appeals tend

to be boilerplate affairs. But this is not a routine order. This order issued a writ of supersedeas, one of the so-called "extraordinary writs," in a case of first impression, involving a novel constitutional claim, in a high-profile, politically divisive case. It is the sort of case where, to strengthen public confidence in the courts, it is sensible to provide at least some explanation for the ruling.

Second, a writ of supersedeas "is a writ issuing from an appellate court *to preserve* the status quo pending the exercise of the appellate court's jurisdiction." *City of New Bern v. Walker*, 255 N.C. 355, 356 (1961) (emphasis added). Here, the Court of Appeals used the writ *to change* the status quo, not to preserve it. The effect of the writ was to permit a law that had not yet taken effect to do so, despite a trial court judgment concluding that the law was unconstitutional. I think the better approach in these circumstances is to leave the trial court judgment undisturbed (i.e., not issue the writ) but to expedite the appeal on the merits so that, if the appellate court ultimately rejects the lower court's reasoning and upholds the challenged law, any delay in the law's implementation would be minimal.

All that being said, it is too late now for this Court to get involved. Ordinarily, appellate courts confine themselves to the trial record that existed when the appeal occurred. *State v. Branch*, 306 N.C. 101, 105 (1982). But in these unusual circumstances, we cannot ignore reality playing out around us. *Cf. In re Thomas' Est.*, 243 N.C. 783, 784 (1956). The status quo has changed. The transfer from the

Governor to the State Auditor took place; the State Auditor appointed new board members; those board members began hiring new staff. It would create quite a mess to try to unring that bell through our own extraordinary writ.

Moreover, although I can only speculate about the reasoning of the Court of Appeals, I think the order signals the court's belief that the General Assembly is more likely to prevail on the merits than the Governor—either for the reasons discussed above, or more broadly because this type of reorganization within the executive branch is not a justiciable legal matter, *see supra* (Berger, J., concurring). With this in mind, and given the typical timeframe for appeals, an opinion from the Court of Appeals in the General Assembly's favor would probably issue shortly before, or during, the upcoming November municipal elections—meaning that, absent the court's writ of supersedeas, the elections board would be undergoing potential leadership changes in the middle of an election. If recent election litigation has taught us anything, it is that changes impacting election administration should occur well in advance of the election. *Griffin v. N.C. Bd. of Elections*, 387 N.C. 386, 392–94 (2025) (Dietz, J., dissenting) (discussing importance of the *Purcell* principle).

Accordingly, although I do not think it was appropriate for the Court of Appeals to issue a writ of supersedeas in this case without providing any reasoning, I cannot ignore the realities of this case and the obvious flaws in the trial court's order. Thus, it is not appropriate for this Court to intervene with our own extraordinary writ and

inject further uncertainty. Instead, I would urge the Court of Appeals to expeditiously decide the case on the merits.

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Justice EARLS dissenting.

The narrow issue presented is whether the Court of Appeals likely erred by allowing control of the State Board of the Elections to transfer from the Governor to the financial Auditor while the Governor contests the lawfulness of that measure. After hearing arguments by the parties, a three-judge panel selected by the Chief Justice held that it was unconstitutional "beyond reasonable doubt" for the legislature to assert this kind of control, based on binding precedent from this Court. *Stein v. Hall*, Order Granting Pl.'s Mot. for Summ. J., No. 23CV029308-910, slip op. 16 (N.C. Super. Ct. Apr. 23, 2025). It barred the law from going into effect. *Id.* Then the Court of Appeals, without argument or explanation, effectively overturned that decision. In an order issued at 3:54 P.M., it allowed the financial Auditor to take control of state election administration the following day. *Stein v. Berger*, Order, No. P25-298 (N.C. Ct. App. Apr. 30, 2025). The Governor immediately asked this Court to stay that decision. This Court effectively refused by failing to act. That refusal rewarded the financial Auditor with wide latitude to make appointments and control the Board of Elections under an adjudicated unconstitutional law while appellate courts mull the merits of the legislature's and the Auditor's appeal. Nearly a month passed before this Court deigned to offer any explanation for its inaction.

It does so now, in an unsigned order that purports not to reach the merits of the parties' arguments while explicitly reaching the merits of the parties' arguments.

In a disingenuous act of double-speak, also known as gaslighting, the order concedes that "we are not asked to decide the substantive constitutional issue" and professes to not "decide it here." Yet it concludes that "the three-judge panel *unambiguously* misapplied this Court's precedent," and it offers to explain "the constitutional assignment of executive" power. (Emphasis added.) It then crafts an entirely new framework for executive power, unmoored from any precedent or party briefing. To do so, it reinterprets the Governor's authority under the "Take Care" Clause in a footnote, notwithstanding the ample precedent that contradicts its new interpretation. The order further dismisses applicable caselaw while announcing a new rule that the General Assembly is entitled to *extra* deference when there is no applicable caselaw. The order blesses the legislature's power grab, hiding its rubber stamp of approval with sophistry.

I disagree with the majority's new and destabilizing constitutional rules which threaten public accountability over our state government, and with its mistreatment of the litigants in this case who have been denied the opportunity to argue their case before our Court prejudges the merits. If the voters of North Carolina wanted a Republican official to control the State Board of Elections, they could have elected a Republican Governor. If they wanted David Boliek (the Auditor) in particular to run our elections, they could have elected him Governor. The voters did not. They hired Joshua Stein and David Boliek to do specific jobs, and the General Assembly is without the power to thwart the voters' will by restructuring those jobs after the

election. The General Assembly may not grab power over enforcement of election laws by shuttling the Board between statewide elected officials until it finds one willing to do its bidding. Because I would allow the Governor's motion for temporary stay, petition for writ of supersedeas, and petition for writ of certiorari to pause implementation of this likely unconstitutional law while the parties proceed through the appellate process, I dissent.

As to the Governor's first request, I fully agree with my colleague Justice Riggs that he is entitled to a temporary stay. The overarching goal of a temporary stay is "to preserve the status quo of the parties during litigation." *A.E.P. Industries, Inc. v. McClure*, 308 N.C. 393, 401 (1983). It is difficult to imagine a more emblematic status quo than the Governor's more than one-hundred years of authority to appoint bipartisan members of our State Board of Elections—an authority displaced by the challenged law. That status quo should have been preserved during the pendency of this litigation, and the majority is wrong to decide otherwise.

The Governor secondly requests that we allow the writ of certiorari to review the Court of Appeals' decision. The operative question there is whether the Governor has shown good cause that the Court of Appeals likely erred by greenlighting the challenged law in its unexplained order. *See Button v. Level Four Orthotics & Prosthetics, Inc.*, 380 N.C. 459, 465 (2022) (noting that a writ of certiorari may issue to "correct errors of law" (quoting *State v. Simmington*, 235 N.C. 612, 613 (1952))); *In re Snelgrove*, 208 N.C. 670, 671 (1935) (noting that certiorari may issue upon a

showing of "good or sufficient cause" (cleaned up)). He has, and this Court should allow the writ.

I agree with my colleague Justice Riggs's analysis of this issue, and I focus here on the General Assembly's likelihood of success on the merits and the prospect of irreparable harm. Such considerations should have figured heavily in the Court of Appeals' decision to allow the General Assembly's requested injunction below. (I say "should," because again that court gave no reasons for its decision, and the majority must invent some to conclude that the court below did not err.) The law challenged here "transfers the State Board [of Elections] 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." *Stein v. Hall*, Order, No. 23CV029308-910, slip op. 4. In essence, the law treats the Governor as fungible with the financial Auditor and signals that the General Assembly has carte blanche to reshuffle the powers and responsibilities of constitutional officeholders who are elected by the entire state.

While the tactic is new, the playbook is old. This effort represents the General Assembly's sixth attempt in the last decade to wrest control over election administration away from the Governor. The voters rejected the fourth such effort by

a large margin.[1] Our Court rejected the second in *Cooper v. Berger* (*Cooper I*), 370 N.C. 392 (2018). There, we held that a configuration of the State Board of Elections that deprived the Governor of removal power over its members and limited his ability to appoint elections administrators who shared his preferences violated the Constitution by leaving the Governor with insufficient control. *Id.* at 416. In separations-of-powers cases, we explained, the question 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." *Id.* at 417. The test is a functional one—courts look at the specific configuration of the Elections Board's structure and "the practical ability of the Governor to ensure that the laws are faithfully executed." *Id.* at 418 (citing *McCrory v. Berger*, 368 N.C. 633 (2018)).

Applying that rubric, we held that the General Assembly could not create a State Board of Elections which left the Governor with "little control over the views and priorities" of that board. *Id.* at 416 (quoting *McCrory*, 368 N.C. at 647). That holding built on a line of cases dating back decades, which recognized that the Governor as chief executive has unique obligations and must have adequate control over certain state government functions to meet those obligations. *Id.* at 414–18 (first

[1] *11/06/2018 Official General Election Results – Statewide*, N.C. State Bd. of Elections, https://er.ncsbe.gov/?election_dt=11/06/2018&county_id=0&office=REF&contest=0 (last visited May 22, 2025) (indicating that 61.60% of eligible voters cast their ballots against a "Bipartisan Board of Ethics and Elections" in 2018).

citing *Bacon v. Lee*, 353 N.C. 696, 716 (2001); and then citing *McCrory*, 368 N.C. at 645); *see also Cooper v. Berger* (*Cooper Confirmation*), 371 N.C. 799, 799 (2018) ("The Governor is our state's chief executive. He or she bears the ultimate responsibility for ensuring that our laws are properly enforced.").

The problem in *Cooper I* was that the Governor in particular was divested of appropriate control over the elections boards. *Where* that power was reallocated was not the core question. The order's tortured attempts to discard *Cooper I* willfully miss the point by insisting that reassigning the power to the Auditor cures the constitutional defect. Just as the reconfigured Board of Elections in *Cooper I* left the Governor with insufficient control, *see id.* at 416, the present law, which leaves no role for the Governor whatsoever, seems similarly invalid. *See also Cooper Confirmation*, 371 N.C. at 801 (upholding a law that required an up-or-down vote by the Senate of the Governor's cabinet because the Governor retained essential appointment, supervision, and removal power). At this preliminary stage, this clear precedent strongly suggests the Governor's likely success on the merits and the Court of Appeals' error in allowing the law to go into effect.

Moreover, the arguments advanced by the General Assembly below reveal the scope of this broad power grab. The General Assembly asserts sweeping authority to reshuffle the powers and responsibilities of elected officials on our Council of State. It interprets the Constitution as providing no limit on how the legislature may allocate duties among such officials. The logical extension of these arguments is that

the General Assembly could decide that the Agriculture Commissioner must represent the State in criminal appeals, the Attorney General supervise the State Health Plan, and the Treasurer run the State Fair—even after voters chose who they thought would be best for each of those tasks. By the same reasoning, the five Republican members of the Council of State could be granted nearly all power over state government, while the five Democratic members are stripped of the same, even though the voters of this state wanted to divide state government power evenly between these political parties. What voters expect an "Auditor," "Attorney General," "Treasurer," or "Agriculture Commissioner" to do when they step into a voting booth would be irrelevant under the legislature's reading; its will would predominate over the public's.

These arguments clearly fail on separation-of-powers grounds and further cut in the Governor's favor on the likely merits. The Constitution vests ultimate sovereignty with the people. N.C. const. art. I, § 2. The people exercise that sovereignty by directly electing members of the executive branch. N.C. const. art. III, §§ 2(1), (7)(1). Popular sovereignty breaks down if voters have no guarantee that the officials they elect will actually be tasked with the responsibilities they were elected to do. Quite simply, the public cannot elect statewide officials to do a particular job if the General Assembly retains total discretion to restructure that job after the results have come in. The General Assembly's assertion of unfettered power contradicts

principles of popular sovereignty and the separation of powers under our constitutional structure.[2]

The Governor has further argued that he is likely to succeed on the merits because at no point has anyone understood that the *financial Auditor in particular* could have sole responsibility to execute state election laws. The Auditor's job is to "provide for the auditing and investigation of State agencies by the impartial, independent State Auditor." N.C.G.S. § 147-64.6(a). For example, he examines financial accounts and systems of accounting, conducts financial audits consistent with certified public accountant standards, examines the accounts kept by the Treasurer, and reports to appropriate officials—including the Governor and Attorney General—about apparent misconduct of state officials. *Id.* at § 147-64.6(b)–(c). Those duties comport with the traditional portfolio of responsibilities of an "auditor," typically "an accountant or an accounting firm[ ] that formally examines an individual's or entity's financial records or status." *Auditor*, Black's Law Dictionary (11th ed. 2019).

[2] *See* Jonathan L. Marshfield, *America's Other Separation of Powers Tradition*, 73 Duke L.J. 545, 551, 566 (2023) (noting that state constitutions organized the executive branch around discrete roles and functions as an essential aspect of popular accountability and offering a theory of separation of powers that accounts for the specialized departments that enable the public to monitor government). We have previously recognized that the title, function, and historical role of a Council of State member shape that official's inherent powers and duties. *See Martin v. Thornburg*, 320 N.C. 533, 546 (1987) (noting that the Attorney General as a representative of the people as sovereign has a common law duty to appear for and defend the State in certain actions).

It strains credulity that this official would have authority to administer federal, state, and local elections as well as oversee campaign finance compliance. As a matter of common sense, no one calls their accountant to protect their right to vote. And the reality that no voter entrusted the Auditor with these critical tasks is in strong tension with the many ways that control of the State Board allows its controller to effectuate their policy preferences. *See Cooper I*, 370 N.C. at 415 n.11 (noting generally the "numerous discretionary decisions" entrusted to the State Board of Elections). Responsibility for administering state election laws even seems in tension with the Auditor's entire purpose, since the Auditor can hardly be "impartial[and] independent" of the elections agency if he alone has appointment, removal, and supervisory control over that agency. *Compare* N.C.G.S. § 147-64.6(a), *with* (c)(23).

The risk of irreparable harm by allowing this law to continue to be in effect is apparent. Because this Court's inaction has dramatically changed the parties' positions, ruling for the Governor now would require uninstalling the Auditor's appointees to the Board of Elections, rehiring nonpartisan staff members who were terminated by the new board, potentially reselecting hundreds of county board officials due to be replaced in the coming weeks, and reconfiguring appropriations currently being negotiated by state lawmakers. The harm caused in the interim, resulting from the early termination of duly appointed Board of Elections members and the understandable public confusion as to who controls our all-important

elections infrastructure, has no adequate remedy. Far from using an injunction to prevent irreparable harm, the Court withholds necessary injunctive relief to double down on such harm to our state's chief executive and to the public.

There is further harm from the appellate court maneuvers that have wrongly denied the Governor the opportunity to present the merits of his arguments before the Court prejudges them, as it does by unsigned order today. This is procedurally improper, and obviously unfair.

That said, the majority's sweeping constitutional commentary will not go unanswered. Not only is its dismissal of multiple applicable separation-of-powers precedents pure theater for the reasons described above, but its stealthy footnote that reinterprets the "Take Care" Clause marks a dangerous sea-change in our constitutional scheme. As our Court has previously explained, that Clause assigns the Governor both "the power and the duty to 'take care that the laws be faithfully executed.' " *Cooper Confirmation*, 371 N.C. at 806 (quoting N.C. Const. art. III, § 5(4)). This "express constitutional" responsibility is unique to the Governor. *McCrory*, 368 N.C. at 636; *see also Winslow v. Morton*, 118 N.C. 486, 490 (1896). Indeed, the Take Care Clause appears just once in the Constitution in the section that "enumerates the express duties of the Governor." *Bacon*, 353 N.C. at 718; N.C. Const. art. III, § 5 ("Duties of Governor."). That placement is no accident—it aligns with the broader constitutional command that "[t]he executive power of the State shall be vested in the Governor." N.C. Const. art. III, § 1. So even as the Constitution creates nine other

executive offices that, together, form the Council of State, the Governor alone "bears the ultimate responsibility for ensuring that our laws are properly enforced." *Cooper I*, 371 N.C. at 799.

The majority's footnote flouts this precedent and the constitutional text. It effectively farms out one of the Governor's core constitutional duties to every other Council member through an inversion of textualism. In the majority's view, the Governor's express duty under the Take Care Clause is merely a "nonexclusive duty." That conclusion springs from a facile word-matching exercise between the Governor's oath and the oath taken by other officers. The Governor must swear to "faithfully perform the duties pertaining to the office of Governor." Other officials, the order notes, must pledge to "faithfully discharge the duties of my office." From that superficial overlap in phrasing, the majority infers that "all ten Council of State members" share the same duty, and therefore the same degree of corresponding authority, to execute the laws as the Governor. This functionally nullifies a core element of gubernatorial authority, expressed in our precedent and the Constitution's text, by demoting the chief executive to just one member of a ten-person council. And this logic has no limiting principle: by the same reasoning, the Governor's "Take Care" duties apply to all "elected or appointed" officers who must take the same oath. *See* N.C. const. art. VI, § 7. Egregiously, the order sees no irony with rendering superfluous an express textual provision of our Constitution, while lecturing that

constitutional interpretation starts with "the text of the relevant [constitutional] provision." (Alteration in original.)

Still purporting not to reach the merits of this dispute, the majority "take[s] this opportunity to briefly outline the constitutional assignment of executive functions, power, and duties." The word "outline" suggests a handy summary of existing doctrine. It thinly masks what is, in reality, the order's invention of a new framework for executive power. The majority manufactures at least "three categories" of executive duties that seem to permit broad reshuffling of power between executive officeholders. It cites no precedent for such a framework, because none exists. No party has submitted any briefing on this novel theory. If the majority's new categories seem incoherent, that is because they appear to be hastily conjured up to serve a political end. And again without irony, the majority announces its atextual theory of executive power while favorably quoting *Harper v. Hall*, 384 N.C. 292 (2023), a case purporting to require that any limits on the legislature's authority must be express in the text. *Id.* at 298.

In case any confusion remained as to where the majority stands on the merits of this appeal, the order concludes with the glib observation that "the constitution grants the General Assembly broad authority to reorganize the executive branch." That claim, in turn, is supported by an out-of-context citation to Article III, section 5, clause 10, a provision which allows the legislature to define the functions and duties of "administrative departments, agencies, and offices of the State." Needless to say,

there is a sharp distinction between assigning tasks to administrative agencies and rewriting the balance of power among constitutional officeholders in our executive branch. Authority to do the former does not include authority to do the latter. Nothing in the text of this provision speaks to the legislature's authority to reorganize the executive branch as a whole. The majority's "not[e]" tips its hand and invites yet more consolidation of power in the General Assembly. This appeal may be, as the majority puts it, "vigorously contested" in the public square—but in this Court there appears to be no such contest.

By design, these maneuvers threaten to kneecap the Governor's authority, allowing duties entrusted to him by the Constitution and the people to be transferred to officers more aligned with particular partisan allegiances. The same is true for disfavored members of the Council of State, each directly and independently elected by the eligible voters of North Carolina, who may find their portfolio of responsibilities gutted by legislative fiat. Despite the majority's protestations, this order is a procedurally improper decision on core substantive constitutional issues—one that charts an entirely new allocation of state government power in service of partisan ends.

No. 114P25 – Stein v. Berger, et al.

Justice RIGGS dissenting.

After an almost month-long delay by this Court, the majority allows an extraordinary writ that was issued by the Court of Appeals—without explanation—to remain in effect and created reasoning to support allowing a statute—that a panel of superior court judges found to be unconstitutional beyond a reasonable doubt—to go into effect during the pendency of this appeal. The majority frames this as allowing a law to "remain intact." Instead, the majority is rewriting precedent and creating an explanation for an unexplained Court of Appeals order in an effort to upend 125-years status quo for the North Carolina State Board of Elections while this case winds its way through the courts. The decision to allow this statute—found to be unconstitutional—to go into effect runs contrary to this Court's precedent and threatens to erode the integrity of the judicial branch. For this reason, I dissent.

I. Factual and Procedural Background

This case presents the latest chapter in a line of cases from the last decade examining, under the Separation of Powers Clause, N.C. Const. art. I, § 6, the Vesting Clause, *id.* art. III, § 1, and the Take Care Clause, *id.* § 5(4), the General Assembly's ability to limit the Governor's executive powers. In October 2023, the General Assembly overrode then-Governor Cooper's veto to enact Senate Bill 749. Act to Revise the Structures of the North Carolina State Board of Elections and County Board of Elections, to Revise the Emergency Powers of the Executive Director of the State Boards of Elections, to Make Clarifying Changes to Senate Bill 512 of the 2023

Regular Session, to Make Additional Conforming and Clarifying Changes to Implement Photo Identification for Voting, and to Amend the Time for Candidates and Vacancy Appointees to File Statements of Economic Interests, S.L. 2023-139, §§ 1.1–8.5, https://ncleg.gov/EnactedLegislation/SessionLaws/PDF/2023-2024/SL2023-139.pdf (hereinafter Session Law 2023-139). Session Law 2023-139 would have replaced the five-member State Board of Elections appointed by the Governor with an eight-member State Board appointed by the legislature. *Id.* § 2.1. It would also have created county boards with four members that would also have been appointed entirely by the legislature. *Id.* § 4.1. Legislative leaders would also have the authority to designate the chair of the State Board, as well as its executive director, in certain circumstances. *Id.* §§ 2.1, 2.5.

After Session Law 2023-139 was enacted, the Governor filed his verified complaint, and the matter was transferred to a three-judge panel. Following a hearing, the panel preliminarily enjoined the challenged provisions before they took effect. On 11 March 2024, the panel ruled unanimously in the Governor's favor, permanently enjoining Session Law 2023-139's provisions that change the State Board and county boards of elections. The Legislative Defendants appealed but did not seek an injunction to stay the trial court's order.

On 29 May 2024, the Legislative Defendants filed a petition for discretionary review prior to determination by the Court of Appeals. This Court denied that

petition on 23 August 2024. *See Cooper v. Berger*, No. 131P24 (N.C. Aug. 23, 2024) (order denying petition for discretionary review).

In the November 2024 election, the North Carolina voters decided that they did not want a Republican supermajority, with power to override the Governor's veto. But before the new terms of the legislature began, (and when the Legislative Defendants' appeal before the Court of Appeals was fully briefed and awaiting argument), the General Assembly, in essentially a lame-duck session, enacted Session Law 2024-57. 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, S.L. 2024-57, §§ 3A.1–.5, https://www.ncleg.gov/Sessions/2023/Bills/Senate/PDF/S382v4.pdf (hereinafter Session Law 2024-57). Governor Cooper vetoed the legislation in December, and the legislature quickly moved to override the veto while it still had the power to do so. *Id.* § 4.2.

The challenged provisions of Session Law 2023-139 were repealed but the legislation adopted another structure for the state and county boards of elections. Before the enactment of Session Law 2024-57, then-Governor Cooper had appointed the then-current members for four-year terms in May 2023. The new provisions purported to change the appointment structure, terminating the current board on 30 April 2025, rather than on 30 April 2027.

Session Law 2024-57 transferred the Governor's authority to appoint members of the State Board to the State Auditor starting 1 May 2025. *Id.* § 3A.3.(c) (amending N.C.G.S. § 163-19(b)). It also transferred to the State Auditor the Governor's authority to fill vacancies or remove members who fail to attend State Board meetings. *Id.* § 3A.3.(d) (amending N.C.G.S. § 163-20(d)). Just as Session Law 2024-57 changed the appointment structure of the State Board, it also changed the county boards by transferring the Governor's powers to the State Auditor. The State Auditor would appoint the chair of each county board instead of the Governor. *Id.* § 3A.3.(f).

Then-Governor Cooper and then-Governor-Elect Stein, moved for leave to file a supplementary complaint. The Superior Court, Wake County—after a hearing on a joint motion—entered an order vacating the three-judge panel's prior summary judgment and preliminary injunction orders, permitted the supplementary complaint, and set a summary judgment briefing and argument schedule before a three-judge panel. On 14 April 2025, the panel held a hearing. One week later on 23 April 2025, the panel issued a decision concluding that "beyond a reasonable doubt" Session Law 2024-57's changes to the State Board and county elections boards are "unconstitutional and must be permanently enjoined." *Stein v. Hall*, No. 23CV029308-910, order at 16 (N.C. Super Ct. April 23, 2025) (order).

On 25 April 2025, the Legislative Defendants filed with the Court of Appeals a petition for writ of supersedeas and a motion for temporary stay or expedited consideration. Legislative Defendants asked that court to permit the law to remain

in effect during the pendency of the appeal. At 3:54 p.m. on 30 April 2025, the Court of Appeals issued an order—without briefing on the merits or oral arguments—allowing the petition for writ of supersedeas, staying the 23 April 2025 order pending appeal, and dismissing the motion for temporary stay as moot. This permitted Session Law 2024-57 to take effect, despite the trial court's ruling that it was unconstitutional.

On the same day, 30 April 2025, Governor Stein filed a motion for temporary stay in this Court, arguing that the Court of Appeals' order allows the unconstitutional law to nonetheless take effect before this Court or the Court of Appeals has reviewed the merits or conducted arguments. This Court took no action on that motion for temporary stay until now.

II. Temporary Stay

As a primary issue, I am obligated to address one of the most distressing aspects of this case. Despite prompt action by a litigant to seek review of an unprecedented order by the Court of Appeals, and on the eve of an unprecedented writ of supersedeas going into effect this Court did nothing—allowing a law to go into effect that a panel of trial court judges appointed by the Chief Justice ruled to be unconstitutional beyond a reasonable doubt. When parties seek relief from this Court, even if this Court denies it, a functional justice system requires an answer. This Court obviously denied the stay by inaction, and that is shameful. We are constitutional officers, all elected to serve the people of this state, but that does not

relieve us of the obligation to treat people and the parties that come before us with respect. This Court should have denied the motion for stay rather than just sitting on it.

Turning to the merits of the stay, after the trial court's ruling that the challenged legislation violated multiple state constitutional guarantees beyond a reasonable doubt, the Governor showed good cause for entry of the stay, even if a majority of this Court intended to overrule or significantly defang *State ex rel McCrory v. Berger*, 368 N.C. 633, 645 (2016), *Cooper v. Berger* (*Cooper I*), 370 N.C. 392 (2018), and *Cooper v. Berger* (*Cooper Confirmation*), 371 N.C. 799 (2018). Failing to stay the unprecedented, unjustified, and deeply troubling writ of supersedeas from the Court of Appeals and thus allowing the harm it created to stand will only continue to erode public confidence in the impartiality of this Court.

The Court here ignores our precedent holding that "in injunction cases . . . there is a presumption that the judgment entered below is correct, and the burden is upon the appellant to assign and show error." *W. Conf. of Original Free Will Baptists v. Creech*, 256 N.C. 128, 140 (1962) (cleaned up); *Huggins v. Wake Cnty. Bd. of Educ.*, 272 N.C. 33, 39 (1967); *Whaley v. Broadway Taxi Co.*, 252 N.C. 586, 588 (1960); *see also*, *e.g.*, *Town of Apex v. Rubin*, 277 N.C. App. 357, 370 (2021) ("We must presume the preliminary injunction is proper, and [the defendant appellant] bears the burden of showing error to rebut the presumption."). A trial court panel appointed by our own Chief Justice found a law unconstitutional and enjoined the

enactment of a law that intruded on the Governor's powers in a similar manner to unconstitutional intrusions identified by this Court in numerous cases over the last decade. That this Court's current majority does not agree with those cases or may intend to change the direction of this Court's jurisprudence does not mean we can just ignore case law instructing us how to deal with trial court injunctions in this type of situation.

A temporary stay maintains the status quo during the pendency of an appeal. *See Nken v. Holder*, 556 U.S. 418, 421 (2009) (recognizing that a stay provides an appellate court with the time to act responsibly in fulfilling its obligation to provide judicial review). The status quo when the Court of Appeals entered its order was—as it has been for the last 125 years in North Carolina—that the Governor appoints a five-member bipartisan State Board of Elections. *See* Act to Provide for the Holding of Elections in North Carolina, ch. 89, §§ 5–6, 1901 N.C. Sess. Laws 243, 244.

Moreover, this is not just a small change to the status quo. The shifting of an entire state agency from under the control of the Governor to control by a different member of the Council of State represents a dramatic departure from how things are done and a significant disruption of the State Board of Elections' operations and functioning. Because of the writ of supersedeas entered by the Court of Appeals and the inaction by this Court, existing members of the State Board of Elections whose terms ran until 2027 were terminated on 1 May 2025. Session Law 2024-57, § 3A.3(c), (amending N.C.G.S. § 163-19).

Furthermore, the status quo with respect to the county boards of elections remains as it was pre-30 April 2025—the Governor has appointed the chair of the county boards of elections and thus a majority of members of those boards. The terms of county boards of elections members are set to be statutorily terminated, prior to the completion of their four-year terms, on 24 June 2025, and the State Auditor will have the power to select their replacements on 25 June 2025. *Id.* § 3A.3(f), (amending N.C.G.S. § 163-30); *Id.* § 3A.3.(h). This Court pays no mind to any of these pending changes.

The change in county board of elections structure is not the only impending deadline that affects the status quo analysis (and, in my view, exacerbates the harm in leaving an unconstitutional law in place pending appeal). There are always election deadlines upcoming, of course, because there are elections every year. That of course does not mean that we lack the power to enjoin any statutes that affect election administration. But it does mean that, particularly as discussed below, we are choosing to let municipal elections this year and mid-term elections, primary and general, proceed next year under a cloud of unconstitutionality. A trial court found the law to be unconstitutional, and this Court, although unconvincingly, says it is not reaching the merits here. Thus, the Court is allowing elections to be conducted under a law where the only court to carefully review it has concluded the law is unconstitutional. This court continues to misapprehend what actually constitutes election integrity and acts again to disrupt faith and orderliness in our election

administration. *See Griffin v. N.C. Bd. of Elections*, 387 N.C. 395, 398 (2025) (Newby, C.J., concurring).

Finally, by inaction, this Court has overruled— without the courage to plainly state it—the rule that emerged from previous cases in this lengthy dispute. This Court unequivocally held in *Cooper I* that the status quo was the maintenance of the Board's structure before the legislative enactment. *Cooper v. Berger*, 370 N.C. 59, 59 (2017) (order) ("The status quo as of the date of this order is to be maintained. Therefore, until further order of this Court, the parties are prohibited from taking further action regarding the unimplemented portions of the act that establishes a new 'Bipartisan State Board of Elections and Ethics Enforcement.' "). In addition to plainly disrupting the status quo pending appeal, we dismiss any recognition we have previously given to maintain the peaceable state of legal relations between parties. We have said in an analogous context that an injunction maintained the status quo "as it existed before the defendants[ ]' asserted their right to operate without state licenses and refuse to obtain licenses—meaning the preliminary injunction operates to place the parties in the position they were prior to the dispute between them." *State v. Fayetteville St. Christian Sch.*, 299 N.C. 731, 732–33 (1980) ("[T]hus, [the preliminary injunction] maintains the last peaceable status quo between the parties.").

I agree with my colleague Justice Earls' explanation of the irreparable harm that the Court of Appeals has wrought. I add only that the Court of Appeals' order

and our rubber stamping of that order creates confusion and chaos at a time where the integrity of our electoral process has been already too damaged by speculation and reckless charges. The Court of Appeals' order allowed a law determined to be unconstitutional and under review to go into effect, and it destroys the last peaceable status quo among the parties on a matter pending appeal. By denying the motion for temporary stay, this Court—in the shadow of darkness—blesses the action of the Court of Appeals and the derogation of constitutional authority exercised by the Governor for more than 125 years. Allowing the stay would have been prudent on so many levels, and that makes this Court's actions all the more troubling.

III. Writ of Certiorari

In a case with broad impact on the election process in North Carolina, prompt resolution of this matter is particularly important to the faith of the public in election administration and to the reputation of the Court. The public interest in the transparency and integrity of decisions by the intermediate appellate court of this state represents just the kind of extraordinary circumstances justifying issuance of a writ of certiorari to consider whether the Court of Appeals erred by allowing the statute to go into effect.

When considering whether to issue a writ of certiorari, this Court must determine whether (1) the matter has merit or if an error was committed in the lower courts, and (2) whether extraordinary circumstances exist to justify granting the writ. *Cryan v. Nat'l Council of YMCA*, 384 N.C. 569, 572 (2023). Generally, an

extraordinary circumstance warranting certiorari review requires a showing of "substantial harm, considerable waste of judicial resources, or 'wide-reaching issues of justice and liberty.' " *Id*. at 573 (quoting *Doe v. City of Charlotte*, 273 N.C. App. 10, 23 (2020)).

Although we review prerogative writs for abuse of discretion, review of supersedeas writ as issued by the Court of Appeals here is quite unusual. This is an extraordinary circumstance that should remind us that abuse of discretion review is not toothless. *See State v. Ricks*, 378 N.C. 737, 743 (2021) (holding the Court of Appeals abused its discretion when it allowed defendant's petition for writ of certiorari and suspended Rules of Appellate Procedure to reach merits of defendant's unpreserved challenge to trial court orders imposing lifetime satellite-based monitoring (SBM), after defendant was convicted of statutory rape of a child and statutory sex offense with a child, alleging that SBM was an unreasonable search); *Belk's Dep't Store v. Guilford Cnty.*, 222 N.C. 441, 445 (1943) ("According to the weight of authority, where the scope of the writ has not been narrowed by statute, its office extends to the review of all questions of jurisdiction, power, and authority of the inferior tribunal to do the action complained of, and all questions of irregularity in the proceedings, that is, of the question whether the inferior tribunal has kept within the boundaries prescribed by the express terms of the statute law or well-settled principles of the common law." (citing 10 Am. Jur. *Certiorari*, § 3)).

A troubling aspect of the Court of Appeals order is that it provides this Court and the public with no insight into the basis (or any potential error underlying) its decision. First, the Court of Appeals did not explain its balancing of the traditional stay factors in determining whether the extraordinary writ was justified. *See* N.C. R. App. P. app. D (providing guidance that a party requesting a writ of supersedeas should provide a factual and legal argument "that irreparable harm will result to petitioner if it is required to obey decree pending its review; [and] that petitioner has meritorious basis for seeking review"). The Court of Appeals also did not explain why it did not follow this Court's precedent in *Cooper I* that the status quo was the structure of the State Board of Elections as it existed since 1901 and before Session Law 2024-57 was enacted. *See* N.C.G.S. § 163-19(b) (2023); Act to Provide for the Holding of Elections in North Carolina, §§ 5–6, 1901 N.C. Sess. Laws at 244; *Cooper I*, 370 N.C. 392. Absent an explained decision to overrule our precedent, this Court must view the trial court's injunction with a "presum[ption] that the judgment entered below is correct." *W. Conf. of Original Free Will Baptists*, 256 N.C. at 140 (cleaned up).

Under an abuse of discretion standard, the majority hypothesizes there are multiple grounds upon which the Court of Appeals could have made a reasoned decision to allow a statute found to be unconstitutional to go into effect. All of those hypotheticals require the majority, of course, to pre-decide the constitutional question, which it disingenuously disclaims. But the deferential abuse of discretion

review, as applied here by the majority, essentially precludes all judicial review and gives the Court of Appeals unreviewable carte blanche to issue orders of substantial consequence, staying the judgment of learned trial courts that have heard the evidence and arguments of the parties, without any explanation at all.

"[W]hen the Court of Appeals issues a writ of certiorari, we review solely for abuse of discretion, examining whether the decision was "manifestly unsupported by reason, or so arbitrary that it could not have been the result of a reasoned decision." *Cryan*, 384 N.C. at 573 (cleaned up) (quoting *State v. Locklear*, 331 N.C. 239, 248 (1992); *see also*, In *re Custodial Law Enf't Recording Sought by Greensboro*, 383 N.C. 261, 271 (2022) (finding the trial court abused its discretion when it—with no findings of fact, explanation or conclusions of law—refused to release police videos, noting that "[h]istory teaches that opaque decision-making destroys trust"); *Terrell v. Kernersville Chrysler Dodge*, *LLC*, 252 N.C. App. 414, 421 (2017) (reversing the trial court's decision to deny the motion to compel arbitration when the order provided no explanation to support the conclusion). We have given our state's intermediate court the greenlight today to engage in incredible overreach without any justification. That kind of substantial action, with no explanation, impedes our judicial review and cannot be countenanced.

Further, troublingly, the Court creates a new rule out of whole cloth today by wrongly suggesting that this is an issue of first impression and that the presumption of constitutionality here is particularly high. The presumption of constitutionality

does not, as the Court here seems to assume, require us to refuse to do our job in enforcing the promises of our State Constitution. "Notwithstanding our deference to legislative enactments, when a challenger proves the unconstitutionality of a law beyond a reasonable doubt, this Court will not hesitate to pronounce the law unconstitutional and to vindicate whatever constitutional rights have been infringed." *Cmty. Success Initiative v. Moore*, 384 N.C. 194, 212 (2023). "The courts of this State have not hesitated to strike down regulatory legislation that is repugnant to the State Constitution." *Id.* at 213 (cleaned up) (quoting *N.C. Real Est. Licensing Bd. v. Aikens,* 31 N.C. App. 8, 11 (1976)).

And this case is most certainly not a matter of first impression. While this Court has reserved judgment on whether the legislature might constitutionally transfer from one executive office to another certain powers, because those questions were not presented in the previous cases in this long saga, the rules that emerged from those cases about separation of powers and the constitutional injury to the Governor by the legislature intruding too much into duties assigned to him were squarely addressed in the *McCrory* and *Cooper* cases. *McCrory*, 368 N.C. 633, *Cooper I*, 370 N.C. 392, and *Cooper Confirmation*, 371 N.C. 799. A new nuance in a constitutional inquiry is not a matter of first impression.

Looking to *McCrory*, the legislature here seeks to, again, make changes to how members of an administrative agency are appointed. In *McCrory*, it mattered that the degree of control the Governor had over administrative commissions depended on

his ability to appoint the commissioners, supervise their day-to-day activities, and to remove them from office. 368 N.C. at 646. Whether it is the legislature giving itself the power to make the appointments or taking that power from the Governor to give to a different officer within the executive branch does not change what the law essentially does—it encroaches on the Governor's authority, a power that specific office has enjoyed for nearly 125 years. Now, it may be that ultimately this is the kind of intrusion on the Governor's powers that this Court did not intend to preclude in its previous cases. On that front, I appropriately refrain from deciding the constitutional question. But the previous cases are clear enough to identify a reasonable likelihood of a constitutional violation such that we should take seriously our duty to preserve the parties' legal rights pending our full review. This Court declares, unconvincingly, that this is a matter of first impression in order to create a standard that does not exist. There is no "special" presumption of constitutionality in a case such as this.

Then, also, we should consider the issue we were actually asked to review:

> Should the Court of Appeals' 30 April 2025 Order be vacated because it destroys the last peaceable status quo among the parties and effectively reverses all relief ordered by the trial court without a record being docketed, merit briefs filed, and the case heard in the normal course of the appellate process?

Opaque decision-making is harmful to trust in our judiciary to do its job impartially and thus we are required to intervene on this specific question.

Turning to the Court's abuse of discretion analysis here and examining those hypothetical reasons that the Court of Appeals could have had for its unexplained, unprecedented order, the Court concluded that the Court of Appeals decided that the superior court misapplied our precedent. After expressly disavowing any decision on the merits of the constitutional question at issue, the majority goes on to discount the precedential value of *McCrory* and the *Cooper* cases and mischaracterizes our precedent.

The issue in this case—whether the General Assembly can remove power from the Governor and vest it in another member of the Council of State—is a natural and corollary extension of the Court's decisions in *McCrory* and the *Cooper* cases. *In Cooper I*, this Court acknowledged 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, with the sufficiency of the Governor's degree of control depending on his or her ability to appoint the commissioners, to supervise their day-to-day activities and to remove them from office.

370 N.C. at 414 (cleaned up). The test established in *McCrory* is "whether the Governor has 'enough control' over administrative bodies that have final executive authority to be able to perform his constitutional duties." *Id.* at 423 (Martin, C.J., dissenting) (citing *McCrory*, 368 N.C. at 646).

This Court has held that the Take Care Clause found in Article II, Section 5(4) of the Constitution gives the Governor the duty to "take care that the laws be faithfully executed." *McCrory*, 368 N.C. at 645 (quoting N.C. Const. art. III, § 5(4)). To be able to faithfully perform this duty the Governor must have enough control over commissions and boards that are executive in nature to perform his constitutional duty. *Id.* at 646. In *McCrory*, this Court considered whether the Governor had sufficient control over commissions when the General Assembly assumed the power to appoint and remove the members of the commission. *Id.* The Court concluded that when the Governor cannot appoint or remove members of the board of commission the Governor cannot perform the constitutional duty to take care that the laws are faithfully executed in those areas. *Id.* Similarly, here, if the State Auditor, rather than the Governor, has the authority to appoint and remove the members of the State Board of Elections, the Governor does not have control to perform his constitutional duty to take care that the laws are faithfully executed. We have never treated all members of the Executive Branch as interchangeable and fungible, particularly in relation to the Governor. Indeed, our State Constitution is full of references to the Governor's authority. The State Auditor's role, while important, does not carry the same level of constitutional authority, nor is the office charged with the ultimate duty to take care that the laws are faithfully executed. N.C. Const. art III, § 7. Again, this may be a case where there is an exception to the rules from the *McCrory* and *Cooper* cases, but a good faith reading of those cases and the rules that come from them

requires us to allow the trial court's judgment to stand while this case proceeds through appellate review.

Now, if this Court truly wanted to avoid prematurely judging the merits of the case and wanted to resolve this matter with finality for the ease of future election administration, we could have (and should have) invoked our supervisory authority to convert the petition for writ of certiorari into a bypass petition for discretionary review. *See, e.g.*, *Hoke Cnty. Bd. of Educ. v. State*, 385 N.C. 380 (2023) (order) (allowing petition for discretionary review prior to determination by the Court of Appeals as to whether the trial court lacked subject matter jurisdiction to enter an order); *Cmty. Success Initiative*, 384 N.C. at 196 (judgment on a petition for discretionary review prior to determination by the Court of Appeals on a challenge to the constitutionality of statute governing restoration of citizenship rights); *In re A.R.A.*, 373 N.C. 190, 194 (2019) (same, for review of an order terminating parental rights); *Bailey v. State*, 348 N.C. 130, 135–36 (1998) (same, for review in an action challenging the constitutionality of legislation capping tax exemption for state and local employees' retirement benefits); *State ex rel. Edmisten v. Tucker*, 312 N.C. 326, 327 (1984) (same, for review in a declaratory judgment action as to the meaning and validity of Safe Roads Act of 1983). But we did not, instead issuing an order that invites untold mischief from our lower appellate court and prejudges the merits of this case on expedited briefing alone. The people of this State deserve an independent judiciary committed to carrying out its constitutional obligation of judicial review.

The Court of Appeals permitted an unconstitutional law to take effect without accepting merit briefs or hearing arguments. To affirm the Court of Appeals' unexplained order, this Court starts to unwind a decade of precedent in an order without merit briefs or argument to create an explanation for the Court of Appeals. From this sad stain on our judiciary, I dissent.