No. 25-652 TENTH JUDICIAL DISTRICT

NORTH CAROLINA COURT OF APPEALS

****

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

Plaintiff-Appellee,

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

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

Intervenor-Defendant-Appellant.

From Wake County
No. 23CV029308-910

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LEGISLATIVE DEFENDANTS-APPELLANTS' BRIEF

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ISSUES PRESENTED

1. Whether the Governor's challenge to Session Law 2024-57, which transferred the State Board of Elections to the Department of the State Auditor, granted the Auditor the power to appoint the Board's members, and made corresponding changes to county boards of elections, presents a nonjusticiable political question.

2. Whether the trial court erred in granting the Governor summary judgment invalidating sections 3.A3.(b), (c), (d), (f), (g), and (h) of Session Law 2024-57 as unconstitutional.

INTRODUCTION

This case represents the rare instance in which the Supreme Court has already indicated that the three-judge panel below "unambiguously misapplied this Court's precedent." Stein v. Berger, 387 N.C. 575, 576 (2025) ("Stein I").

In December last year, after years of litigation by the Governor and his predecessor seeking to block efforts to reform the State Board of Elections, the General Assembly availed itself of an option expressly granted to it under our Constitution and transferred the Board of Elections to the Auditor, gave the Auditor power to appoint the Board's members, and made corresponding changes to county boards. See N.C. Sess. L. 2024-57 ("Senate Bill 382"), Part III.A. Rather than accept those decisions—which were approved by supermajorities in both the House and Senate over former Governor Cooper's veto—the Governor sued once again, insisting that Senate Bill 382's changes to the State and county boards of elections are unconstitutional because they do not give him enough control to ensure the boards carry out his "policy preferences." In support of that argument, he continues to rely on the Supreme Court's decisions in State v. Berger, 368 N.C. 633 (2016) ("McCrory"), Cooper v. Berger, 370 N.C. 392 (2018) ("Cooper I"), and Cooper v. Berger, 371 N.C. 799 (2018) ("Cooper Confirmation")—even though those decisions expressly disclaimed any application to cases that involve the allocation of power between the Governor and the other constitutional officers who serve on the Council of State.

In a fractured 2-1 decision, the panel enjoined Senate Bill 382 shortly before its changes were about to go into effect. On 30 April 2025, this Court stayed the

panel's decision, and allowed the law to go into effect. Three weeks later, in a published order, the Supreme Court approved the issuance of a stay, noting there were "multiple grounds" on which this Court could have concluded the panel committed reversible error. Stein I, 387 N.C. at 576.

Contrary to the three-judge panel's decision, Senate Bill 382 represents a legitimate exercise of the General Assembly's express and plenary power to structure agencies of State government and to assign duties to the "other elective officers" who serve as members of the Council of State. The panel's decision enjoining that legislation—and removing questions over the proper structure of the Board of Elections from the political process—suffers from numerous legal errors, any one of which require reversal.

First, the panel failed to apply the applicable standard of review, which requires that laws enacted by the General Assembly be treated as presumptively constitutional and must be upheld unless they are expressly barred by the Constitution. No provision of the Constitution, however, prohibits the General Assembly from assigning Auditor the duty to appoint members to the State and county boards of elections. Indeed, the Constitution expressly authorizes the General Assembly to do so in Article III, Section 7(2).

Second, the panel erred by treating this as a separation of powers case. Senate Bill 382 continues to allocate all the relevant appointments to the Auditor, who is a constitutional officer within the executive branch. The separation of powers only deals with the balance of power between the branches, not the allocation of duties

within a single branch. Thus, the panel erred when it concluded that the Supreme Court's decisions in McCrory, Cooper I, and Cooper Appropriations, "controlled" the outcome of the case. None of those cases dealt with the situation here, and accordingly each warned that "'**our opinion takes no position on how the separation of powers clause applies to those executive departments that are headed by independently elected members of the Council of State**.'" Cooper Confirmation, 371 N.C. at 805 n.4 (quoting McCrory, 368 N.C. at 646, n.5) (emphasis added); Cooper I, 370 N.C. at 407 n.5 (same). Yet, the panel concluded the fact Senate Bill 382 allocated appointments to the Auditor, rather than the General Assembly, "makes no difference to the constitutional analysis." (R p 201). The Supreme Court, however, has now made clear that it does. Stein I, 387 N.C. at 578.

Third, the panel accepted the Governor's argument that the Vesting Clause[1] and Take Care Clause[2] mandate that the Governor—and "only" the Governor—hold all executive power and have sufficient control over every executive board and commission to carry out his "views and priorities." But that position is incompatible with our Constitution's text, history, and precedent. It ignores other constitutional provisions that expressly establish the Auditor and other members of the Council of State as members of the executive branch and charges the General Assembly with responsibility for assigning their duties. See N.C. Const. art. III, §§ 2 (establishing

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

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

the office of Lieutenant Governor); 7(1) (establishing "Other elective offices," including the Auditor); 7(2) (providing that "their respective duties shall be assigned by law").

Finally, the panel failed to acknowledge that the decision how to allocate duties related to the administration of elections among the various officers within the multi-member executive branch represents a nonjusticiable political question that is textually committed to the discretion of the General Assembly in its role as representatives of the People.

The framers of our Constitution made a deliberate decision not to maintain a plural executive. They did so as a check against the accumulation of power in one person. The General Assembly's choice to transfer the Board of Elections, as well as the power to appoint its members, to the Auditor is a natural outgrowth of that decision. While the Governor may disagree—and may even wish our Constitution gave him the type of consolidated powers the federal constitution gives the President—that is not the system the People of North Carolina chose.

STATEMENT OF THE CASE

The Governor originally filed this action on 17 October 2023 challenging previous legislation, N.C. Sess. L. 2023-139 ("Senate Bill 749") that would have expanded the Board of Elections from five to eight members and granted all the relevant appointments to majority and minority leaders in the House and Senate. (R p 3). Because the Governor's complaint presented a solely facial challenge, the action was assigned to a three-judge panel consisting of Superior Court Judges Edwin

Wilson, Lori Hamilton, and Andrew Womble (the "Panel") on 8 November 2023. (R pp 62-65). On 11 March 2024, the Panel granted summary judgment for the Governor, and Legislative Defendants appealed. While that appeal was pending, the General Assembly adopted Senate Bill 382, which repealed Senate Bill 749. Legislative Defendants accordingly dismissed their appeal as moot on 20 December 2024.

On 11 February 2025, the Court granted the Governor's request to file a Supplemental Complaint challenging Senate Bill 382's changes to the State and county boards of elections. (R p 141). The parties filed cross motions for summary judgment, which, after multiple rounds of briefing, were heard by the Panel on 14 April 2025. On 23 April 2025, the Panel issued a split decision granting the Governor's motion for summary judgment in full. (R p 191-211). Judge Womble filed a dissent. (R p 207-211).

Legislative Defendants filed a notice of appeal on 24 April 2025. (R pp 221-224). The Auditor filed a notice of appeal the next day on 25 April 2025. (R pp 227-230). The Record on Appeal was settled by agreement on 16 July 2025, and the case was docketed in the Court of Appeals the same day.

STATEMENT OF THE GROUNDS FOR APPELLATE REVIEW

The three-judge Panel's summary judgment order is a final judgment, and appeal therefore lies to the Court of Appeals as of right under N.C. Gen. Stat. § 7A-27(b).

STATEMENT OF THE FACTS

While the panel's summary judgment order begins with Senate Bill 749, that legislation is no longer at issue. Senate Bill 382—which the General Assembly adopted over the Governor's veto—repealed the relevant portions of Senate 749. N.C. Sess. L. § 3.A.1. As a result, the Governor agreed to an Amended Consent Order on 11 February 2025 that (i) provided the Panel's prior summary judgment order and injunction addressing Senate Bill 749 were "vacated and are of no effect"; and (ii) dismissed the Governor's challenge to that legislation (Count 1 of the Complaint) as moot. (R p 107).[3]

Senate Bill 382 transferred the Board of Elections administratively to the Department of the State Auditor. N.C. Sess. L. 2024-57, § 3A.2.(a). It then provided that the terms of the Board's current members would terminate on 30 April 2025, after which time the Auditor would appoint their successors. See id. § 3A.3(c) (amending N.C. Gen. Stat. § 163-19) and § 3A.3(g). The Auditor's appointments must meet the following criteria: (1) no more than three members of the Board of Elections may be members of the same political party; (2) the appointments must come from a list of nominees submitted by the State party chair of each of the two political parties having the highest number of registered affiliates; and (3) no person may serve more

[3] The Governor voluntarily dismissed the State of North Carolina as a defendant on 28 January 2025. (R p 103). The parties then filed a Joint Motion to Vacate Judgment; to Supplement Complaint; and to Establish Briefing Schedule (R p 95), which led to the entry of the Amended Consent Order.

than two full consecutive four-year terms. Id. § 3A.3(c) (amending N.C. Gen. Stat. § 163-19).

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

Although the Auditor is a constitutional officer within the executive branch, see N.C. Const. art. III, § 7(1), the Governor nevertheless claimed that Senate Bill 382 violates the separation of powers because it "deprives the Governor of sufficient control" over the State and county boards of elections and thus denies him the ability "to implement executive policy consistent with his views and priorities." (R p 118). In doing so, the Governor insisted that his claims were controlled by McCrory and Cooper I—even though those decisions disclaimed any application to departments "headed by the independently elected members of the Council of State." Cooper I, 370 N.C. at 407 n.5 (quoting McCrory, 368 N.C. at 646, n.5. Purporting to rely on those decisions, the Governor asserted the Vesting Clause and Take Care Clause require that the Governor—and "only" the Governor—must exercise all executive power. (R p 117 (alleging "[t]he Governor is the <u>only</u> executive branch officer vested with the executive power of the State" and "[t]he Governor is the <u>sole</u> executive branch officer with a <u>constitutional</u> duty to 'take care that the laws be faithfully executed.'" (R p 117 (emphasis in original) (citing N.C. Const. art. III, §§ 1, 5(4)). The Supplemental Complaint thus sought a declaration that Sections 3A.3(b), (c), (d), (f), (g), and (h) of

Senate Bill 382 violate the Separation of Powers as well as a permanent injunction preventing their implementation. (R pp 121-23).

On 6 March 2025, Auditor Dave Boliek moved to permissively intervene. (R p 161). His motion was granted by consent on 11 March 2025. (R p 179).

On 14 April 2025, the three-judge panel heard the Governor's and Legislative Defendants' cross-motions for summary judgment. On 23 April 2025, the panel issued its decision. By a 2-1 vote, the majority granted the Governor's motion for summary judgment, denied Legislative Defendants' motion, and permanently enjoined the challenged portions of Senate Bill 382. (R pp 191-206).

Accepting the Governor's arguments wholesale, the majority held: "McCrory, Cooper I, and Cooper Confirmation control the panel's decision in this case. It is the Governor, and no one else, who must have sufficient control over executive boards, including the State Board of Elections and county boards." (R p 205). As a result, the majority held that Senate Bill 382's changes violate the Constitution because they "interfere" with the Governor's duties under the Vesting Clause and Take Care Clause, which they see as granting exclusive powers to the Governor. (R p 201). The fact Senate Bill 382 "transfers the Governor's authority to the Auditor, rather than the General Assembly," the majority reasoned, "makes no difference to the constitutional analysis" because "[t]he Constitution does not permit the Auditor to be solely responsible for the execution of the State's election laws." (Id.) Likening the Council of State to the "advisory councils of English monarchs," the majority explained that "Council of State members [may] aid the Governor in executing the

laws, but the Governor alone wields the State's executive authority and bears the ultimate duty of faithful execution." (R p 205). Judge Womble dissented. (R pp 207-11).

On 24 April 2025, Legislative Defendants appealed the Panel's decision and filed a motion asking the panel to stay its judgment, which was denied. The next day, Legislative Defendants filed a petition for writ of supersedeas with this Court. The Auditor also noticed an appeal the same day and responded supporting the Legislative Defendants.

On 30 April 2025, this Court granted Legislative Defendants' petition and stayed the panel's ruling, allowing Senate Bill 382's changes to take effect. (R pp 232-233). That night, the Governor filed a petition for writ of certiorari and writ of supersedeas with the Supreme Court.

On 23 May 2025, the Supreme Court issued a 5-2 decision upholding this Court's issuance of the stay and denying the Governor's petition for certiorari. The Court began by confirming that McCrory, Cooper I, and Cooper Confirmation are "inapposite" and thus the panel "unambiguously misapplied this Court's precedent" when it treated them as controlling. Stein I, 387 N.C. at 576. The Court explained, "[i]t is well settled that the state constitution apportions executive authority among the ten individually elected officers of the Council of State, led by the Governor." Accordingly, the Governor "does not unilaterally exercise the executive power." Id. The Court then clarified that "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." 387 N.C. at 578 n. 4.

The appeal now comes to this Court for a decision on the merits.

ARGUMENT

The General Assembly's decision to transfer the Board of Elections to the Department of the Auditor, authorize the Auditor to appoint the Board's members, and make corresponding changes to county boards of elections do not violate the separation of powers. Instead, it is a legitimate exercise of the General Assembly's plenary power to establish, organize, and reorganize State agencies, as well as its express power under Article III, Section 7(2) to assign the duties of the "other elective officers" who comprise the Council of State.

In its order upholding the Court's issuance of a stay, the Supreme Court held there are "multiple grounds" to reverse the panel's order—including that the majority failed to follow "the fundamental approach according to which North Carolina's courts evaluate a law's constitutionality"; that it failed to recognize that the case presented a nonjusticiable question; and that it wrongfully concluded that McCrory, Cooper I, and Cooper Appropriations "controlled" the outcome of the case. 387 N.C. at 576. Each requires reversal of the trial court's order.

I. STANDARD OF REVIEW

The three-judge panel erred from the outset by failing to properly apply the standard of review, which requires the Court to presume that acts of the General Assembly are valid unless the plaintiff can show, beyond a reasonable doubt, that the law is prohibited by an express provision of the Constitution.

Facial challenges, such as the Governor's challenge to Senate Bill 382, are the "most difficult challenge to mount successfully." State v. Bryant, 359 N.C. 554 (2005). Such challenges are "seldom" upheld "because it is the role of the legislature, rather than [a] [c]ourt, to balance disparate interests and find a workable compromise among them." Cooper v. Berger, 371 N.C. 799, 804 (2018) ("Cooper Confirmation") (quoting Beaufort Cnty. Bd. of Educ. v. Beaufort Cnty. Bd. of Comm'rs, 363 N.C. 500, 502 (2009)). "[T]he idea of the judiciary "preventing . . . the legislature, through which the people act, from exercising its power is the most serious of judicial considerations.'" Harper v. Hall, 384 N.C. 292, 323 (2023) (quoting McCrory, 368 N.C. at 650 (Newby, J., concurring in part and dissenting in part)).

"'Unlike the United States Constitution, the North Carolina Constitution 'is in no matter a grant of power.'" Id. (quoting McIntyre v. Clarkson, 254 N.C. 510, 515 (1961)). Rather, "'[a]ll power which is not limited by the Constitution inheres in the people.'" Id. Thus, "[b]ecause the legislature serves as 'the agent of the people for enacting laws,' it has the presumptive power to act,' . . . and possesses plenary power along with the responsibilities explicitly recognized in the constitution." Id. (quoting State ex rel. Martin v. Preston, 325 N.C. 438, 448 (1989)). "The General Assembly's textual and plenary power is limited only by the express text of the constitution." Id. (citing Baker v. Martin, 330 N.C. 331, 338–39 (1991)).

Accordingly, every presumption favors the validity of a statute. Ivarsson v. Off. of Indigent Def. Servs., 156 N.C. App. 628, 631 (2003). And when a challenger contends the General Assembly has acted unconstitutionally, the act must be upheld

absent proof that an "express provision" of the Constitution "explicitly" prohibits that act, "beyond a reasonable doubt." Harper, 384 N.C. at 298, 323 (emphasis added). This "high bar" is "the highest quantum of proof" known to law. Id. at 324.

Ultimately, "an individual challenging the facial constitutionality of a legislative act must establish that no set of circumstances exists under which the act would be valid." Bryant, 359 N.C. at 564 (emphasis added); see also McCrory, 368 N.C. at 639 (explaining the constitutional violation must be "plain and clear.").

Despite this standard, the panel held that Senate Bill 382 was unconstitutional even though no provision of the Constitution explicitly prohibits the General Assembly from assigning the power to appoint the Board of Election's members to the Auditor.

II. THE CONSTITUTION EXPRESSLY AUTHORIZES THE GENERAL ASSEMBLY TO DISTRIBUTE DUTIES AMONG THE MEMBERS OF THE STATE'S MULTI-MEMBER EXECUTIVE BRANCH.

As Judge Womble recognized in his dissent, the decision to transfer the Board of Elections under the Auditor and to authorize him to appoint its members is "one the General Assembly was expressly authorized to make." (R p 211).

To be sure, the General Assembly would have inherent authority to enact Senate Bill 382 even if it were not expressly authorized by the Constitution. Because it retains all powers not expressly prohibited, "the General Assembly need not identify the constitutional source of its power when it enacts statutes" but may "rely on its general power to legislate, which it retains as an arm of the people." Cooper Confirmation, 371 N.C. at 815–16 (quoting Pope v. Easley, 354 N.C. 544, 546 (2001) (per curiam)). This includes the power to organize and reorganize the legislative

branch. See Stein I, 387 N.C. at 580 (Berger, J., concurring) ("[T]he ultimate responsibility for assigning duties among executive branch officials, absent an express commitment by the constitution, has indeed been placed squarely in the hands of the General Assembly. (quotations omitted)).

Here, however, there is express authority. Besides the Governor, the Constitution establishes nine "Other elective officers," including the Auditor, who are, by definition, members of the executive branch. See N.C. Const. art. III, §§ 2(1) (establishing the office of Lieutenant Governor); 7(1) (establishing eight "other elective officers," including the Auditor). The Constitution then reserves for the People—acting through their representatives in the General Assembly—the power to assign the duties of these "other elective officers" in Article III, Section 7(2) by providing that "their respective duties shall be prescribed by law." N.C. Const. art. III, § 7(2).[4]

Thus, as one might expect, laws assigning duties to the "other elective officers" within our plural executive system are nothing new. In fact, they are commonplace.[5]

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[4] In addition, Article III, Section 5(10) provides that "[t]he General Assembly shall prescribe the functions, powers, and duties of the administrative departments and agencies of the State" and has the authority to "alter them from time to time." N.C. Const. art. III, § 5(10) (emphasis added). It then sets out procedures for the Governor to make or propose changes, but it reserves the final authority over such decisions for the legislative branch. Id.

[5] For example, the General Assembly has assigned the Commissioner of Insurance the duty to see "that all laws of this State that the Commissioner is responsible for administering . . . are faithfully executed." N.C. Gen. Stat. § 58-2-40 (1). The Commissioner of Labor is charged with the duty "to secure the enforcement of all laws relating to the inspection of factories, mercantile establishments, public eating places, and commercial institution in the State." N.C. Gen. Stat. § 95-4 (4)

And they are what the drafters of our Constitution intended when they provided that these officers' "respective duties shall be prescribed by law." N.C. Const. art. III, § 7(2).

The General Assembly's authority to assign duties to the Auditor and other Council of State members is an outgrowth of its general power to make laws and establish the policies that govern the executive branch. See, e.g., Rhyne v. K-Mart Corp., 358 N.C. 160, 169–70 (2004) ("The legislative branch is without question 'the policy-making agency of our government' . . . ."); State ex rel. Martin v. Melott, 320 N.C. 518, 524 (1987) (plurality) ("The citizens of this state have the right to distribute the governmental power among the various branches of the government."). Accordingly, both McCrory and Cooper I recognize that whether to create, eliminate, or move a given board or commission to another department is "a decision committed to the sole discretion of the General Assembly." Cooper I, 370 N.C. at 409 (emphasis added); see also McCrory, 368 N.C. at 664 (noting "the General Assembly's significant express constitutional authority to assign executive duties to the constitutional officers and organize executive departments"). This includes the power to determine

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(further providing that the Commissioner of Labor shall have the power to "appoint inspectors and other assistants"). The Secretary of State is similarly charged with authority to issue charters, certificates of incorporation, and other corporate documents, "as may be required by the corporation laws of the State," as well as to "administer the Securities Laws of the State." N.C. Gen. Stat. § 147-36(7) and (12).

who will appoint individuals to the statutory offices the General Assembly creates. See McCrory, 368 N.C. at 644.[6]

The General Assembly's express and plenary authority to assign duties to Council of State members under Article III, Section 7(2) has at least two implications. First—and as discussed below—it means that the allocation of duties among the State's multi-member executive branch (or at least those duties that are not exclusively assigned to a particular officer) constitutes a political question, textually committed to the legislative branch. See Harper, 384 N.C. at 327 (citation omitted); Stein I, 387 N.C. at 575; see also Section V, supra. . Second, whether or not the issue is justiciable, the General Assembly's exercise of its constitutional power under Article III, Section 7(2) must, by definition, be constitutional. See Harper, 384 N.C. at 322 ("Given that 'a constitution cannot violate itself' . . . a branch's exercise of its express authority by definition comports with the separation of powers." (quoting Leandro v. State, 346 N.C. 336, 352 (1997)).

The existence of an express provision on point in Article III, Section 7(2) should have ended the case. Yet, despite the plain language of that provision, the majority accepted the Governor's argument that Senate Bill 382 is somehow unconstitutional

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[6] The Supreme Court has made clear that making appointments does not involve the exercise of the executive power. See McCrory, 368 N.C. at 644 ("[A]ppointing statutory officers is not an exclusively executive prerogative"); see also Cooper Confirmation, 371 N.C. at 813 ("[O]ur courts have long held that the appointment power in North Carolina 'is not an executive, legislative, or judicial power, but only a mode of filling the offices created by law'" (quoting Cunningham, 124 N.C. at 643, 33 S.E.at 139)).

because it prevents him from performing his core functions under the Vesting and Take Care Clauses. In doing so, it erred as a matter of law.

III. SENATE BILL 382 DOES NOT IMPLICATE THE SEPARATION OF POWERS.

The panel further erred by treating this as a separation of powers case. Senate Bill 382 neither takes power from the executive branch nor interferes with any of the executive branch's "core" functions. Instead, it merely reallocates statutory duties among constitutional officers within the executive branch—something that does not implicate the separation of powers.

A. The Separation of Powers Clause Governs the Allocation of Power Between Branches, Not the Assignment of Duties Within the Same Branch.

The Separation of Powers Clause in Article I, Section 6 does not by itself provide an independent limit on the General Assembly's power to structure State agencies or to choose who appoints statutory officers. The Separation of Powers Clause "does not establish the various powers" that belong to each branch. Id. 384 at 298. It is thus "considered as general statement of broad, albeit fundamental constitutional principle' and must be considered with the related, more specific provisions of the constitution that outline the practical workings for governance. Id. (quoting State v. Furmage, 250 N.C. 616, 627 (1959)).

As a textual matter, the General Assembly's decision to transfer the Board of Elections to the Department of the Auditor, and to give the Auditor the power to appoint the Board's members (as well as the fifth member of the county boards), does not implicate the Separation of Powers Clause. The Governor and the Auditor are

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

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

Thus, as the Supreme Court explained in May, "the present case concerns the General Assembly's ability to reassign certain duties among executive constitutional officers within the same branch. It does not implicate the classic separation of powers question whether certain functions belong in the executive or legislative branches." Stein I, 387 N.C. at 577.

Still, the majority launched straight into a separation of powers analysis. As a result, it failed to analyze the relevant question—whether the General Assembly's adoption of Senate Bill 382 interferes with the executive branch's ability to perform any of its core powers. (It does not.) Instead, it mistakenly focused only on whether Senate Bill 382 gave the Governor enough control over the Board of Elections, as if he were the only member of the State's executive branch. (R p 201 ("Because the State Board and county boards exercise executive functions, the question becomes whether the Governor, under Senate Bill 382, has sufficient control over those entities.") But that, of course, is not the question.

Had the panel started with the right question, it might have gotten the right answer. Senate Bill 382 takes nothing away from the executive branch. Indeed, it allocates all the relevant appointments to an elected, constitutional officer in the executive branch—the Auditor. Such an arrangement does not implicate, much less violate, the separation of powers.

B. McCrory, Cooper I, and Cooper Confirmation are Inapposite.

The panel also ignored the Supreme Court's repeated warnings that its decisions in McCrory, Cooper I, and Cooper Confirmation, should not be applied to cases that involve boards assigned to other members of the Council of State.

Indeed, the Court stressed each time that, "[a]s in McCrory, '**our opinion takes no position on how the separation of powers clause applies to those executive departments that are headed by independently elected members of the Council of State**.'" Cooper Confirmation, 371 N.C. at 805 n.4 (emphasis added) (quoting McCrory, 368 N.C. at 646, n.5); Cooper I, 370 N.C. at 407 n.5 (same).

This same language appears verbatim in each of Supreme Court's decisions for a reason. None of those cases addressed the allocation of power between the Governor and other members of the constitutional officers within the executive branch. The Supreme Court accordingly "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,' such as 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." Stein, 387 N.C. at 577 (emphasis in original).

But the majority ignored the Supreme Court's warnings and treated McCrory, Cooper I, and Cooper Confirmation as dispositive. It thus concluded that "McCrory, Cooper I, and Cooper Confirmation control the Panel's decision in this case" and similarly professed that the "panel cannot look past Cooper I, the controlling authority for this specific separation of powers issue." (R pp 205, 207 (emphasis added)). Then, the majority insisted that the fact Senate Bill 382 reassigned duties concerning the Board of Elections to the Auditor, rather than the General Assembly, "makes no difference to the constitutional analysis." (R p 201 (emphasis added)). But, as the Supreme Court has now made clear, that difference does matter to the analysis. Stein I, 387 N.C. at 577 (holding that the majority's decision constituted a "plain misapplication of our caselaw").

When analyzed under the proper framework, there can no dispute that Senate Bill 382 represents a legitimate exercise of the General Assembly's power to assign

executive duties to Council of State members. Our Constitution does not assign the Governor the power to regulate elections. Nor is the power to regulate elections inherent to his office. Thus, the Governor cannot show the challenged provisions are unconstitutional, much less do so beyond a reasonable doubt.

IV. SENATE BILL 382 DOES NOT INTERFERE WITH THE GOVERNOR'S CONSTITUTIONAL DUTIES.

To succeed on his challenge, the Governor would have to show that an express provision of the Constitution explicitly prohibits Senate Bill 382's changes to State and county boards of election. Harper, 384 N.C. at 298. But no such provision exists.

In the absence of such a provision, the panel adopted the Governor's sweeping assertion that the Vesting Clause and Take Care Clause combine to require that all executive power must be vested "solely" in the Governor, and "only" in the Governor. (R pp 112-113). Thus, the theory goes, Senate Bill 382 is unconstitutional—even though it grants the executive branch all the appointments to the Board of elections—because it allocates those appointments to the Auditor rather than the Governor. That theory, however, has no support in our constitutional text, history, or precedent.

A. The Constitution Does Not Grant the Governor Exclusive Power to Administer Elections.

The panel repeatedly criticized Senate Bill 382 for "taking" what it terms the "Governor's appointment and removal powers" and "transferring" them to the Auditor. (See, e.g., R pp 194, 201).

But the panel got it backwards. The State and county boards of elections are creatures of statute. They were established by the Legislature. There is no constitutional requirement that they exist at all, much less that the Governor appoint

their members. Similarly, no provision of the Constitution grants the Governor an exclusive right to appoint statutory officers.[7] Thus, the Governor has no "right" to continue appointing the Board of Elections' members, or to insist that his appointees remain in office. Instead, as the Supreme Court confirmed in McCrory, the power to decide who appoints statutory officers is one that belongs in the first instance to the Legislature. See 368 N.C. at 644 ("[A]ppointing statutory officers is not an exclusively executive prerogative").s

Executive powers, functions, and duties "fall into three categories": (1) those assigned "by the constitutional text itself"; (2) those that are "inherent in a given executive role" and thus inure to a particular officer; and (3) those that are "assigned by law." Stein I, 387 N.C. at 578-79.

"Although some executive functions, powers, and duties are exclusive to one of the ten Council of State members" such as the Governor's duty to serve as Commander in Chief of the militia under Article III, Section 5(5), "others could plausibly be assigned to several, or even all, of the ten." Id. Accordingly, while

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

"unassigned and noninherent functions, powers, and duties, fall to the Governor" as a matter of default, the General Assembly is free to reassign duties that are merely "assigned by law"—i.e., those assigned by statute—to other constitutional officers. See id.; see also McCrory, 368 N.C. at 664 (Newby, J., concurring in part) (recognizing that, unless the constitution commits a function, duty, or power exclusively to one constitutional officer, it is the responsibility of the Legislature to assign it to a specific officer or department). Thus, "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." Stein I, 387 N.C. at 580 (Berger, J., concurring) (quoting McCrory, 368 N.C. at 664 (Newby, J., concurring in part)).

The power to appoint (and remove) members of the State and county boards of elections falls into this latter category of powers that are "assigned by law" and which the General Assembly is free to reassign.

First, the text of the Constitution does not assign the duty to oversee elections to the Governor—or any other Council of State member. Accordingly, the power to oversee elections, and to appoint the members of State and county boards of elections, is not one that the Constitution vests exclusively in the Governor.

The power to oversee elections is also not one that inherently vests in the Governor. In fact, the Governor had no role in overseeing the original Board of Elections, created in 1899. See 1899 Act to Regulate Elections, ch. 507, 1899 N.C. Pub. L. 659. Then, the General Assembly elected all seven members. Id. In time, the General Assembly gave the Governor oversight authority and the appointment

power. But just because the Governor oversaw the Board of Elections at one point does not mean he must always oversee it. In other words, a statutorily granted duty does not become constitutionalized by the mere passage of time. The General Assembly can change its mind.[8] Indeed, Senate Bill 382's changes to the Board of Elections are hardly an outlier.[9]

In sum, the Governor does not have any express or inherent constitutional right to oversee the administration of elections (or to appoint the individuals who sit on the State and county boards of elections). Instead, those powers were merely granted to the Governor "by law." They accordingly can be reassigned in the same

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[8] And General Assembly may have had good reason to do so. The failure of the Governor's political appointees to ensure that the Board adhere to the State's election laws is well documented and has been the subject of much litigation. See Griffin v. N. Carolina State Bd. of Elections, 913 S.E.2d 894, 896 (N.C. 2025) (concluding to the extent that 60,000 voters failed to properly provide the required registration information "the Board is primarily, if not totally, responsible."); Griffin v. N. Carolina State Bd. of Elections, No. COA25-181, 2025 WL 1021724, at *9 (N.C. Ct. App. Apr. 4, 2025), review allowed in part, denied in part, 913 S.E.2d 894 (N.C. 2025) ("The General Assembly enacted this requirement in 2004 . . . with bipartisan support during the administration of an elected Democrat governor and while elected Democrats constituted the majorities in both chambers in the General Assembly. The Board failed to amend the voter registration application form to obtain this information required by the 2004 law from new voter applicants until 2023.").

[9] Only six states—Delaware, Florida, New Jersey, Pennsylvania, Texas, and Virginia—delegate the appointment of elections officials to the Governor. See The National Conference of State Legislatures, Election Administration at State and Local Levels, https://www.ncsl.org/elections-and-campaigns/election-administration-at-state-and-local-levels (last visited 13 Feb. 2025). While in four states—Maine, New Hampshire, Oklahoma, and Tennessee—the chief election official is selected by the legislature. And seventeen states and Washington, D.C., have a separate board or commission that oversees elections in the state or jurisdiction. In short, there is no right answer or inherent gubernatorial role. There is only a policy decision to make. And in North Carolina the General Assembly gets to make that decision. Harper, 384 N.C. at 300.

manner. And the responsibility for deciding which constitutional officer will be assigned those duties is one that is reserved for the Legislature—not the Governor or the courts. N.C. Const. art. III, § 7(2) ("Their [the Council of State members'] respective duties shall be prescribed by law."); accord Stein, 2025 WL 1486969, at *3 (Berger, J., concurring) ("[T]he 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." (cleaned up)). There is nothing unconstitutional about the General Assembly's decision to entrust those duties to the Auditor.

B. The Panel Misread the Vesting Clause and Take Care Clause.

Ultimately, the panel's decision (and the Governor's position) rests on a fundamental misreading of the Vesting Clause and Take Care Clause. Despite the Governor's insistence to the contrary, neither clause grants power exclusively or "solely" in the Governor, nor do they make the Governor be the "only" executive officer responsible for carrying out the State's election laws.

First the Vesting Clause. While that clause provides—as a general matter—that executive power shall be vested in the Governor, N.C. Const. art. III, § 1, the Constitution does not stop there. As described above, the Constitution also establishes nine "Other elective officers," including the Auditor, each of whom is independently elected on a statewide basis. See N.C. Const. art. III, § 2 (establishing the office of the Lieutenant Governor) and § 7 (establishing the "Other elective offices"). It then expressly charges the General Assembly with authority to assign

their duties by providing "their respective duties shall be prescribed by law." N.C. Const. art. III, § 7(2). Accordingly, while these officers form the "Council of State," which has certain prescribed functions under our Constitution, they also serve as independent constitutional officers with duties and functions of their own.

The panel's decision, however, effectively read Article III, Section 7(2)—as well as the other provisions establishing the Auditor and other elective officers as part of the executive branch—out of the Constitution. But the Court cannot treat those provisions as mere surplusage. If the Vesting Clause meant that the only the Governor can hold executive power, there would be no room for the General Assembly to assign duties to other officials. Such an interpretation would violate the principle that all provisions of the Constitution must be read in pari materia, and in a manner that gives effect to each provision. Stephenson v. Bartlett, 355 N.C. 354, 378 (2002) (citing In re Peoples, 296 N.C. 109, 159 (1978)).

History, too, contradicts the panel's reading of the Vesting Clause. The Vesting Clause was first added with the adoption of our State's Reconstruction Constitution in 1868. But that same constitution also provided that the executive branch would consist of not only the Governor, but also the other members of the Council of State. 1868 N.C. Const. art. III, § 1 (listing governor as one of eight elected offices in the executive branch). In addition, the 1868 Constitution added, for the first time, provisions (i) requiring that the Council of State be directly elected and (ii) expressly stating that their respective duties "shall be prescribed by law." See 1868 N.C. Const., art. III, § 13 ("The respective duties of the [constitutional executive officers] shall be

prescribed by law.") Thus, "[w]ith the passage of the Constitution of 1868 'the Council of State became a body of elected officers, with executive duties of their own.'" Cooper Confirmation, 371 N.C. at 800 n.1 (emphasis added) (quoting John V. Orth & Paul Martin Newby, The North Carolina State Constitution 124-25 (2d ed. 2013)).

The panel's conclusion that our Constitution requires all executive power to be placed "solely" in the Governor ignores that history and mistakenly reads the Vesting Clause in isolation, without any regard for the other, express provisions of the Constitution that establish nine "Other elective officers" within the executive branch and authorize the General Assembly to assign their duties.

The panel's decision similarly misreads the Take Care Clause. In doing so, the majority accepted the Governor's assertion that the clause requires that the Governor have sufficient power over all executive boards and commissions to ensure they carry out his " views and priorities." (R pp 204-05). But the Take Care Clause does not go so far.

By its text, the Take Care Clause confers no power on the Governor. Instead, it limits his power. The clause subordinates the Governor's power to legislative direction by commanding that he acts within, and not exceed, the bounds of the laws passed by the General Assembly. See N.C. CONST. art. III, § 5(4) ("Execution of laws. The Governor shall take care that the laws be faithfully executed."). Thus, the clause requires the Governor to "take care" (not "ensure," as the Governor often suggests) that laws are executed in a manner "faithful," not to his prerogatives, but to those of the legislature. In other words, the clause imposes a duty of fidelity and a

duty of care: The Governor must exercise those powers he has been granted, either under the Constitution or by statute, in a manner that is faithful to the General Assembly's directives.

The Governor's conception of the Take Care Clause as a source of power thus cannot come from constitutional text. Instead, it comes from his (mis)reading of McCrory and Cooper I. But those cases do not interpret the clause as broadly as he would like. At most, those cases hold that the Governor's duties under the Take Care Clause carry with them "the ability to affirmatively implement the policy decisions that executive branch agencies subject to his or her control are allowed, through delegation from the General Assembly." Cooper I, 370 N.C. at 415 (emphasis added). And even then, any such power is only "interstitial." 370 N.C. at 416 n.11 (emphasis added).

In other words, the scope of the Governor's duty under the Take Care Clause depends what General Assembly has delegated to him. The Governor has no power to make policy decisions about matters that have not been assigned to him. Further, if a statute delegates decisions to other executive officials (such as members of the Council of State), the Governor has no obligation to personally execute the statute—only to use those powers he has in a manner faithful to the laws the General Assembly has enacted.

The Supreme Court has confirmed this understanding of the Take Care Clause. In "Cooper Appropriations" case, decided in 2020, the Supreme Court rejected the Governor's claim that the Take Care Clause required that he have power to direct

the distribution of federal block grants. Cooper v. Berger, 376 N.C. 22 (2020) (Ervin, J.) ("Cooper Appropriations"). As the Court explained, the Governor has no power to make "interstitial decisions" regarding questions the General Assembly has not delegated to him. Id. 376 N.C. at 46. Thus, the Court concluded that the General Assembly's decision to direct the distribution of federal block grants did not impermissibly interfere with the Governor's obligations under the Take Care Clause because "the General Assembly has not delegated the authority to determine how the relevant federal block money should be spent." Id.

So too here. The General Assembly has chosen to transfer the Board of Elections to the Department of the Auditor—an independent, constitutional officer within the executive branch—and to assign him the duty to appoint the Board's members (as well as the corresponding duties related to county boards). This renders the Board of Elections distinguishable from the boards and commissions at issue in McCrory, all of which were housed within cabinet agencies that fell directly under the control of the Governor and his appointees. Thus, there are no "interstitial decisions" for the Governor to make. Nor has the Governor (or any agency under his control) been delegated decisions that might serve as a vehicle to enact his "policy preferences."

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All told, the panel should have dismissed the Governor's challenge to Senate Bill 382, which failed to meet the high bar necessary to succeed on a facial challenge. Although he (and the panel's majority) continues to cite the same cases, they are

inapplicable. Senate Bill 382 did not transfer any power away from the executive branch. To the contrary, the Auditor, an independently elected member of the executive branch, appoints all of the members of the Board of Elections. Nor has the Governor been prevented from carrying out any law or duty that has been assigned to him. As a result, he cannot show that Senate Bill 382's changes to the Board of Elections, and the concomitant changes to the county boards, violate the Constitution.

V. THE GOVERNOR'S LAWSUIT PRESENTS A NONJUSTICIABLE POLITICAL QUESTION.

While the "multiple" errors in the trial court's analysis require reversal of its decision on the merits, the Supreme Court's order suggests it should have gone further and considered whether to assign duties related to the State Board of Elections to the Auditor constitutes a non-justiciable political question. *See* Stein I, 387 N.C. at 576 (citing Harper, 384 N.C. at 325-350)); *see also* id., 387 N.C. at 580-81 (Berger, J., concurring)).

The panel concluded that application of the political question doctrine was controlled by the Supreme Court's decision in Cooper I. (R p. 197-99). But, while Cooper I is difficult to square with the Court's later cases applying the political question doctrine—and thus may no longer be good law—it ultimately addressed a different inquiry.[10] In Cooper I, the Court held the Governor's challenge was

[10] The Court's order in Stein I suggests a majority of justices believe the case is controlled by Harper, which overturned prior decisions in which the Court refused to apply the political question doctrine, and that and Cooper I thus should be overturned for the same reasons. Cf. Harper, 384 N.C. at 326 (Newby, J.) (reversing, on reconsideration, Court's prior decisions based on reasoning from the justice's dissents); Cooper I (Newby, J., dissenting) ("This case presents a nonjusticiable

justiciable because it required the Court to resolve "a conflict between two competing constitutional provisions" and reviewed whether the legislation at issue violated the separation of powers by preventing the executive branch from performing one of its "core" functions. 370 N.C. at 409-10. This case, however, does not involve the separation of powers, but instead the General Assembly's express (and plenary) authority to assign unreserved official duties among Council of State members within the executive branch under Article III, Section 7(2).

The political question doctrine is "a function of the separation of powers." Harper, 384 N.C. at 325 (quoting Baker, 369 U.S. at 217). The doctrine "operates to check the judiciary and prevent its encroaching on the other branches' authority. Under this doctrine, courts must refuse to review political questions, that is, issues that are better suited for the political branches. Such issues are considered nonjusticiable." Id. (citation omitted). Accordingly:

> [O]ut of respect for the separation of powers, a court must refrain from adjudicating a claim when any one of the following is present (1) a textually demonstrable commitment of the matter to another branch; (2) a lack of judicially discoverable and manageable standards; or (3) the impossibility of deciding a case without making a policy determination of a kind clearly suited for nonjudicial discretion.

Id. (citing Baker, 369 U.S. at 217; Bacon, 353 N.C. at 716-17). All three of these factors are present here.

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political question because it satisfies not just one, . . . but all four" of the criteria enumerated in Baker v. Carr, 369 U.S. 186, 217)). Legislative Defendants thus submit that Cooper I was wrongly decided—even though it is inapplicable—and should this case reach the Supreme Court intend to argue as much.

The Constitution expressly commits responsibility for assigning duties to the multiple executive officers who serve on the Council of State to the General Assembly in its discretion under Article III, Section 7(2). Except for those specific duties that it assigns to particular officers, the Constitution does not impose any limits on the General Assembly's authority to decide which Council of State member should perform which duty. Nor does it provide any judicially manageable standards for the Court to use when reviewing those decisions. Deciding which Council of State member is best suited to perform otherwise unassigned duties (especially those duties that exist only by operation of statute) requires the type of policy decision that can only be made by the political branches. Stein I, 387 N.C. at 580 (Berger, J., concurring) ("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.); see also Harper, 384 N.C. at 428 (explaining that, where the constitution does not provide guidance to the applicable standard, it forces the courts "to utilize their own policy preferences").

The panel was thus wrong when it concluded that Cooper I controls whether this case presents a political question. How executive power is disbursed among the Council of State members is a political question that is expressly reserved for the Legislature, and the Courts do not have any role in second-guessing the policy questions involved in that type of intra-branch dispute.

CONCLUSION

Senate Bill 382 represents a legitimate exercise of the General Assembly's express constitutional power to structure agencies of State government to ensure their accountability to the People. The panel's decision wrongfully removes the structure of the Board of Elections—and the decision of who should appoint its members—from the political process. Accordingly, Legislative Defendants ask that the panel's order, which granted the Governor's motion for summary judgment and denied Legislative Defendants' motion, be reversed.

Respectfully submitted, this the 22nd day of August, 2025.

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CERTIFICATION

The undersigned counsel of record certifies in accordance with N.C. R. App. P. 28(j)(2) the foregoing Legislative Defendants/Appellants' Opening Brief, filed in proportionally spaced type, contains no more than 8,750 words, including footnotes and citations in the text, but excluding covers, captions, indexes, tables of authorities, certificates of service, certificates of compliance, and counsel's signature block.

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