No. COA 25-652 TENTH DISTRICT

NORTH CAROLINA COURT OF APPEALS
****

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

Plaintiff-Appellee,

v.

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

Defendants-Appellants,

and

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

Defendant-Intervenor-Appellant.

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

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APPELLANT'S BRIEF OF THE NORTH CAROLINA STATE AUDITOR

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N.C. Const. of 1868 art. III, § 13 34

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Charles A. Rees,
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John V. Orth & Paul Martin Newby,
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APPELLANT'S BRIEF OF THE NORTH CAROLINA STATE AUDITOR

****

Introduction

Our State's Constitution directs the General Assembly to "prescribe the functions, powers, and duties of the administrative departments and agencies of the State," and to "alter them from time to time." N.C. Const. art. III, § 5(10). Taking the Constitution at its word, the General Assembly altered the respective duties of particular executive officials last year through legislation known as "Senate Bill 382." That bill moved certain executive authority—the power to appoint members of our State and County Boards of Elections—away from the Governor and to the independently elected State Auditor. Displeased with that shift, the Governor filed suit and claimed that the General Assembly violated North Carolina Supreme Court precedent, as well as our Constitution's Separation of Powers, Take Care, and Vesting Clauses.

The Governor is wrong. Section 5(10) of our Constitution, known as the Reorganization Clause, authorizes the General Assembly to reallocate the duties and structure of the executive branch as it sees fit, so long as those duties are not otherwise prescribed by our Constitution's text. That is exactly what Senate Bill 382 accomplishes. As the Supreme Court already explained in rejecting the Governor's bid for certiorari in

this very case, the Governor's reliance on *McCrory*, *Cooper I*, and *Cooper Confirmation* is misplaced. Those decisions dealt with inter-branch disputes, not the reassignment of authority within the executive branch. Nor, as the Supreme Court further clarified, do the Separation of Powers, Take Care, or Vesting Clauses offer him refuge either.

Even setting all that aside, the Governor's challenge fails for another reason: it raises a political question. The Reorganization Clause commits executive restructuring to the legislative branch, and courts are not free to second-guess *how* the General Assembly exercises that power. Finally, and more broadly, the General Assembly's plenary legislative power forecloses judicial intervention here as well.

For all these reasons, this Court should reverse the Panel's order granting the Governor summary judgment and denying Defendants' motion.

Issues Presented

1. Whether the trial court erred in granting summary judgment in Plaintiff-Appellee's favor, failing to grant summary judgment in Defendants-Appellants' favor, and invalidating sections 3A.3.(b), (c), (d), (f), (g), and (h) of Senate Bill 382 as unconstitutional.

2. Whether the trial court lacked subject matter jurisdiction to determine the propriety of the amendments in Senate Bill 382 to the appointment structures of the State and County Boards of

Elections because that determination is a nonjusticiable political question.

Statement of the Case

The General Assembly passed Senate Bill 382 in December 2024. In February 2025, the Governor filed a supplemental complaint[1] against Philip E. Berger, in his official capacity as President Pro Tempore of the North Carolina Senate, and Destin C. Hall, in his official capacity as Speaker of the North Carolina House of Representatives ("Legislative Leader Defendants"; together with the Auditor, "Defendants"). (R p 109). The Governor claimed that the provisions of Senate Bill 382 transferring appointment authority to the Auditor—Sections 3A.3.(b), (c), (d), (f), (g), and (h)—violated the Constitution's Separation of Powers, Take Care, and Vesting Clauses. (R pp 121–22, Doc Ex pp 11–14, 19).

The parties cross-moved for summary judgment on 25 February 2025, (R pp 155, 158), and the Auditor, who permissively intervened as a defendant, filed a memorandum opposing the Governor's motion and supporting Legislative Leader Defendants' motion on 12 March 2025. (R

[1] This case originally began as a challenge to prior legislation, and the Auditor was not a party to that dispute. (R p 3). With both sides' consent, the Governor filed a supplemental complaint in this same case, now challenging Senate Bill 382 instead of the prior law. (R pp 95, 109).

p 181, Doc Ex 132). A three-judge panel of Superior Court judges ("Panel") granted the Governor's motion on 23 April 2025. (R p 191). Legislative Leader Defendants and the Auditor appealed that order on 24 April 2025 and 25 April 2025, respectively. (R pp 221, 227).

This Court granted supersedeas and stayed the Superior Court's order on 30 April 2025. (R p 232). The Governor then petitioned the North Carolina Supreme Court for a writ of certiorari, which the Supreme Court denied. *Stein v. Berger*, 387 N.C. 575, 579 (2025). Defendants timely filed the record on 16 July 2025, and this case was docketed the same day.

Statement of Grounds for Appellate Review

The Superior Court's 23 April 2025 order (R pp 191–211) allowing the Governor's motion for summary judgment is a final, appealable order. *Hoaglin v. Duke Univ. Health Sys., Inc.*, 293 N.C. App. 517, 521 (2024). This Court has appellate jurisdiction under N.C.G.S. § 7A-27(b)(1) [App. 1].

Statement of Facts

I. The General Assembly Enacts Senate Bill 382.

Last fall, the General Assembly passed Senate Bill 382, which made changes to the organization and structure of the North Carolina State

Board of Elections ("State Board" or "Board") and the County Boards of Elections ("County Boards").

Through what is known as a "Type II transfer," Senate Bill 382 moved the State Board, intact, from the Governor's Office to the Office of the State Auditor. *See* N.C. Sess. L. 2024-57, § 3A.2.(a) [App. 43]; *see also* N.C.G.S. § 143A-6(b) [App. 3]. The Board still retains its status as an independent entity. N.C. Sess. L. 2024-57, § 3A.2.(a). The central change effected by Senate Bill 382—and the aspect that the Governor challenges—is the transfer of appointment power from one executive official to another. *See id.* § 3A.3. Previously, the Governor appointed all State Board members and one member of each County Board. *Id.* Senate Bill 382 gave that appointment authority to the Auditor. *Id.*

Then-Governor Cooper vetoed Senate Bill 382. The General Assembly overrode that veto and enacted the bill. *See* N.C. Sess. L. 2024-57.

II. The Governor Challenges Senate Bill 382.

The Governor responded by filing suit in Superior Court. In a split decision, the Panel blocked Senate Bill 382 from taking effect. (R pp 191–211). Relying predominantly on the Separation of Powers test set out in

State ex rel. McCrory v. Berger, 368 N.C. 633 (2016), and *Cooper v. Berger*, 370 N.C. 392 (2018) ("*Cooper I*"), the Panel held that Senate Bill 382 unlawfully deprived the Governor of sufficient "control" over Board appointments. (R pp 201–06). Defendants appealed that decision, and this Court granted the Legislative Leader Defendants' petition for writ of supersedeas and stayed the Panel's order from taking effect pending disposition of Defendants' appeal. (R p 232).

III. The Supreme Court Declines to Stay This Court's Decision.

The Governor petitioned our Supreme Court for a writ of certiorari and a writ of supersedeas, asking it to reinstate the Panel's order. *See Stein*, 387 N.C. at 575. The Supreme Court refused, holding that this Court did not abuse its discretion in blocking the Panel's order. *Id.* at 576, 579.

The Court reasoned that there were "multiple grounds upon which the Court of Appeals could have made a reasoned decision to stay the [Panel's] … order." *Id.* at 576. For instance, the "fundamental approach according to which North Carolina's courts evaluate a law's constitutionality." *Id.* (citing *McKinney v. Goins*, 387 N.C. 35, 41–47 (2025)). Or "the political question doctrine and non-justiciability." *Id.*

(citing *Harper v. Hall*, 384 N.C. 292, 325–50 (2023)). But "[f]or purposes of [its emergency] order," the Supreme Court focused on "just one" rationale: the fact that "the three-judge panel unambiguously misapplied [Supreme Court] precedent." *Id.*

The Supreme Court held that both *McCrory* and *Cooper I* (and *Cooper v. Berger*, 371 N.C. 799 (2018) ("*Cooper Confirmation*")) were inapposite here, explaining that our State's Constitution disburses executive power "among the ten individually elected officers of the Council of State" rather than placing it all in the hands of the Governor. *Stein*, 387 N.C. at 576. The Court noted that both *McCrory* and *Cooper I* had included a critical caveat: those opinions expressly took "no position on how the Separation of Powers Clause applies to those executive departments that are headed by the independently elected members of the Council of State." *Id.* at 577–78 (citation modified). In other words, while *McCrory* and *Cooper I* involved *inter*-branch power disputes, this case centers around *intra*-branch organization. *Stein*, 387 N.C. at 577. For that reason, the Supreme Court determined that neither *McCrory* nor *Cooper I* governs this case. *Id.* Rather, this case is "one of first impression." *Id.*

Before concluding, the Supreme Court clarified the scope of two other constitutional provisions at issue here. It first observed, directly counter to the Governor's prior claims, that the Governor's duty under the Take Care Clause "is a nonexclusive duty conferred upon all ten Council of State members." *Id.* at 578 n.4. It also expounded on the meaning of the Vesting Clause. The Court explained that executive powers fall into three categories: those prescribed by the Constitution, those set by law, and those inherent in a particular role. *Id.* at 578–79. Citing the Vesting Clause, the Court reasoned that "[a]ny unassigned and noninherent executive functions, powers, and duties fall to the Governor." *Id* at 579.

Justices Berger and Dietz concurred separately. In his opinion, Justice Berger strongly suggested that the Governor's challenge to Senate Bill 382 was a nonjusticiable political question because the "reallocation of [Board appointment] authority within the Council of State is expressly contemplated in the constitution." *Id.* at 581 (Berger, J., concurring). In his concurrence, Justice Dietz explored Article III, Section 11, which in his view might prohibit the General Assembly from shifting power within the executive branch if the power did not align with

the official's "core constitutional role." *Id.* at 582 (Dietz, J., concurring). But because the Panel's order "did not grasp any of this legal complexity," he agreed that this Court did not err by staying it. *Id.* Justices Earls and Riggs dissented.

Senate Bill 382, now Session Law 2024-57, is in effect. The Auditor made his State Board appointments on 1 May 2025. He likewise appointed one member to each County Board in late June, and the State Board appointed their remaining members soon thereafter. This Court should reject the Governor's attempt to unwind that work.

Argument

Senate Bill 382 is a valid exercise of the General Assembly's power. Our Constitution's Reorganization Clause expressly permits this kind of intra-executive branch restructuring—full stop. That should end the matter. But even if it did not, the Panel's order errs because the Reorganization Clause renders the Governor's challenge nonjusticiable. That provision textually assigns the General Assembly ultimate authority to reorient the executive branch as it sees fit. So too does the General Assembly's plenary power make the Governor's claim nonjusticiable.

As our Supreme Court has now made clear, the Governor's challenge ignores the Constitution's text, misunderstands its history, and distorts past precedent far beyond its four corners. This Court should reverse the Panel's order.

I. The Standard of Review Is De Novo.

This Court reviews a grant of summary judgment de novo. *Value Health Sols., Inc. v. Pharm. Rsch. Assocs.*, 385 N.C. 250, 267 (2023). But "the idea of the judiciary preventing the legislature, through which the people act, from exercising its power is the most serious of judicial considerations." *Harper*, 384 N.C. at 323 (citation modified). So our courts "presume[] that legislation is constitutional." *Id.* To succeed in a constitutional claim against a statute, a party must "meet the highest quantum of proof" and "show[] that the statute is unconstitutional beyond a reasonable doubt." *Id.* at 324. In cases of first impression like this one, the presumption of constitutionality is "especially strong," "because cases of first impression inherently lack precedential guidance." *Stein*, 387 N.C. at 577 & n.3.

II. The Reorganization Clause Expressly Permits Senate Bill 382.

Article III, Section 5(10) of our Constitution gives the General Assembly final authority to restructure and reallocate the duties of the executive branch. The Governor does not—indeed, cannot—meaningfully contest that reading of the Reorganization Clause. Instead, he and the Panel have cobbled together an amalgam of constitutional provisions and prior Supreme Court precedent that they claim constrains that power. But their reading is belied by the text, structure, and history of the Constitution—not to mention the Supreme Court's reasoning in this very case.

A. Our Constitution Permits the General Assembly to Reorganize the Executive Branch.

The Governor's challenge to Senate Bill 382 fails for a simple reason: our Constitution explicitly allows the changes it effects. It vests ultimate authority over the organization and structure of the executive branch to the General Assembly, *Adams v. N.C. Dep't of Nat. & Econ. Res.*, 295 N.C. 683, 696–97 (1978), and that includes the power to re-delegate duties amongst members of the Council of State. The General Assembly did exactly that through Senate Bill 382.

"Unlike the United States Constitution, the North Carolina Constitution is in no matter a grant of power." *Harper*, 384 N.C. at 323 (internal quotation marks omitted). Ours instead begins "with a categorical assertion of popular sovereignty: 'That all political [p]ower is vested in and derived from the people only.'" John V. Orth, *North Carolina Constitutional History*, 70 N.C. L. Rev. 1759, 1762 (1992) (quoting N.C. Const. of 1776, Declaration of Rights, § 1). The people of our State thus exercise plenary power, instead of the specifically enumerated powers our federal government possesses. *McIntyre v. Clarkson*, 254 N.C. 515, 515 (1961). And because the legislature "is closest to the people and most accountable through the most frequent elections," the people exercise their plenary power "through the legislative branch." *Harper*, 384 N.C. at 297.

Rather than granting the legislature certain powers as the federal Constitution does, our State's Constitution starts from the premise that the General Assembly has plenary power and only places limitations on that power through express text. *Hart v. State*, 368 N.C. 122, 131 (2015); *see also Harper*, 384 N.C. at 323. That is why, among the three branches, "the preponderant power has always rested with the legislature." John

V. Orth & Paul Martin Newby, *The North Carolina State Constitution* 50 (2d ed. 2013) [App. 68]. So "[u]nless the Constitution *expressly* or by *necessary implication* restricts the actions of the legislative branch, the General Assembly is free to implement legislation as long as that legislation does not offend some specific constitutional provision." *Baker v. Martin*, 330 N.C. 331, 338–39 (1991).

In addition to acknowledging the General Assembly's baseline plenary authority, our Constitution also affirmatively recognizes certain legislative powers and duties. *E.g.*, N.C. Const. art. III, §§ 5(10), 7(2); *id.* art. IV, §§ 10, 12(1). These provisions "develop[] the nature" of the General Assembly's plenary authority by explaining the contours of certain powers and assigning the General Assembly certain tasks. *Harper*, 384 N.C. at 321.

This case involves one such explicitly recognized power. Article III, which describes the duties and structure of the executive branch, contains a clause explaining that it is the General Assembly—not any executive official—that has ultimate authority over the executive's structure and responsibilities. Titled "Administrative reorganization," the Reorganization Clause in Section 5(10) directs the General Assembly

to "prescribe the functions, powers, and duties of the administrative departments and agencies of the State," and permits the General Assembly to "alter them from time to time." N.C. Const. art. III, § 5(10). That provision "specifically assigns to the General Assembly authority over the administrative [departments and agencies] it legislatively creates," *Cooper I*, 370 N.C. at 437 (Newby, J., dissenting), including the Board, *see* N.C.G.S. §§ 163-22, -30 [App. 10, 13].

The Clause also gives the Governor some say in executive structure and duty allocation. It allows him to either propose alterations *sua sponte* or change a proposal from the General Assembly via executive order. N.C. Const. art. III, § 5(10). But any prospective change by the Governor is ultimately subject to General Assembly approval. The General Assembly can either veto his changes "by resolution of either house" or "specifically modif[y]" them "by joint resolution of both houses." *Id.* All told, the Constitution's Reorganization Clause recognizes that the General Assembly retains final authority over the organization and structure of the executive branch.

That authority fits squarely within the broader framework our Constitution sets out as well. Elsewhere, the Constitution sets forth

specific members of the executive branch who are to be popularly elected, independent of the Governor. N.C. Const. art. III, § 7(1). The Constitution directs the General Assembly—not any other member of the executive branch—to "prescribe[]" those officials' duties "by law." *Id.* § 7(2). So too does the General Assembly have the power to create and determine the substantive duties of new, unelected departments that it creates. *See Cooper Confirmation*, 371 N.C. at 805 (discussing statutory officials). In other words, because the General Assembly assigns most executive duties in the first instance, it makes sense that it also holds the power to reassign them under the Reorganization Clause.

Senate Bill 382 is a textbook exercise of that power. The General Assembly has taken one executive "function"—appointment authority over members of the State and County Boards of Elections—and "alter[ed]" it by vesting it with another independent executive officer. N.C. Const. art. III, § 5(10). According to the plain text of our Constitution, that is proper. The Panel erred in concluding otherwise.

B. The Governor and Panel's Reliance on Case Law and Other Constitutional Provisions Fails.

Neither the Governor nor the Panel majority dispute the General Assembly's authority under the Reorganization Clause. Instead, they

argue that, notwithstanding Section 5(10)'s expansive directive to "prescribe" and "alter" the "functions, powers, and duties" of the executive branch, other constitutional provisions prevent the General Assembly from conferring Board appointment power in the Auditor. And they claim that our Supreme Court recognized as much in *McCrory* and *Cooper I*.

That is wrong. Neither the Separation of Powers, Take Care, or Vesting clauses prohibit *intra-branch* transfers like the one at issue here. Nor, as our Supreme Court has made clear, do *McCrory* and *Cooper I*.

1. Senate Bill 382 Does Not Run Afoul of the Separation of Powers Clause.

Our Constitution's Separation of Powers Clause divides our State government's "power into its constituent parts: legislative, executive, and judicial," with "the preponderant power … rest[ing] with the legislature." Orth & Newby, *supra*, at 50. That Clause provides that "[t]he legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other." N.C. Const. art. I, § 6.

To ensure the three branches remain separate, the Clause bars one branch from interfering with or usurping the exercise of another branch's duties. In *McCrory* and *Cooper I*, for instance, the statutes at issue

involved too much legislative control over executive functions—*inter-branch* meddling, in other words. *McCrory*, 368 N.C. at 646; *Cooper I,* 370 N.C. at 416.[2] But the Separation of Powers Clause does not speak to how power must be divided *within* a single branch; it says nothing about where within the branch a particular duty must reside. And the text, structure, and history of our Separation of Powers Clause all confirm as much.

Text. North Carolina courts' "longstanding approach to constitutional questions" is to first look to "the text." *McKinney*, 387 N.C. at 37. The relevant text is plain. It mandates that the three branches of government must "be forever separate and distinct *from each other*." N.C. Const. art. I, § 6 (emphasis added). Nowhere does it command that the branches' powers must be *internally* delineated in any specific manner. *See Cooper v. Berger*, 376 N.C. 22, 44 (2020) (one branch violates the Clause only when its "actions … prevent *another branch* from performing its constitutional duties" (emphasis added)). In fact, our Supreme Court has said exactly that in this case. It explained that *McCrory* and *Cooper*

[2] The Auditor respectfully submits that both *McCrory* and *Cooper I* were wrongly decided and intends to argue as much should this case reach the Supreme Court again. But, in any event, they are inapplicable.

I both acknowledged a key distinction—whether a transfer of power is inter- or intra-branch "*does* make a difference to the constitutional analysis." *Stein*, 387 N.C. at 578.

Structure. The Constitution's structure likewise confirms that the specific duties assigned to any given executive officer are meant to evolve over time, not be frozen in place by the Separation of Powers Clause. That Clause serves "as a general statement of a broad … constitutional principle," and must be read alongside the "more specific provisions … that outline the practical workings for governance." *Harper*, 384 N.C. at 321–22. Those more concrete provisions in our Constitution—like the Reorganization Clause and Article III, Section 7(2)—make plain that the Separation of Powers Clause does not prohibit the General Assembly from reallocating duties and functions, like Board appointments, within the executive branch.

To diffuse executive power, *Stein*, 387 N.C. at 580 (Berger, J., concurring), our Constitution creates a multi-member executive branch, comprised of ten independently elected officers including the Governor, N.C. Const. art. III, §§ 2(1), 7(1). This structure prevents consolidation of authority in a single chief executive. *See McCrory*, 368 N.C. at 655

(Newby, J., concurring in part and dissenting in part); *see also Johnson & Johnson v. Wilson*, 563 P.3d 841, 848 (N.M. 2024) (explaining that a "fragmented executive framework" is designed both "to weaken the power of a central chief executive and further an intrabranch system of checks and balances.").[3]

Although the Constitution specifically delineates the *Governor*'s (and some of the Lieutenant Governor's) duties, *e.g.*, N.C. Const. art. III, §§ 5(5), 5(6), 6; *id.* art. II, § 22(1), it provides that the eight other officers' duties "shall be prescribed by law," *id.* art. III, § 7(2). The Constitution generally leaves the substantive responsibilities of the other Council of State members up to the discretion of the General Assembly. Nowhere does it state that those duties are etched in stone. In fact, it says precisely the opposite. The General Assembly has the power to "alter" executive officials' duties "from time to time." N.C. Const. art. III, § 5(10).

The North Carolina Constitution, in other words, creates a multimember executive branch and directs the General Assembly to set and reallocate the duties of those members. *See* N.C. Const. art. III,

[3] Indeed, to the extent our Constitution envisions separation of powers within the executive branch, it cuts against the Governor—not for him. Allowing the General Assembly to reassign duties prevents the Governor from consolidating power.

§§ 5(10), 7(2). Because a "branch's exercise of its express authority by definition comports with separation of powers," *Harper*, 384 N.C. at 322, the Separation of Powers Clause does not prevent the General Assembly from making intra-executive alterations as it sees fit.

History. The historical understanding of the Separation of Powers Clause likewise indicates that it was never meant to touch intra-branch disputes.

Our first Constitution, enacted in 1776, included a Separation of Powers Clause nearly identical to the one in our current Constitution. N.C. Const. of 1776, Declaration of Rights, § 4. As Justice Samuel Ashe observed shortly after our Constitution was adopted, "at the time of our separation from Great Britain," the people of North Carolina met "and formed that system or those fundamental principles comprised in the constitution, dividing the powers of government into separate and distinct branches." *Bayard v. Singleton*, 1 N.C. 5, 6 (1787); *see also* Orth, *supra*, at 1760. Those powers were "the legislative, the judicial and executive," and the Constitution "assign[ed] to each, several and distinct powers, and prescrib[ed] their several limits and boundaries." *Bayard*, 1

N.C. at 6. North Carolinians in the eighteenth century thus understood the Separation of Powers Clause to apply only to inter-branch disputes.

So did Marylanders. Our 1776 Constitution's Separation of Powers Clause "is almost identical to that in the Maryland Declaration of Rights," and was likely drawn from it. Orth & Newby, *supra*, at 9; *see* Md. Const. of 1776, Declaration of Rights, § 6. Historical context suggests that Maryland's Framers likewise only conceived of their Separation of Powers Clause as barring inter-branch interference. Before it enacted its constitution, Maryland's government had "intermixed" its "functions," with executive officials exercising legislative and judicial powers and legislators wielding executive duties. Charles A. Rees, *Remarkable Evolution: The Early Constitutional History of Maryland*, 36 U. Balt. L. Rev. 217, 246 (2007). As one early Maryland high court opinion put it, this intermixing was "the most glaring abuse[] of the colonial government," and "it was against such abuses that [the Separation of Powers Clause] was directed." *Magruder v. Swann*, 25 Md. 173, 180 (1866). Against this backdrop, then, it's clear that Maryland's Framers also understood their Separation of Powers clause as only preventing

cross-branch intermingling. *See Wright v. Wright's Lessee*, 2 Md. 429, 452–53 (1985).

Given that historical context, North Carolina courts have, unsurprisingly, long understood that "[t]he principal function of the separation of powers is to maintain the tripartite structure of the Government—and thereby protect individual liberty—by providing a safeguard against the encroachment or aggrandizement *of one branch at the expense of another*." *Bacon v. Lee*, 353 N.C. 696, 715 (2001) (emphasis added) (citation modified). Members of post-1776 Constitution Commissions have expressed the same view. N.C. Constitutional Comm'n, *Report of the North Carolina State Constitution Study Comm'n 1959* 1 (1959), https://dub.sh/wB422wu [App. 49]. So too has the United States Supreme Court. *Touby v. United States*, 500 U.S. 160, 167–68 (1991) ("The principle of separation of powers focuses on the distribution of powers *among* the three coequal Branches … ; it does not speak to the manner in which authority is parceled out within a single Branch.").

The text, structure, and history of our Constitution all point in one direction: our Separation of Powers Clause has nothing to say about

intra-branch organization. The Panel's reliance on that provision was error.

2. Senate Bill 382 Does Not Run Afoul of the Take Care Clause.

The Panel's reliance on the Take Care Clause was likewise erroneous. Throughout this case, the Governor has claimed that this Clause entitles him to retain "sufficient control" over Board appointment authority for all time. (Doc Ex 22–23). The Panel adopted that same view in its order. (R p 200). But the Take Care Clause is not an exclusive grant of power. The Governor therefore cannot use it to exclude other independent executive officials from performing a duty that was once his.

Even though the Clause directs the Governor to "take care that the laws be faithfully executed," N.C. Const. art. III, § 5(4), our Supreme Court recognized in *Cooper Confirmation* that "the Governor is not alone in this task." 371 N.C. at 800. Other Council of State members also must faithfully execute the duties they have been assigned. *Id.* And if there were any doubt as to what that language in *Cooper Confirmation* meant, the Supreme Court cleared the fog in this case. Observing that, for instance, all other Council of State members must take nearly identical oaths to faithfully execute their duties, the Court explained that the

"duty to 'take care that the laws be faithfully executed' … is a nonexclusive duty conferred upon all ten Council of State members." *Stein*, 387 N.C. at 578 n.4.

That reading not only adheres to the text—it also makes the most sense in practice. Consider, for example, the North Carolina Department of Agriculture and Consumer Services, which currently sits under the Commissioner of Agriculture. N.C.G.S. § 106-2(a) [App. 2]. Imagine if the General Assembly had originally placed that department under the Governor but later concluded it belonged under the Agriculture Commissioner instead. Under the Governor's theory, that shift—no matter how sensible—would be barred under the Take Care Clause, simply because it adjusts who within the executive branch carries out the law. That cannot be right. It would defy common sense and run headlong into the Constitution's broad grant of authority allowing the General Assembly to assign and reassign executive duties. *See* N.C. Const. art. III, §§ 5(10), 7(2).

3. Senate Bill 382 Does Not Run Afoul of the Vesting Clause.

As one last attempt to tether the Governor's argument to constitutional text, the Panel asserts that our Constitution's Vesting

Clause confers "executive authority *exclusively* in the Governor's Office." (Doc Ex p 16 (emphasis added); *see* R p 203). Thus, this argument goes, any interference with his ability to carry out his executive power—not the branch's ability as a whole—is a separation of powers problem. Not so.

The Constitution's Vesting Clause states that "[t]he executive power of the State shall be vested in the Governor." N.C. Const. art. III, § 1. In its order in this case, the Supreme Court gave the parties guideposts as to what exactly it means to "vest[]" the "executive power of the State" in the Governor. It explained that "[e]xecutive functions, powers, and duties fall into three categories." *Stein*, 387 N.C. at 578–79. The first "consists of those prescribed by the constitutional text itself," like the Governor's role as Commander in Chief. *Id.* at 579; *see also* N.C. Const. art. III, § 5(5). The second bucket "consists of those assigned by law." *Stein*, 387 N.C. at 579. The third "comprises those functions, powers, and duties inherent in a given executive role," like the Attorney General's "duty to represent the State in legal proceedings." *Id.* n.5.

The Court clarified that the Vesting Clause only comes into play if a duty doesn't fall into any of those three categories. Citing that Clause,

the Court observed that "[a]ny unassigned and noninherent executive functions, powers, and duties fall to the Governor." *Id.* at 579. The Vesting Clause, in other words, operates only as a catchall. If a duty is not laid out in constitutional or statutory text and does not inhere in any official's role, only then can the Governor claim it. The Vesting Clause does not inhibit the General Assembly's ability to assign and reallocate duties.

That makes sense. While the Vesting Clause applies by its terms to the Governor, it cannot be a grant of *all* executive power as he claims. The Council of State members exercise executive power as well. *See* N.C. Const. art. III, § 7(2). The most natural reading of the Vesting Clause, then, is the Supreme Court's—it doesn't vest the Governor with "ultimate" power over the branch; it only directs the Governor to oversee any duties that do not fit into one of these three categories.

The Governor has tried to make much of the fact that the 1868 version of the Vesting Clause used the phrase "*[s]upreme* executive authority." (Doc Ex p 222 (emphasis added); R p 204). But the current Constitution omits the word "supreme." N.C. Const. art. III, § 1; *see Cuomo v. N.Y. State Comm'n on Ethics & Lobbying in Gov't*, 2025 WL

515384, at *6 (N.Y. Feb. 18, 2025) [Add. 9] (constitution's removal of word "supreme" "belie[d] [the Governor's] expansive theory of executive power"). While the Governor will likely claim that alteration was "primarily editorial," (Doc Ex p 222), that argument defeats itself. If the word "supreme" had the sweeping meaning the Governor claims it does, its omission would *have* to be substantive. Otherwise, the term "supreme" would have had no meaning from the beginning.

At its core, the Governor's reading of the Vesting Clause collapses executive power into a single office. But as our Supreme Court recognized, our Constitution does not work that way. It contemplates a range of independent officers and entities within the executive branch. The Vesting Clause does not allow the Governor to hoard executive power all to himself. The trial court erred in adopting this view, and the Panel's order should be reversed.

4. *McCrory* and *Cooper I* Are Inapposite.

The Governor's position also finds no support in precedent. Below, both the Governor and the Panel invoked *McCrory* and *Cooper I* to claim that the Governor must retain "sufficient control over the State Board." (R p 200; *see* Doc Ex pp 22–23). But our Supreme Court has now squarely

held that the Panel was "mistaken[]" to "conclude[] that *McCrory*[and] *Cooper I* … controlled this case." *Stein*, 387 N.C. at 578.

Both cases dealt with inter-branch conflict. Because neither opinion involved a dispute over power *within* one branch, the Supreme Court cautioned in both cases that it took "no position on how the separation of powers clause applies to those executive departments that are headed by the independently elected members of the Council of State." *Cooper I*, 370 N.C. at 407 n.4; *McCrory*, 368 N.C. at 646 n.5. Those caveats, as our Supreme Court explained in this case, "render[] *McCrory*[and] *Cooper I* … inapposite." *Stein*, 387 N.C. at 577. This case is instead "one of first impression." *Id.* This is another error warranting reversal.

C. The Constitution Does Not Constrain the General Assembly from Giving Duties to Executive Officers Based on the Nature of Their Roles.

Even though the Governor's position finds no support in precedent or the Constitution's text, the Panel adopted a sweeping rule that significantly cabins the General Assembly's power. The Panel held that the General Assembly's power to assign the Council of State's duties "is constrained by the people's understanding of the purpose of those offices when they were created." (R p 203). That view misapprehends the law.

1. The Constitution Does Not Limit Council of State Members' Duties to Their Subject Matter.

The Panel's view—that the Council of State's duties are limited only to the "people's understanding" of those offices when they were created—has no footing in our Constitution's text. Indeed, instead of pointing to any specific provision, the Panel relied solely on *Sneed v. Greensboro City Board of Education*, 299 N.C. 609, 613 (1980), which explains that constitutional text should be analyzed in light of its "history … and its antecedents." *Id.*

But the Panel's analysis skipped a critical step. It never located any text in our Constitution that actually places substantive limits on the General Assembly's authority to assign Council of State members' duties. The Panel simply appears to have identified the terms "Auditor" and "Treasurer" in the Constitution and assumed that their *duties* must be closely tied to a judicially-assumed understanding of their *titles*. No text in our Constitution places any such limitation.

Without any textual backing for the "people's understanding," the Governor may try to twist Justice Dietz's concurrence in the Supreme Court's order to support his position. Justice Dietz pointed to Article III, Section 11, which was adopted in tandem with the Reorganization

Clause. *See* Orth & Newby, *supra*, at 126. Section 11 provides that by July 1, 1975, "all administrative departments, agencies, and offices of the State and their respective functions, powers, and duties shall be allocated by law among and within not more than 25 principal administrative departments *so as to group them as far as practicable according to major purposes*." N.C. Const. art. III, § 11 (emphasis added). Justice Dietz considered whether that language may restrict the General Assembly's power under the Reorganization Clause such that it can only grant an official new duties if it aligns with the official's "major purpose[]." *Stein*, 387 N.C. at 582 (Dietz, J., concurring).

The Governor would err to make this argument. As an initial matter, Section 11's directive to group departments by subject matter is not even a mandatory one—it simply instructs the General Assembly to do so "as far as practicable." N.C. Const. art. III, § 11. More fundamentally, however, that provision was focused on consolidation, not on limiting the duties of any department. As the 1968 Constitutional Commission explained, both the Reorganization Clause and Section 11 were "directed at improving the organizational and administrative effectiveness of the executive branch." N.C. Constitutional Comm'n,

Report of the North Carolina State Constitution Study Comm'n 1968 130 (1968) (hereinafter "1968 Report"), https://dub.sh/rLT870M [App. 53]. Prior to that amendment, the Governor had been tasked with overseeing "an array of 200 state agencies of various titles and descriptions." *Id.* Because he could scarcely learn the names of each agency head during his tenure, this large number of agencies "thwarted" the Governor's "coordinative function." *Id.* Thus, Section 11 provided that General Assembly with a "clear mandate": "reduce the number of administrative departments and agencies to not more than 25, and to do so by July 1, 1975." *Id.*

As the Commission Report makes clear, Section 11 was enacted for organizational—not substantive—purposes. To trim down and consolidate the executive branch, it capped the number of administrative departments and, in the interest of administrative efficiency, ensured that those consolidated departments would be grouped together by subject matter as far as practicable. Nothing in Section 11 prevents the General Assembly from conferring new duties on an executive officer, so long as—at the end of the day—there are no more than 25 executive departments that are grouped together by subject matter "as far as

practicable." Section 11 does not restrict executive officials to performing only duties that align with their "core purpose."

What's more, tethering constitutional officers to their purported "core functions" could throw our executive system into disarray. Many of our State's executive agencies have responsibilities that might not, at first blush, appear related to their traditional purposes. Justice Dietz points out one example—the Commissioner of Insurance oversees the "training and certif[ication] [of] fire and rescue personnel," which he acknowledges "are not closely related to insurance." *Stein*, 387 N.C. at 582. Tethering authority to "core functions" would cause an untold number of agencies to face challenges seeking to unwind their longstanding oversight of certain duties. And if an agency lost one of those challenges, where could the General Assembly turn next? It likely would have to guess again—hoping the courts might bless the next delegation—and repeat that cycle until it landed on a "fit" the judiciary deemed acceptable. That is, if *any* officer were acceptable at all.

2. Appointing Board of Elections Members Fits Comfortably Within the Auditor's Core Duties and Title.

Even accepting the framing offered by the Panel or the Governor's possible misuse of Justice Dietz's concurrence, Senate Bill 382 still passes muster. Assigning the Auditor appointment authority over the Boards fits squarely within his core responsibilities. While the Auditor's duties were largely fiscal at the time the office was created, they have—by design—never been fixed in place. Over the past century, the Auditor's role has expanded to encompass a broader mandate to ensure transparency and accountability in government.

The 1868 Constitution created the Auditor's position and directed that the "duties of the … Auditor," along with the other members of the Council of State, "shall be prescribed by law." N.C. Const. of 1868, art. III, § 13. At the time, those statutory duties revolved mostly around payment collection for the State and local governments. The pertinent statute directed the Auditor to "superintend the fiscal concerns of the State," which included "report[ing] to the General Assembly, annually, a complete statement of the funds of the State," "examin[ing] and settl[ing] the accounts of all persons indebted to the State," and "suggest[ing] plans

for the improvement and management of the public revenue." N.C. Sess. L. 1868–69-270, § 63 (1), (2), (3), (7), https://dub.sh/AirMLKc [App. 15].

In 1921, the Auditor's role expanded, acquiring greater autonomy and independence and shifting more toward audits than pure accounting. The General Assembly amended the Auditor's governing statute to empower him to examine and adjust accounts, beyond collecting and paying. N.C. Sess. L. 1921-163, § 1, https://dub.sh/qL4png8 [App. 24]. The legislature also increased the Auditor's role as a torchbearer for government transparency; for the first time, the Auditor was empowered to audit and examine "all departments of the State Government and State institutions … from time to time." *Id.* § 4; *see also* N.C. Sess. L. 1921-1, § 8 (extra session), https://dub.sh/oNbVlhG [App. 28].

In 1955, the General Assembly transferred "all preaudit functions"—which up to that point had been some of the Auditor's "primary dut[ies]"—to the State's Budget Bureau. K. Todd Johnson, *Auditor, State*, NCpedia (2006), https://dub.sh/EKm5iiN; *see* N.C. Sess. L. 1955-576, §§ 1(1), (21), https://dub.sh/p5qC45q [App. 32]. That left the Auditor "in a position of independence to [better] review and comment on the operational and financial affairs of North Carolina State

Government." N.C. Office of the State Auditor, *History of the Office of State Auditor* (last visited Aug. 22, 2025), https://dub.sh/GzVeDsC. By 1955, then, the Auditor's responsibilities had shifted to encompass more of the State's transparency functions and less of its traditional accounting work.

Since 1955, the General Assembly has further amended Article 5A, Chapter 147 of the N.C. General Statutes to expand the Auditor's role in ensuring government accountability. In the 1970s, for instance, the General Assembly conferred the Auditor authority to conduct operational audits. *See* N.C. Sess. L. 1973-1415 [App. 42]. And it has since made the Auditor independent, so that it can better review and examine *all* aspects of the operational and financial affairs of State government, not just the public fisc. *See* N.C.G.S. § 147-64.6 [App. 4].

In light of this historical expansion of the Auditor's role beyond just financial matters, it is easy to see how the new responsibility in Senate Bill 382 fits squarely with the title of "State Auditor" too. An "auditor" is someone who "hears," "listens," "examine[s]," and "verif[ies]" information, *Auditor*, Merriam-Webster, https://dub.sh/LDoppPH (last visited Aug. 22, 2025), and an "audit" likewise is defined as a formal or

methodical "examination" or "review," *Audit*, Merriam-Webster, https://dub.sh/TPMsVBg (last visited Aug. 22, 2025). Overseeing the Boards of Elections fits within that role. For decades, the State Board has been designed to function independently. *See, e.g.*, N.C. Sess. L. 1973-1409 [App. 41]; N.C. Sess. L. 2024-57, § 3A.2.(a) ("[T]he State Board of Elections shall exercise all its prescribed statutory powers independently of the State Auditor."). The State Board doesn't need to be governed; it only needs to be overseen and "examined." The title "State Auditor" aligns more with that oversight role than "Governor."

The Auditor's duties have steadily evolved to emphasize accountability and administrative efficiency. Consistent with the title and role of an auditor, appointing the officials responsible for overseeing elections is "a reasonable fit with [the Auditor's] core roles because of the need to conduct our elections without taint of fraud or corruption and without irregularities." *Stein*, 387 N.C. at 582 (Dietz, J., concurring) (internal quotation marks omitted).

* * *

The Constitution's Reorganization Clause in Article III, Section 5(10) grants the General Assembly the power to assign duties amongst

the executive branch as it sees fit. Senate Bill 382 does just that—it shifts responsibilities within that branch. For that reason, as our Supreme Court has already recognized, Senate Bill 382 does not run afoul of the Separation of Powers Clause, the Take Care Clause, the Vesting Clause, or any prior precedent. The Panel was wrong to strike Senate Bill 382 down, and this Court should reverse.

III. The Reorganization Clause Renders This Case Nonjusticiable.

This Court should reverse the Panel's order for yet another reason. Not only does the Reorganization Clause grant the General Assembly the power to enact Senate Bill 382—that Clause also renders the Governor's challenge a nonjusticiable political question.

The political question doctrine "excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of [the General Assembly] or the confines of the Executive Branch." *Bacon*, 353 N.C. at 717. A question is an inherently political one if our Constitution "textually … commit[s]" the issue to a specific branch, *id.*, or if "it requires courts to make policy determinations that are better

suited for the policymaking branch of government," *Harper*, 384 N.C. at 350. Both are true here.

A. The Constitution Textually Commits Executive Branch Restructuring to the General Assembly.

When our Constitution makes clear that an issue is "textually … commit[ted]" to a coordinate branch, any challenge to that branch's exercise of that authority presents a political question that courts have no power to decide. *Bacon*, 353 N.C. at 717. Courts cannot, in other words, "interject" themselves into an inter-branch "balance" of power that the Constitution already settled. *Cooper I*, 370 N.C. at 438 (Newby, J., dissenting).

Yet the Governor would have this Court do exactly that. The Reorganization Clause "expressly assigns" to the General Assembly final say in reorganizing the executive branch. N.C. Const. art. III, § 5(10). So the Governor's challenge as to *how* the General Assembly carried out that power is a nonjusticiable political question.[4]

The Supreme Court's decision in *Harper* drives that point home. At issue in that case was whether challenges to redistricting plans

[4] In addition, the Governor failed to exhaust his option to seek reorganization under Art. III, § 5(10) and has waived his ability to challenge it now.

presented a political question. *Harper*, 384 N.C. at 326. The Court held that they were. It reasoned that "[t]he text of our state constitution … expressly assigns the tax of redistricting to the General Assembly." *Id.* at 327; *see* N.C. Const. art. II, § 3. The Constitution placed guardrails on the General Assembly's ability to redistrict, and an exercise of discretion that did *not* run afoul of those limitations was left up to the discretion of the General Assembly. *Harper*, 384 N.C. at 330, 334. Any challenge to the General Assembly's exercise of that power was nonjusticiable.

The same is true here. Just as our Constitution expressly vests the General Assembly with redistricting power, N.C. Const. art. II, § 3, so too does it "grant[] the General Assembly broad authority to reorganize the executive branch," *Stein*, 387 N.C. at 579; *see* N.C. Const. art. III, § 5(10). The procedures in the Reorganization Clause likewise place some guardrails on that power. As in *Harper*, the General Assembly's "discretionary considerations" under that Clause can *only* be "constrained by the express limitations found" in the constitutional provisions that directly relate to that express power. 384 N.C. at 334. "To hold otherwise … would abrogate the constitutional limitations or 'objective constraints' that the people of North Carolina have imposed"

on executive branch restructuring. *Id.* (internal quotation marks omitted).[5]

The Auditor expects that in response, the Governor will argue that *Cooper I*'s footnote 7 forecloses the Auditor's argument here. 370 N.C. at 411 n.7. It does not. *Cooper I*'s reasoning, as already explained, was premised on an *inter*-branch power dispute. *Id.* at 416–17. Because the statute at issue in *Cooper I* did not afford the executive branch *as a whole* sufficient control over the new Bipartisan Board, the Separation of Powers Clause made the case justiciable. *Id.* at 416–22. That is not the case here.

As Justice Berger concluded when this case went before the Supreme Court, "the ultimate responsibility for assigning duties among executive branch officials … has indeed been squarely placed in the hands of the General Assembly." *Stein*, 387 N.C. at 580 (Berger, J., concurring) (internal quotation marks omitted). "In such

[5] The Governor's challenge also presents a political question because it implicates inherently political decisions about what executive official is best suited to which duties. *See Harper*, 384 N.C. at 345–46. His challenge, boiled down to its essence, centers around which duties are and are not proper to assign to certain executive officials. That is nothing more than a dispute over *how* the General Assembly is exercising its policy discretion.

circumstances, … [c]ourt[s] decline[] to exercise [their] judicial power." *Id.*

B. Our Constitution's Amendment History Confirms That Executive Organization Is Committed to the General Assembly's Discretion.

In 1968, the State Constitution Study Commission proposed two amendments to our Constitution. The first, Proposed Amendment 5, would have made "significant substantive changes" to the Governor's intra-branch supervisory power by dramatically expanding his control over other executive officers. *McCrory*, 368 N.C. at 643. It would have allowed the Governor to "appoint and … remove the heads of *all* administrative departments and agencies of the State." 1968 Report at 113. It also would have cut the number of Council of State members in half and allowed the Governor to fill those previously elected positions by appointment. *Id.* at 117. In short, Proposed Amendment 5 would have substantially consolidated power over the executive branch and placed it in the hands of the Governor.

The second, Proposed Amendment 8, added Sections 5(10) and 11 to Article III to the Constitution for the first time. As detailed above, those sections clarified and reaffirmed the General Assembly's power

over the organization and structure of the executive branch and explained the mechanism for the General Assembly to override any attempted modification by the Governor. Even though the Reorganization Clause gave the Governor some role to play in the process for the first time, the Commission made clear that Proposed Amendment 8 did not "deprive[]" the General Assembly "of any of its present authority over the structure and organization of state government"; it still "retain[ed] the power to make changes on its own initiative." *Id.* at 131.

Proposed Amendment 5 failed. It received an unfavorable report from the House Committee on Constitutional Amendments, and the General Assembly declined to submit it to the people. *McCrory*, 368 N.C. at 644. But the General Assembly passed Proposed Amendment 8. *See* N.C. Sess. L. 1969-932 § 1 [App. 39]. And in doing so, the General Assembly modified the Commission's version of Proposed Amendment 8 to strengthen its hand at the expense of the Governor's. It inserted a 60-day time limit for the Governor to respond to the legislature's changes and allowed a majority vote by just one chamber to reject a Governor's proposal. *Compare id. with* 1968 Report at 128. The people ratified the

modified version of Proposed Amendment 8, enacting what are now Sections 5(10) and 11 of Article III. *See* N.C. Sess. L. 1969-932 § 1.

That history illustrates two key points. First, by seeking to expand the Governor's authority over the other members of the executive branch via Proposed Amendment 5, the Commission recognized that he didn't already wield the sort of intra-executive branch authority the Governor now claims to possess. Second, by ratifying the General Assembly's strengthened version of Amendment 8, the people reaffirmed that the Constitution "expressly assigns the task" of executive restructuring "to the General Assembly," not the Governor. *Harper*, 384 N.C. at 327.

IV. The General Assembly's Plenary Power Renders the Governor's Challenge Nonjusticiable.

Finally, and most fundamentally, the General Assembly wields plenary power to reorganize the Board. The Governor's challenge presents a nonjusticiable question for that reason as well.

Because it acts on behalf of the people, the General Assembly wields plenary power "limited only by the express text of the constitution." *Id.* at 323. Therefore, an act of the General Assembly is constitutional unless it violates an express provision of the Constitution. *McKinney*, 387 N.C. at 42. Where an act of the General Assembly does not run afoul of an

express provision of the Constitution, it involves a "policy determination of a kind clearly suited for nonjudicial discretion," and is nonjusticiable. *Harper*, 384 N.C. at 325.

The Governor's challenge presents just this kind of policy determination. The Constitution says nothing about the creation or existence of the State Board of Elections, nor does it impose any limits on the General Assembly's authority over it. The Board is a statutory creation; it's never mentioned in the Constitution, unlike, for example, the State Board of Education. *See* N.C.G.S. § 163-19(a) [App. 10]; *cf.* N.C. Const. art. IX, § 4. The State Board of Elections did not exist until 1901, more than a century after North Carolina's first Constitution, and long after elections had already become part of our governmental structure. N.C. Sess. L. 1901-89, § 5, https://dub.sh/BuVFExX [App. 20]; *see id.* § 6 (creating the County Boards of Elections).

It follows that the General Assembly has plenary authority to reshape, reorganize, or eliminate it. Questions relating to the Board's organization, functions, and duties are policy issues belonging to the General Assembly's plenary authority and falling outside the purview of the limited role of judicial review.

Conclusion

This Court should reverse the Superior Court Panel's Order granting the Governor summary judgment and denying summary judgment to Defendants.

Respectfully submitted, this 22nd of August, 2025.

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Certificate of Compliance

Pursuant to Rule 28(j) of the Rules of Appellate Procedure, undersigned counsel certifies that this brief, which was prepared using Century Schoolbook, a proportional font, is fewer than 8,750 words (excluding cover, indexes, tables of authorities, certificates of service, this certificate of compliance and appendixes) as reported by the word-processing software.

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Certificate of Service

I hereby certify that I have this day electronically filed a copy of the foregoing document with the Clerk of the North Carolina Court of Appeals and that I have served the foregoing by e-mailing a copy to counsel's correct and current email addresses as shown below:

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WARD AND SMITH, P.A.

/s/ Alex C. Dale
Alex C. Dale

No. COA 25-652 TENTH DISTRICT

NORTH CAROLINA COURT OF APPEALS
****

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

Plaintiff-Appellee,

v.

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

Defendants-Appellants,

and

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

Defendant-Intervenor-Appellant.

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

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APPENDIX

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§ 7A-27. Appeals of right from the courts of the trial divisions.

(a) Appeal lies of right directly to the Supreme Court in any of the following cases:

(1) All cases in which the defendant is convicted of murder in the first degree and the judgment of the superior court includes a sentence of death.

(2) From any final judgment in a case designated as a mandatory complex business case pursuant to G.S. 7A-45.4 or designated as a discretionary complex business case pursuant to Rule 2.1 of the General Rules of Practice for the Superior and District Courts.

(3) From any interlocutory order of a Business Court Judge that does any of the following:

a. Affects a substantial right.

b. In effect determines the action and prevents a judgment from which an appeal might be taken.

c. Discontinues the action.

d. Grants or refuses a new trial.

(4) Any trial court's decision regarding class action certification under G.S. 1A-1, Rule 23.

(5) Repealed by Session Laws 2021-18, s. 1, effective July 1, 2021, and applicable to appeals filed on or after that date.

(a1) Repealed by Session Laws 2016-125, s. 22(b), 4th Ex. Sess., effective December 1, 2016.

(b) Except as provided in subsection (a) of this section, appeal lies of right directly to the Court of Appeals in any of the following cases:

(1) From any final judgment of a superior court, other than one based on a plea of guilty or nolo contendere, including any final judgment entered upon review of a decision of an administrative agency, except for a final judgment entered upon review of a court martial under G.S. 127A-62.

(2) From any final judgment of a district court in a civil action.

(3) From any interlocutory order or judgment of a superior court or district court in a civil action or proceeding that does any of the following:

a. Affects a substantial right.

b. In effect determines the action and prevents a judgment from which an appeal might be taken.

c. Discontinues the action.

d. Grants or refuses a new trial.

e. Determines a claim prosecuted under G.S. 50-19.1.

f. Grants temporary injunctive relief restraining the State or a political subdivision of the State from enforcing the operation or execution of an act of the General Assembly. This sub-subdivision only applies where the State or a political subdivision of the State is a party in the civil action.

g. Denies, upon the court's own motion or the motion of a party, the transfer of an action or proceeding pursuant to Rule 42(b)(4) of the North Carolina Rules of Civil Procedure.

(4) From any other order or judgment of the superior court from which an appeal is authorized by statute.

(c) through (e) Repealed by Session Laws 2013-411, s. 1, effective August 23, 2013.

(1967, c. 108, s. 1; 1971, c. 377, s. 3; 1973, c. 704; 1977, c. 711, s. 4; 1987, c. 679; 1995, c. 204, s. 1; 2010-193, s. 17; 2013-411, s. 1; 2014-100, s. 18B.16(e); 2014-102, s. 1; 2015-264, s. 1(b); 2016-125, 4th Ex. Sess., s. 22(b); 2017-7, s. 2; 2021-18, s. 1; 2023-134, s. 16.21(c).)

§ 106-2. Department of Agriculture and Consumer Services established; Board of Agriculture, membership, terms of office, etc.

(a) Department and Board Established. – The Department of Agriculture and Consumer Services is created and established and shall be under the control of the Commissioner of Agriculture, with the consent and advice of a board to be established and named "The Board of Agriculture."

(b) Membership; Qualifications. – The Board of Agriculture shall consist of the Commissioner of Agriculture, who shall be an ex officio member and chairman thereof and shall preside at all meetings, and of 12 other members from the State, so distributed as to reasonably represent the different sections and agriculture of the State. The Commissioner of Agriculture and the members of the Board of Agriculture shall be practicing farmers engaged in their profession. The members of the Board shall be appointed by the Governor by and with the consent of the Senate. In the appointment of the members of the Board the Governor shall also take into consideration the different agricultural interests of the State, and shall appoint members with the following qualifications:

(1) One member who shall be a practicing tobacco farmer to represent the tobacco farming interest.

(2) One member who shall be a practicing cotton grower to represent the cotton interest.

(3) One member who shall be a practicing fruit or vegetable farmer to represent the fruit and vegetable farming interest.

(4) One member who shall be a practicing dairy farmer to represent the dairy and cattle interest of the State.

(5) One member who shall be a practicing poultryman to represent the poultry interest of the State.

(6) One member who shall be a practicing peanut grower to represent the peanut interests of the State.

(7) One member who shall be experienced in marketing to represent the marketing of products of the State.

(8) One member who shall be actively involved in forestry to represent the forestry interests of the State.

(9) One member who shall be actively involved in the nursery business to represent the nursery industry of the State.

(10) One member who shall be a practicing general farmer to represent the general farming interest.

(11) One member who shall be a practicing pork farmer to represent the swine interest of the State.

(12) One member who shall be actively involved in the equine industry to represent the equine industry of the State.

(c) Terms. – The term of office of members of the Board shall be six years and until their successors are duly appointed and qualified.

(d) Vacancies. – Vacancies in the Board shall be filled by the Governor for the unexpired term. (Code, s. 2184; 1901, c. 479, ss. 2, 4; Rev., s. 3931; 1907, c. 497, s. 1; C.S., s. 4667; 1931, c. 360, s. 1; 1937, c. 174; 1995, c. 509, s. 53; 1997-261, ss. 15, 16; 2011-145, s. 13.22A(dd); 2013-99, s. 1; 2013-342, s. 1; 2023-63, s. 1.3.)

§ 143A-6. Types of transfers.

(a) Under this Chapter, a Type I transfer means the transferring of all or part of an existing agency to a principal department established by this Chapter. When all or part of any agency is transferred to a principal department under a Type I transfer, its statutory authority, powers, duties, and functions, records, personnel, property, unexpended balances of appropriations, allocations or other funds, including the functions of budgeting and purchasing, are transferred to the principal department.

When any agency, or part thereof, is transferred by a Type I transfer to a principal department under the provisions of this Chapter, all its prescribed powers, duties, and functions, including but not limited to rule making, regulation, licensing, and promulgation of rules, rates, regulations, and standards, and the rendering of findings, orders, and adjudications are transferred to the head of the principal department into which the agency, or part thereof, has been transferred.

(b) Under this Chapter, a Type II transfer means the transferring intact of an existing agency, or part thereof, to a principal department established by this Chapter. When any agency, or part thereof, is transferred to a principal department under a Type II transfer, that agency, or part thereof, shall be administered under the direction and supervision of that principal department, but shall exercise all its prescribed statutory powers independently of the head of the principal department, except that under a Type II transfer the management functions of any transferred agency, or part thereof, shall be performed under the direction and supervision of the head of the principal department.

(c) Whenever the term "management functions" is used it shall mean planning, organizing, staffing, directing, coordinating, reporting and budgeting. (1971, c. 864, s. 1.)

§ 147-64.6. Duties and responsibilities.

(a) General Duty. – It is the policy of the General Assembly to provide for the auditing and investigation of State agencies by the impartial, independent State Auditor.

(b) Areas of Examination. – The duties of the Auditor are independently to examine into and make findings of fact on whether State agencies have done or are doing all of the following:

(1) Have established adequate operating and administrative procedures and practices; systems of accounting, reporting, and auditing; and other necessary elements of legislative or management control.

(2) Are providing financial and other reports that disclose fairly, consistently, fully, and promptly all information needed to show the nature and scope of programs and activities and have established bases for evaluating the results of these programs and operations.

(3) Are promptly collecting, depositing, and properly accounting for all revenues and receipts arising from their activities.

(4) Are conducting programs and activities and expending funds made available in a faithful, efficient, and economical manner in compliance with and in furtherance of applicable laws of the State, and, if applicable, federal law.

(5) Are determining that the authorized activities or programs effectively serve the intent and purpose of the General Assembly and, if applicable, federal law.

(6) Are adhering to statutory requirements that include conditions precedent, classifications, and similar eligibility or qualifying standards to assure that statutory intent is carried out while the requirements are in effect.

(7) Are not engaging in an improper governmental activity as provided in G.S. 147-64.6B, including misappropriation, mismanagement, waste of State resources, fraud, or a violation of State or federal law.

(c) Responsibilities. – The Auditor is responsible for the following acts and activities:

(1) Audits made or caused to be made by the Auditor shall be conducted in accordance with generally accepted auditing standards as prescribed by the American Institute of Certified Public Accountants, the United States General Accounting Office, or other professionally recognized accounting standards-setting bodies.

(2) Financial and compliance audits may be made at the discretion of the Auditor without advance notice to the organization being audited. Audits of economy and efficiency and program results shall be discussed in advance with the prospective auditee unless an unannounced visit is essential to the audit.

(3) The Auditor, on the Auditor's own initiative and as often as the Auditor deems necessary, or as requested by the Governor or the General Assembly, shall, to the extent deemed practicable and consistent with the Auditor's overall responsibility as contained in this Article, make or cause to be made audits of all or any part of the activities of the State agencies. Each State agency receiving a financial statement audit by the Auditor under this subdivision shall prepare a financial statement and supplementary information in the format required by the Auditor. Financial statements and supplementary information prepared as required by this subdivision shall be completed and submitted to the Auditor not later than 60 days after the deadline for the State agency's Comprehensive Annual Financial Report submission as established by the State Controller.

(4) The Auditor, at the Auditor's own discretion, may, in selecting audit areas and in evaluating current audit activity, consider and utilize, in whole or in part, the relevant audit coverage and applicable reports of the audit staffs of the various

State agencies, independent contractors, and federal agencies. The Auditor shall coordinate, to the extent deemed practicable, the auditing conducted within the State to meet the needs of all governmental bodies.

(5) The Auditor may contract with federal audit agencies, or any governmental agency, on a cost reimbursable basis, for the Auditor to perform audits of federal grants and programs administered by State agencies in accordance with agreements negotiated between the Auditor and the contracting federal audit agencies or any governmental agency. In instances where the grantee State agency subgrants these federal funds to local governments, regional councils of government, and other local groups or private or semiprivate institutions or agencies, the Auditor may examine the books and records of these subgrantees to the extent necessary to determine eligibility and proper use in accordance with State and federal laws.

The Auditor shall charge and collect from the contracting federal audit agencies, or any governmental agencies, the actual cost of all the audits of the grants and programs contracted by the Auditor to do. Amounts collected under these arrangements shall be deposited in the State Treasury and be budgeted in the Department of State Auditor and shall be available to hire sufficient personnel to perform these contracted audits and to pay for related travel, supplies, and other necessary expenses.

(6) The Auditor shall, in the Auditor's reports of audits or reports of investigations, make any comments, suggestions, or recommendations the Auditor deems appropriate concerning any aspect of the State agency's activities and operations.

(7) The Auditor may charge and collect from each examining and licensing board the actual cost of each audit of the board. Costs collected under this subdivision shall be based on the actual expense incurred by the Auditor's office in making the audit, and the affected State agency is entitled to an itemized statement of the costs. Amounts collected under this subdivision shall be deposited into the General Fund as nontax revenue.

(8) The Auditor shall examine as often as necessary the accounts kept by the State Treasurer, and if the Auditor discovers any irregularity or deficiency in the accounts, unless the irregularity or deficiency is rectified or explained to the Auditor's satisfaction, report it in writing to the General Assembly and provide a copy of the report to the Governor and Attorney General. In addition to regular audits, the Auditor shall check the Treasurer's records at the time a new Treasurer assumes office and charge the Treasurer with the balance in the accounts and shall check the Treasurer's records at the time the Treasurer leaves office to determine that the accounts are in order.

(9) The Auditor may examine the accounts and records of any bank or financial institution relating to transactions with the State Treasurer, or with any State agency, or the Auditor may require banks doing business with the State to furnish the Auditor information relating to transactions with State agencies.

(10) The Auditor may, as often as the Auditor deems advisable, conduct a detailed review of the bookkeeping and accounting systems in use in the various State agencies that are supported partially or entirely from State funds. These examinations shall be for the purpose of evaluating the adequacy of systems in use by these State agencies. In instances where the Auditor determines that existing systems are outmoded, inefficient, or otherwise inadequate, the Auditor shall recommend changes to the State Controller. The State Controller

shall prescribe and supervise the installation of these changes, as provided in G.S. 143B-426.39(2).

(11) The Auditor shall, through appropriate tests, satisfy himself or herself concerning the propriety of the data presented in the Comprehensive Annual Financial Report and shall express the appropriate auditor's opinion in accordance with generally accepted auditing standards.

(12) The Auditor shall provide a report to the Governor and Attorney General, and other appropriate officials, of facts in the Auditor's possession that pertain to the apparent violation of criminal statutes or apparent instances of malfeasance, misfeasance, or nonfeasance by an officer or employee.

(13) At the conclusion of an audit, the Auditor or the Auditor's designated representative shall discuss the audit with the official whose office is subject to audit and submit necessary underlying facts developed for all findings and recommendations that may be included in the audit report. On audits of economy and efficiency and program results, the auditee's written response shall be included in the final report if received within 15 to 30 days from receipt of the draft report. The length of time shall be determined by the Auditor and shall be commensurate with the number and complexity of the findings.

(14) The Auditor shall notify the General Assembly, the Governor, the Chief Executive Officer of each agency audited, and other persons as the Auditor deems appropriate that an audit report has been published, its subject and title, and the locations, including State libraries, at which the report is available. The Auditor shall then distribute copies of the report only to those who request a report. The copies shall be in written or electronic form, as requested. The Auditor shall also file a copy of the audit report in the Auditor's office, which will be a permanent public record. In addition, the Auditor may publish on his or her Web site any reports from audits of State agencies not directly conducted by the Auditor. If the report is the result of an investigation of a unit of local government subject to Article 3 of Chapter 159 of the General Statutes, the Auditor shall notify the Local Government Commission that a report has been published with respect to that unit of local government. Nothing in this subsection shall be construed as authorizing or permitting the publication of information whose disclosure is otherwise prohibited by law.

(15) The audit and investigation function does not infringe upon or deprive the General Assembly and the executive or judicial branches of State government of any rights, powers, or duties vested in or imposed upon them by statute or the Constitution.

(16) The Auditor is responsible for receiving reports of allegations of the improper governmental activities as provided in G.S. 147-64.6B. The Auditor shall adopt policies and procedures necessary to provide for the investigation or referral of these allegations.

(17) Repealed by Session Laws 2009-136, s. 2, effective June 19, 2009.

(18) Repealed by Session Laws 2010-31, s. 6.15(b), effective July 1, 2010.

(19) Whenever the Auditor believes that information received or collected by the Auditor may be evidence of a violation of any of the provisions of Chapter 138A of the General Statutes, Chapter 120C of the General Statutes, or Article 14 of Chapter 120 of the General Statutes, the Auditor shall report that information to the State Ethics Commission and the Secretary of State as appropriate. The Auditor is bound by interpretations issued by the State Ethics

Commission as to whether or not any information reported by the Auditor under this subdivision involves or may involve a violation of Chapter 138A of the General Statutes, Chapter 120C of the General Statutes, or Article 14 of Chapter 120 of the General Statutes. Nothing in this subdivision limits the Auditor's authority under subdivision (1) of this subsection.

(20) Whenever the Auditor believes that information received or collected by the Auditor may be evidence of criminal misconduct, the Auditor shall report that information to either the State Bureau of Investigation or the district attorney for the county where the alleged misconduct occurred. Nothing in this subdivision limits the Auditor's authority under subdivision (1) of this subsection.

(21) If an audit or investigation undertaken by the Auditor results in a finding that a private person or entity has received public funds as a result of fraud, misrepresentation, or other deceptive acts or practices while doing business with a State agency, the Auditor shall submit a detailed written report of the finding, and any additional necessary supporting documentation, to the State Purchasing Officer or the appropriate official, as applicable. A report submitted under this subsection may include a recommendation that the private person or entity be debarred from doing business with the State or a State agency.

(22) Verification audits for compliance with statutory requirements, with or without advance notice to the State agency being audited, may be initiated at the discretion of the Auditor or as requested by the Governor or General Assembly.

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

(d) Reports and Work Papers. – The Auditor shall maintain for 10 years a complete file of all audit reports and reports of other examinations, investigations, surveys, and reviews issued under the Auditor's authority. Audit work papers and other evidence and related supportive material directly pertaining to the work of the Auditor's office shall be retained according to an agreement between the Auditor and State Archives. To promote intergovernmental cooperation and avoid unnecessary duplication of audit effort, and notwithstanding the provisions of G.S. 126-24, pertinent work papers and other supportive material related to an audit or investigation made pursuant to this section may be, at the discretion of the Auditor and unless otherwise prohibited by law, made available for inspection by duly authorized representatives of the State and federal government who desire access to and inspection of the records in connection with some matter officially before them, including criminal investigations.

Except as provided in this section, or upon an order issued in Wake County Superior Court upon 10 days' notice and hearing finding that access is necessary to a proper administration of justice, audit work papers and related supportive material are confidential, including any interpretations, advisory opinions, or other information or materials furnished to or by the State Ethics Commission under this section.

(e) Access to Records. – The Auditor may examine the accounts and records of any organization or State agency relating to a verification audit for compliance with a statutory condition precedent, classification, or other similar eligibility or qualifying standard. (1983, c. 913, s. 2; 1985 (Reg. Sess., 1986), c. 1024, ss. 24, 25; 1987, c. 738, s. 62; 1989, c. 236, s. 2; 1999-188, s. 2; 2001-142, s. 2; 2001-424, ss. 9.1(a), 15.2(c); 2002-126, s. 27.2(b); 2002-159, s. 48; 2004-129, s. 46; 2008-215, ss. 1(a), 2, 3; 2009-136, s. 2; 2010-31, s. 6.15(b); 2010-194, s. 27; 2014-100, ss. 25.2, 25.3; 2015-241, s. 25.1(b); 2015-268, s. 7.4; 2017-6, s. 3; 2018-5, s. 27.1; 2018-146, ss. 3.1(a), (b), 6.1; 2019-19, ss. 2, 3; 2020-78, s. 18.1; 2021-112, s. 3; 2021-191, s. 1(a); 2024-57, s. 3A.3(b).)

SUBCHAPTER II. ELECTION OFFICERS.

Article 3.

State Board of Elections.

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

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

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

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

(d) At the first meeting held after new appointments are made, the members of the State Board shall take the following oath:

> "I, ____ , do solemnly swear (or affirm) that I will support the Constitution of the United States; that I will be faithful and bear true allegiance to the State of North Carolina, and to the constitutional powers and authorities which are or may be established for the government thereof; that I will endeavor to support, maintain, and defend the Constitution of said State, and that I will well and truly execute the duties of the office of member of the State Board of Elections according to the best of my knowledge and ability, according to law, so help me God."

(e) After taking the prescribed oath, the State Board shall organize by electing one of its members chair and another secretary.

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

- (1) Holds any elective or appointive office under the government of the United States, the State of North Carolina, or any political subdivision thereof.
- (2) Is a candidate for nomination or election to any office.
- (3) Holds any office in a political party or organization.
- (4) Is a campaign manager or treasurer of any candidate in a primary or election.
- (5) Is currently an employee of the State, a community college, or a local school administrative unit.
- (6) Within the 48 months prior to appointment, has held any of the following positions with an organization that has engaged in electioneering in those 48 months:
  - a. Director, officer, or governing board member.
  - b. Employee.
  - c. Lobbyist registered under Chapter 120C of the General Statutes.
  - d. Independent contractor.

e. Legal counsel of record.

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

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

(2) Register as a lobbyist under Chapter 120C of the General Statutes.

(3) Make written or oral statements intended for general distribution or dissemination to the public at large supporting or opposing the nomination or election of one or more clearly identified candidates for public office.

(4) Make written or oral statements intended for general distribution or dissemination to the public at large supporting or opposing the passage of one or more clearly identified referendum or ballot issue proposals.

(5) Solicit contributions for a candidate, political committee, or referendum committee.

(6) Serve as a member of any other State board, as defined in G.S. 138A-3. (1901, c. 89, ss. 5, 7; Rev., ss. 2760, 4300, 4301; C.S., ss. 5921, 5922; 1933, c. 165, s. 1; 1953, c. 428; 1967, c. 775, s. 1; 1975, c. 286; 1985, c. 62, ss. 1, 1.1; 2005-276, s. 23A.3; 2006-262, s. 4.2; 2013-381, s. 45.1(a); 2017-6, ss. 4(c), 7(a); 2018-2, s. 8(b); 2018-13, s. 5; 2018-146, ss. 3.1(a)-(c), 3.2(a); 2023-139, s. 2.1; 2024-57, s. 3A.3(a), (c).)

§ 163-22. Powers and duties of State Board of Elections.

(a) The State Board shall have general supervision over the primaries and elections in the State, and it shall have authority to make such reasonable rules and regulations with respect to the conduct of primaries and elections as it may deem advisable so long as they do not conflict with any provisions of this Chapter.

(b) From time to time, the State Board shall publish and furnish to the county boards of elections and other election officials a sufficient number of indexed copies of all election laws and State Board rules and regulations then in force. It shall also publish, issue, and distribute to the electorate such materials explanatory of primary and election laws and procedures as the State Board shall deem necessary.

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

(d) The State Board shall investigate when necessary or advisable, the administration of election laws, frauds and irregularities in elections in any county and municipality and special district, and shall report violations of the election laws to the State Bureau of Investigation for further investigation and prosecution.

(e) The State Board shall determine, in the manner provided by law, the form and content of ballots, instruction sheets, pollbooks, tally sheets, abstract and return forms, certificates of election, and other forms to be used in primaries and elections. The State Board shall furnish to the county boards of elections the registration application forms required pursuant to G.S. 163-82.3. The State Board shall direct the county boards of elections to purchase a sufficient quantity of all forms attendant to the registration and elections process. In addition, the State Board shall provide a source of supply from which the county boards of elections may purchase the quantity of pollbooks needed for the execution of its responsibilities. In the preparation of ballots, pollbooks, abstract and return forms, and all other forms, the State Board may call to its aid the Attorney General of the State, and it shall be the duty of the Attorney General to advise and aid in the preparation of these books, ballots and forms.

(f) The State Board shall prepare, print, and distribute to the county boards of elections all ballots for use in any primary or election held in the State which the law provides shall be printed and furnished by the State to the counties. The State Board shall instruct the county boards of elections as to the printing of county and local ballots.

(g) The State Board shall certify to the appropriate county boards of elections the names of candidates for district offices who have filed notice of candidacy with the State Board and whose names are required to be printed on county ballots.

(h) The State Board shall tabulate the primary and election returns, declare the results, and prepare abstracts of the votes cast in each county in the State for offices which, according to law, shall be tabulated by the State Board.

(i) The State Board shall make recommendations to the legislature relative to the conduct and administration of the primaries and elections in the State as it may deem advisable.

(j) Notwithstanding the provisions of any other section of this Chapter, the State Board shall have access to any ballot boxes and their contents, any voting machines and its contents, any

registration records, pollbooks, voter authorization cards or voter lists, any lists of absentee voters, any lists of presidential registrants under the Voting Rights Act of 1965 as amended, and any other voting equipment or similar records, books or lists in any precinct, county, municipality or electoral district over whose elections it has jurisdiction or for whose elections it has responsibility.

(j1) Notwithstanding G.S. 153A-98 or any other provision of law, all officers, employees, and agents of a county board of elections shall give the State Board, upon request, all information, documents, and data within their possession, or ascertainable from its records, including any internal investigation or personnel documentation and shall make available, upon request pursuant to an investigation under subsection (d) of this section, any county board of elections employee for interview and produce any equipment, hardware, or software for inspection. These requirements are mandatory and shall be timely complied with as specified in a request made by any five members of the State Board.

(k) Notwithstanding the provisions contained in Article 20 or Article 21A of this Chapter, the State Board shall be authorized, by resolution adopted prior to the printing of the primary ballots, to reduce the time by which absentee ballots are required to be printed and distributed for the primary election from 50 days to 45 days. This authority shall not be authorized for absentee ballots to be voted in the general election, except if the law requires ballots to be available for mailing 60 days before the general election, and the absentee ballots are not ready by that date, the State Board shall allow the counties to mail absentee ballots out as soon as the absentee ballots are available.

(*l*) Notwithstanding any other provision of law, in order to obtain judicial review of any decision of the State Board rendered in the performance of its duties or in the exercise of its powers under this Chapter, the person seeking review must file a petition in the Superior Court of Wake County.

(m) The State Board shall provide specific training to county boards of elections regarding rules for registering students.

(n) The State Board shall promulgate minimum requirements for the number of pollbooks, voting machines and curbside ballots to be available at each precinct, such that more will be available at general elections and a sufficient number will be available to allow voting without excessive delay. The State Board shall provide for a training and screening program for chief judges and judges. The State Board shall provide additional testing of voting machines to ensure that they operate properly even with complicated ballots.

(o) The State Board shall require counties with voting systems to have sufficient personnel available on election day with technical expertise to repair equipment, to investigate election day problems, and to assist in curbside voting.

(o1) The State Board shall include in all forms prepared by the State Board a prominent statement that submitting fraudulently or falsely completed declarations is a Class I felony under this Chapter.

(p) Except as provided in G.S. 163-27, the State Board may assign responsibility for enumerated administrative matters to the Executive Director by resolution, if that resolution provides a process for the State Board to review any administrative decision made by the Executive Director.

(q) Nothing in this Chapter shall grant authority to the State Board to alter, amend, correct, impose, or substitute any plan apportioning or redistricting State legislative or congressional districts other than a plan imposed by a court under G.S. 120-2.4 or a plan enacted by the General Assembly.

(r) Nothing in this Chapter shall grant authority to the State Board to alter, amend, correct, impose, or substitute any plan apportioning or redistricting districts for a unit of local

government other than a plan imposed by a court, a plan enacted by the General Assembly, or a plan adopted by the appropriate unit of local government under statutory or local act authority.

(s) Notwithstanding any other provision of law, the State Board shall ensure voted ballots, election results tapes, and executed ballot applications are retained and preserved for a period of 22 months after the corresponding election or as otherwise specified in federal law, whichever is greater.

(t) The State Board shall not accept private monetary donations or in-kind contributions, directly or indirectly, for conducting elections or employing individuals on a temporary basis. (1901, c. 89, ss. 7, 11; Rev., ss. 4302, 4305; 1913, c. 138; C.S., ss. 5923, 5926; 1921, c. 181, s. 1; 1923, c. 196; 1933, c. 165, ss. 1, 2; 1945, c. 982; 1953, c. 410, s. 2; 1967, c. 775, s. 1; 1973, c. 47, s. 2; c. 793, s. 2; 1975, c. 19, s. 65; 1977, c. 661, s. 6; 1979, c. 411, s. 1; 1981, c. 556; 1985 (Reg. Sess., 1986), c. 986, ss. 2, 3; 1987, c. 485, ss. 2, 5; c. 509, s. 9; c. 642, s. 3; 1989, c. 635, s. 5; 1991, c. 727, ss. 5.2, 7; 1993 (Reg. Sess., 1994), c. 762, s. 12; 1995, c. 509, s. 114; 1999-424, s. 7(a); 2001-398, s. 4; 2009-537, s. 10; 2009-541, s. 1; 2011-31, s. 15; 2011-182, s. 3; 2016-125, 4th Ex. Sess., s. 20(b); 2017-6, s. 3; 2018-13, s. 3.2(a), (b); 2018-144, s. 1.4A; 2018-146, s. 3.1(a), (b); 2023-139, s. 2.3; 2023-140, ss. 2, 39(b); 2024-57, s. 3A.3(e).)

Article 4.

County Boards of Elections.

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

(a) In every county of the State there shall be a county board of elections, which may be referred to as "county board" in this Chapter. Each county board shall consist of five persons of good moral character who are registered voters in the county in which they are to act. Four members of each county board shall be appointed by the State Board on the last Tuesday in June of each odd-numbered year and shall continue to serve until successors are appointed and qualified. One member of each county board shall be appointed by the State Auditor to be the chair of the county board on the last Tuesday in June of each odd-numbered year and that member's term of office shall continue until a successor is appointed and qualified. Of the appointments to each county board by the State Board, two members each shall belong to the two political parties having the highest number of registered affiliates as reflected by the latest registration statistics published by the State Board.

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

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

(2) Holds any office in a state, congressional district, county or precinct political party or organization. Provided, however, that the position of delegate to a political party convention shall not be considered an office for the purpose of this subdivision.

(3) Is a campaign manager or treasurer of any candidate or political party in a primary or election.

(4) Is a candidate for nomination or election.

(5) Is the wife, husband, son, son in law, daughter, daughter in law, mother, mother in law, father, father in law, sister, sister in law, brother, brother in law, aunt, uncle, niece, or nephew of any candidate for nomination or election. Upon any member of the county board becoming ineligible, that member's seat shall be declared vacant. This subdivision only applies if the county board is conducting the election for which the relative is a candidate.

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

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

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

"I, ____, do solemnly swear (or affirm) that I will support the Constitution of the United States; that I will be faithful and bear true allegiance to the State of North Carolina and to the constitutional powers and authorities which are or may be established for the government thereof; that I will endeavor to support, maintain and defend the Constitution of said State, not

inconsistent with the Constitution of the United States; and that I will well and truly execute the duties of the office of member of the ____ County Board of Elections to the best of my knowledge and ability, according to law; so help me God."

(f) Each member of the county board shall attend each instructional meeting held pursuant to G.S. 163-46, unless excused for good cause by the chair of the county board, and shall be paid the sum of twenty five dollars ($25.00) per day for attending each of those meetings. (1901, c. 89, ss. 6, 11; Rev., ss. 4303, 4304, 4305; 1913, c. 138; C.S., ss. 5924, 5925, 5926; 1921, c. 181, s. 1; 1923, c. 111, s. 1; c. 196; 1933, c. 165, s. 2; 1941, c. 305, s. 1; 1945, c. 758, ss. 1, 2; 1949, c. 672, s. 1; 1953, c. 410, ss. 1, 2; c. 1191, s. 2; 1955, c. 871, s. 1; 1957, c. 182, s. 1; 1959, c. 1203, s. 1; 1967, c. 775, s. 1; 1969, c. 208, s. 1; 1973, c. 793, s. 7; c. 1094; c. 1344, s. 4; 1975, c. 19, s. 66; c. 159, s. 1; 1981, c. 954, s. 1; 1983, c. 617, ss. 1, 2; 1985, c. 472, s. 4; 1997-211, s. 1; 2016-125, 4th Ex. Sess., s. 5(h); 2017-6, ss. 2, 3, 7(h); 2018-145, s. 25(a); 2018-146, ss. 3.1(a), (b), 4.3(a); 2023-139, s. 4.1; 2024-57, s. 3A.3(a), (f).)

PUBLIC LAWS

OF THE

STATE OF NORTH CAROLINA,

PASSED BY THE

GENERAL ASSEMBLY

AT ITS

SESSION 1868-'69,

BEGUN AND HELD IN THE

CITY OF RALEIGH ON THE SIXTEENTH OF NOVEMBER, 1868,

TO WHICH ARE PREFIXED

THE CONSTITUTION OF THE STATE AND A REGISTER OF STATE OFFICERS, MEMBERS OF THE GENERAL ASSEMBLY AND JUDICIARY.

WITH

THE AUDITOR'S STATEMENT OF THE PUBLIC REVENUE AND EXPENDITURE.

PUBLISHED BY AUTHORITY.

RALEIGH:
M. S. LITTLEFIELD, STATE PRINTER & BINDER.
1869.

reduced as in their judgment may be deemed just and proper.

Requisitions approved, &c.

Sec. 60. When the Inspectors have passed upon and approved or amended the various requisitions, the Secretary shall prepare a list of the various kinds of stationery required, and the amount of each and the time at which it is required to be delivered, and shall invite sealed proposals to supply the same by advertising at least twice in two weekly issues of four papers in the State.

Proposals, &c.

Sec. 61. Said sealed proposals must be forwarded to the Secretary of State previous to the first day of November, and the lowest bidder for each class offering sufficient security shall be awarded the contract to supply the same; the award shall be signed by the Secretary, who shall state thereon that each contract is thus awarded to the lowest responsible bidder, and no account for stationery furnished shall be audited or paid except upon presentation of such award.

Secretary to furnish amount of stationery to Auditor.

Sec. 62. The Secretary of State shall furnish to the Auditor each year, before the first Wednesday in August, the amount of stationery, with the cost thereof, including freight, furnished each County during the previous year, and it shall be the duty of the Auditor to forward to the Board of County Commissioners of each County, before the fifteenth day of August in each year, the stationery account of such County, and the same shall be levied with the taxes of the County and paid over with the other taxes by the Sheriff.

Auditor.

Sec. 63. It is the duty of the Auditor:

1. To superintend the fiscal concerns of the State.

Report.

2. To report to the General Assembly, annually, a complete statement of the funds of the State, of its revenues and of the public expenditures during the preceeding fiscal year, and, as far as practicable, an account of the same down to the termination of the current calendar year, together with a detailed estimate of the expenditures to be defrayed from the Treasury for the ensuing fiscal year, specifying therein each object of expenditure and distinguish-

ing between such as are provided for by permanent or temporary appropriations, and such as must be provided for by a new statute, and suggesting the means from which such expenditures are to be defrayed.

Suggest plans.

3. To suggest plans for the improvement and management of the public revenue.

Keep accounts.

4. To keep and state all accounts in which the State is interested.

Examine accounts.

5. To examine and settle the accounts of all persons indebted to the State, and to certify the amount or balance to the Treasurer.

Collect moneys, &c.

6. To direct and superintend the collection of all moneys due the State.

Examine claims.

7. To examine and liquidate the claims of all persons against the State, in cases where there is sufficient provision of law for the payment thereof; and where there is no sufficient provision, to examine the claim and report the fact, with his opinion thereon, to the General Assembly.

To require persons to settle, &c.

8. To require all persons who have received any moneys belonging to the State, and have not accounted therefor, to settle their accounts.

Draw warrants.

9. To draw warrants on the Treasurer for the payment of all monies directed by law to be paid out of the Treasury; but no warrant shall be drawn unless authorized by law, and every warrant shall refer to the law under which it is drawn.

Keep leases, &c.

10. To keep in his office all leases, mortgages, bonds and other securities for money given to the people of the State, unless otherwise specially directed.

Keep certificates, &c.

11. To keep and preserve the certificates of stock of any kind, owned by the people of the State.

Procure statements of deposit.

12. To procure from the books of the banks, in which the Treasurer makes his deposits, monthly statements of the moneys received and paid on account of the Treasurer.

To countersign checks, &c.

13. To countersign and enter all checks drawn by the Treasurer, and all receipts for money paid to the Treasurer,

and no such receipts shall be evidence of payment, unless so countersigned.

Keep account between State and Treasurer.

14. To keep an account between the State and the Treasurer, and therein charge the Treasurer with the balance in the Treasury when he came into office, and with all moneys received by him, and credit him with all warrants drawn or paid by him.

Examine bank book kept by Treasurer, &c.

15. To examine carefully on the first Tuesday of every month, or oftener if he deems it necessary, the accounts of the debts and credits in the bank book kept by the Treasurer, and if he discovers any irregularity or deficiency therein, unless the same be rectified or explained to his satisfaction, to report the same forthwith, in writing, to the Governor.

Require statements, &c.

Sec. 64. To require, from time to time, all persons who have received moneys or securities, or have had the disposition or management of any property of the State, of which an account is kept in his office, to render statements thereof to him; and all such persons shall render such statement at such time and in such form as he shall require.

Power to require oath.

Sec. 65. He has power to require any person presenting an account for settlement, to be sworn before him and to answer orally as to any facts relating to its correctness.

May draw warrant

Sec. 66. Whenever he is satisfied that moneys have been paid into the Treasury, through mistake, he may draw his warrant therefor on the Treasurer, in favor of the person who made such payment; but this provision shall not extend to payments on account of taxes, to payments on bonds and mortgages.

With consent may lease.

Sec. 67. He may, with the consent of the Attorney General, if they are satisfied that the interests of the State will not be prejudiced, release any portion of real property, subject to a judgment in favor of the people of this State, from the lien created by such judgment, and may also acknowledge satisfaction of a judgment in favor of the people, when it is satisfied by payment.

When property sold on a foreclosure, &c.

Sec. 68. Whenever any real property mortgaged to the people of this State, or bought in for the benefit of the State, or which a certificate shall have been given to a former purchaser, is sold by the Attorney General on a foreclosure by notice, or under a judgment, for a greater sum than the amount due to the State, with costs and expense, the surplus money received into the Treasury, after a conveyance has been executed to the purchaser, shall be paid to the person legally entitled to such real property at the time of the foreclosure of the forfeiture of the original contract; but the Auditor shall not draw his warrant for surplus money, unless upon satisfactory proof by affidavit or otherwise, of the legal rights of such person.

Office hours.

Sec. 69. The Auditor shall keep his office at the City of Raleigh, and shall attend there at between the hours of nine o'clock, A. M., and two o'clock, P. M., Sundays and legal holidays excepted.

Clerk hire and expenses allowed.

Sec. 70. He shall be allowed such office room, clerk hire and other expenses as may be necessary.

Treasurer.

Sec. 71. It is the duty of the Treasurer:

Receive moneys.

1. To receive all moneys which shall, from time to time, be paid into the Treasury of this State.

Keep bank book.

2. To keep a bank book, in which shall be entered his account of deposits in bank, and moneys drawn therefrom, and to exhibit the same to the Auditor for his inspection on the first Tuesday in every month, and oftener if required.

Pay warrants, &c.

3. To pay all warrants legally drawn on the Treasurer by the Auditor, and no moneys shall be paid out of the Treasury except on the warrant of the Auditor; to report to the General Assembly at its annual session the exact balance in the Treasury to the credit of the State, with a summary of the receipts and payments of the Treasury during the preceding fiscal year, and so far as practicable, an account of the same down to the termination of the current calendar year.

Banks to transmit

Sec. 72. The banks having State deposits shall every month transmit to the Auditor a statement of the moneys

PUBLIC LAWS AND RESOLUTIONS

OF THE

STATE OF NORTH CAROLINA

PASSED BY THE

GENERAL ASSEMBLY

AT ITS

SESSION OF 1901,

BEGUN AND HELD IN THE CITY OF RALEIGH

ON

WEDNESDAY, THE NINTH DAY OF JANUARY, A. D. 1901.

PUBLISHED BY AUTHORITY.

RALEIGH, N. C.:
EDWARDS & BROUGHTON, AND E. M. UZZELL, STATE PRINTERS AND BINDERS.
PRESSES OF EDWARDS & BROUGHTON.
1901.

CHAPTER 89.

An act to provide for the holding of elections in North Carolina.

The General Assembly of North Carolina do enact:

Time of holding elections for members of Congress, members of the General Assembly and county officers.

SECTION 1. On the Tuesday next after the first Monday in November, in the year of our Lord one thousand nine hundred and two, and every two years thereafter, an election shall be held in the several election precincts in each county for members of Congress in the several districts, members of the General Assembly for their respective counties and districts, a Register of Deeds, County Surveyor, Coroner, Sheriff, County Commissioners, where the County Commissioners are elected by the people, and in such counties as have one, a County Treasurer, and other officers, whose terms are for two years. And on the said first Tuesday after the first Monday in November, in the year of our Lord one thousand nine hundred and two, and every four years thereafter, an election shall be held in each county for Clerk of the Superior Court, and at such times an election shall be held in the several Judicial Districts for the office of Solicitor.

Clerk of the Superior Court and Solicitor.

Time for holding election of Constable and Justices of the Peace.

SEC. 2. On the first Tuesday after the first Monday in November, in the year of our Lord one thousand nine hundred and two, and every two years thereafter, an election shall be held in each township, for the office of Constable, and also for Justices of the Peace in such counties as elect them by a vote of the people, and all other officers elected by a vote of the township.

Time for holding election of State officers.

SEC. 3. That on Tuesday next after the first Monday in November, in the year of our Lord one thousand nine hundred and four, and every four years thereafter, an election shall be held in the several election precincts in each county for the following officers: Governor, Lieutenant-Governor, Secretary of State, Auditor, Treasurer, Superintendent of Public Instruction, Attorney-General, and other State officers whose terms last for four years, and at said time and every two years thereafter, elections shall be held in the several election precincts in each county for other State officers whose election is not otherwise provided for by law.

Vacancy in State office, filled by election at next general election if over 30 days after vacancy, unless otherwise provided in Constitution.

SEC. 4. Whenever any vacancies shall exist by reason of death, resignation or otherwise, in any of the following offices, to-wit: Secretary of State, Auditor, Treasurer, Superintendent of Public Instruction, Attorney-General, Solicitor, Justices of the Supreme Court, Judges of the Superior Court, or any other State officer elected by the people, the same shall be filled by elections, to be held in the manner and places, and under the same regulations and rules as prescribed for general elections, at the next regular

election for member of the General Assembly, which shall occur more than thirty days after such vacancy, except as otherwise provided for in the Constitution.

State Board of Elections.

SEC. 5. That there shall be a State Board of Elections, consisting of five electors, whose terms of office shall begin on the first day of June, one thousand nine hundred and one, and continue for two years and until their successors are appointed and qualified. The Governor shall appoint the members of this board, and not more than three of them shall be of the same political party. Their successors shall likewise be appointed by the Governor, and their term of office shall continue for two years and until their successors are elected and qualified.

Governor to appoint.

Of different political parties.

Term of office.

County Board of Elections.

SEC. 6. That there shall be in every county in the State a County Board of Elections to consist of three persons of good moral character, who are electors in the county in which they are to act, who shall be appointed by the State Board of Elections at least three months before the next general State election, and biennially thereafter, and whose terms of office shall continue for two years from the time of their appointment and until their successors are appointed and qualified, unless sooner removed therefrom as hereinafter provided. Not more than two members of the County Board of Elections shall belong to the same political party, and the State chairman of each political party shall have the right to recommend three electors in each county, and it shall be the duty of the State Board of Elections to appoint said County Board from the names thus recommended: *Provided*, that said chairmen shall recommend such persons on or before the first Monday of August of each year in which appointments are to be made.

Qualifications.

By whom and when appointed.

Terms of office.

Political division.

By whom recommended.

When recommended.

Meetings and organization State Board.

SEC. 7. The State Board of Elections shall meet in Raleigh on the first Monday in July, in the year nineteen hundred and one, and shall organize by electing one of their members chairman and another secretary, and the chairman of said board may call such meetings as may be necessary to discharge the duties and functions imposed upon said board by this act at such times and places as he may appoint. Any vacancy occurring in the said board shall be filled by the Governor and the person so appointed shall fill the unexpired term. And the members of the said board shall receive in full compensation for their services four dollars per day for the time they are actually engaged in the discharge of their duties, together with their actual travelling expenses, and such other expenses as are necessary and incident to the discharge of the duties imposed by this act, to be paid by the Treasurer of the State upon the warrant of the Auditor: *Provided*, that the chairman shall call a meeting of the Board

Called Meetings.

Vacancy, how filled.

Compensation.

By whom paid.

upon the application in writing of any two members thereof, or if there be no chairman, or the chairman does not call such meeting, any three members of the said board shall have power to call a meeting of the board. And any duty imposed or power conferred by this act may be performed or exercised at such meeting, although the time for performing or exercising the same prescribed by this act may have expired. And if at any meeting any member of said board shall fail to attend, and by reason thereof there is a failure of a quorum, the members attending shall adjourn from day to day, for not more than two days, at the end of which time, if there should be no quorum, the Governor may remove the members so failing to attend summarily and appoint their successors.

Chairman shall call meeting on application of two members.

Three members may call meeting.

Any duty may be performed.

Member failing to attend and by reason thereof no quorum, Governor may remove and appoint successor.

SEC. 8. That it shall be the duty of the County Board of Elections in each county to appoint all registrars and judges of election in their respective counties, and to fill vacancies except as herein provided.

County Boards shall appoint registrars and judges and fill vacancies.

SEC. 9. That the State Board of Elections shall have power to remove from office any member of the County Board of Elections for incompetency, failure of duty, or for any other satisfactory cause. When any member of the County Board of Elections shall be removed by the State Board of Elections, the vacancy thus created shall be filled by the State Board of Elections. Vacancies occurring in the County Board of Elections for other cause than removal by the State Board of Elections, shall be filled by the chairman of the State Board of Elections, but the person so appointed to fill any vacancy shall be of the same political party as his predecessor.

State Board may remove members of County Board.

Vacancies, how filled.

SEC. 10. That the County Board of Elections shall have power to remove any registrar or judge of election appointed by them for incompetency, failure to qualify within the time prescribed by law, failure to discharge the duties of office after qualifying, or for any other satisfactory cause. That if any member of the County Board of Elections, or any registrar or judge of election, after having been removed as hereinbefore provided, and notified thereof, shall continue to exercise the duties of the position from which he has been removed, he shall be guilty of a misdemeanor, and upon conviction shall be fined or imprisoned at the discretion of the Court.

County Boards may remove registrar and judges.

Misdemeanor to exercise duties after removal.

Penalty.

SEC. 11. That it shall be the duty of the County Board of Elections to meet in their respective counties not later than the first Monday in September, in the year of our Lord one thousand nine hundred and two, and biennially thereafter, and, a majority being present, they shall organize by electing one of their members chairman and another secretary, and they may meet at such

Meetings of County Boards and organization.

STATE OF NORTH CAROLINA

PUBLIC LAWS AND RESOLUTIONS

PASSED BY THE

GENERAL ASSEMBLY

AT ITS

SESSION OF 1921

BEGUN AND HELD IN THE CITY OF RALEIGH

ON

WEDNESDAY, THE FIFTH DAY OF JANUARY, A.D. 1921

PUBLISHED BY AUTHORITY

RALEIGH
MITCHELL PRINTING COMPANY
STATE PRINTERS
1921

Twenty-ninth district.

Twenty-ninth District—Alleghany, Ashe, and Watauga shall elect elect one senator.

Thirtieth district.

Thirtieth District—Avery, Madison, Mitchell, and Yancey shall elect one senator.

Thirty-first district.

Thirty-first District—Buncombe shall elect one senator.

Thirty-second district.

Thirty-second District—Haywood, Jackson, and Transylvania shall elect one senator.

Thirty-third district.

Thirty-third District—Cherokee, Clay, Graham, Macon, and Swain shall elect one senator.

SEC. 2. This act shall be in force from and after its ratification.

Ratified this the 8th day of March, A.D. 1921.

CHAPTER 162

AN ACT TO REQUIRE THE SECRETARY OF STATE TO SEND TO THE JUDGES AND CLERKS OF THE SUPERIOR COURTS COPIES OF SUCH ACTS OR PARTS OF ACTS AS CHANGE THE PROCEDURE IN CIVIL ACTIONS OR SPECIAL PROCEEDINGS.

The General Assembly of North Carolina do enact:

Copies to be sent.

SECTION 1. That upon the ratification of any act changing the procedure in civil actions or special proceedings, it shall be the duty of the Secretary of the State forthwith to send copies of such parts of such acts as change the procedure to all judges and clerks of the Superior Courts.

SEC. 2. That this act shall take effect from and after its ratification.

Ratified this the 8th day of March, A.D. 1921.

CHAPTER 163

AN ACT TO AUTHORIZE AND DIRECT THE STATE AUDITOR TO CAUSE TO BE EXAMINED, AUDITED, AND ADJUSTED THE VARIOUS ACCOUNTS, SYSTEMS OF ACCOUNTS, AND ACCOUNTING OF THE SEVERAL STATE DEPARTMENTS AND INSTITUTIONS.

The General Assembly of North Carolina do enact:

State Auditor to devise and establish accounting systems.

SECTION 1. That the State Auditor shall have the power and authority, and it shall be his duty, to devise and establish accounting procedures for the State, its departments and institutions, to record in detail all transactions affecting the acquisition, custodianship, and disposition of values, including cash receipts and

disbursements, so that the recorded facts can be presented periodically to the public in such summaries and analytical schedules in detailed support thereof as shall be necessary to show the full effect of such transactions upon the finances of the State; to devise systems for control and disbursement of funds of the State, its departments and institutions; to devise and establish a general set of books of accounts with controlling accounts of all the assets and liabilities of the State departments and institutions, and of revenues and expenses of the State, its departments and institutions, and of all appropriations of the State, and such books and accounts generally as are necessary and proper to carry out and put into effect the systems of accounting procedures and control and disbursement of funds devised for State departments and institutions; to establish the date for the beginning of the fiscal year of the State, and to require all officers of the State, its departments and institutions, at such time or any other time he may select, to put into effect the systems of accounting procedure and control and disbursement of funds, and to use the books of accounts in accordance with systems devised.

Systems for control and disbursement of funds.

General account books.

Controlling accounts of assets and liabilities.

System made effectual.

Use of books of accounts.

SEC. 2. That the State Auditor shall have the power and the authority to employ accountants to assist in the work in devising a system of accounting procedures and control and disbursement of funds and books of accounts mentioned in this act, and to pay to such accountants such compensation as may be agreed upon between him and such accountants: *Provided*, such compensation shall be considered and approved by the Governor.

Employment of accountants.

Pay of accountants.

Proviso: Pay approved by Governor.

SEC. 3. That all officers of the State and its institutions shall, at the time selected by the State Auditor, put into effect the systems of accounting procedures and control of funds and disbursement thereof, and begin the use of the sets of books and accounts devised and selected for them.

Systems to be used by State and institutions.

SEC. 4. That the State Auditor may require all State departments and institutions to make reports from time to time, and is empowered to have all departments of the State Government and State institutions examined and audited from time to time, and shall employ such experts to make audits and examinations and analyze the reports of such institutions and departments as he may deem to be necessary.

State Auditor may require reports.

Examination of departments and institutions.

Experts for audits and examinations.

SEC. 5. That at any time, upon complaint made to him or upon his own motion, the Governor may appoint a special commission to investigate any State department or institution, which commission shall have power to subpœna witnesses, require the production of books and papers, and to do all things necessary to a full and thorough investigation, and shall submit its findings to the Governor. The members of such commission shall, while engaged in the performance of their duties, receive their actual expenses and four dollars per diem.

Commission for examination of departments or institutions.

Powers of commission.

Findings submitted to Governor.

Pay of commissioners.

Amendment of existing laws.

SEC. 6. That all laws and clauses of laws in conflict with this act are hereby amended so as to carry out the purposes of this act.

SEC. 7. That this act shall be in force from and after its ratification.

Ratified this the 8th day of March, A. D. 1921.

CHAPTER 164

[C. S., 3880]

AN ACT TO REPEAL CHAPTER 76 OF THE PUBLIC LAWS, EXTRA SESSION 1920, "AN ACT TO AMEND CHAPTER 150, SECTION 1, OF THE PUBLIC LAWS OF 1915, FIXING THE SALARY OF THE KEEPER OF THE CAPITOL."

The General Assembly of North Carolina do enact:

Salary law repealed.

SECTION 1. That chapter seventy-six of the Public Laws, extra session of nineteen hundred and twenty, be and the same is hereby repealed.

SEC. 2. That this act shall be in force from and after its ratification.

Ratified this the 8th day of March, A.D. 1921.

CHAPTER 165

AN ACT TO ISSUE BONDS OF THE STATE FOR THE PERMANENT ENLARGEMENT AND IMPROVEMENT OF THE STATE'S EDUCATIONAL AND CHARITABLE INSTITUTIONS.

Preamble: Institutions inadequate.

Enlargement and improvement necessary.

WHEREAS, the State's educational institutions and the State's charitable institutions are inadequate to meet the demands of the people of the State, and it is necessary that the State's institutions be permanently enlarged and improved in order that they may properly be sufficient for the purpose of their creation, and adequate to the demands and necessities of the people of the State: Now, therefore,

The General Assembly of North Carolina do enact:

Purpose of bond issue.

Bond issue authorized.

SECTION 1. That for the purpose of permanently enlarging the State's educational and charitable institutions, to make them adequate to the demands and necessities of the people of the State, the State Treasurer is hereby authorized and directed to issue bonds of the State of North Carolina, payable in the manner and

STATE OF NORTH CAROLINA

PUBLIC LAWS AND RESOLUTIONS

ENACTED BY THE

EXTRA SESSION

OF THE

GENERAL ASSEMBLY

OF

1921

BEGUN AND HELD IN THE CITY OF RALEIGH
ON
TUESDAY, THE SIXTH DAY OF DECEMBER, A.D. 1921

PUBLISHED BY AUTHORITY

RALEIGH
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1922

PUBLIC LAWS

OF THE

STATE OF NORTH CAROLINA

EXTRA SESSION 1921

CHAPTER 1

AN ACT TO PROVIDE FOR MAKING EFFECTUAL THE MEANS OF PAYMENT PROVIDED FOR BONDS AND NOTES OF COUNTIES, TOWNSHIPS, SCHOOL DISTRICTS, AND MUNICIPAL CORPORATIONS, AND TO PROVIDE FOR SUPERVISION OF SUCH MEANS BY THE STATE AUDITOR AND MAKING NONCOMPLIANCE WITH ITS TERMS A MISDEMEANOR AND FIXING A PENALTY.

Preamble: defaults by political subdivisions affecting general credit.

Preamble: State supervision imperative.

Whereas the default in payment for a single day of the interest or principal of bonds or notes issued by any county, township, school district, or municipal corporation results not only in discredit to the obligor, but seriously affects the credit of the State itself and all of its political subdivisions; and whereas, in order to protect the credit of the State and all of its subdivisions, it is imperative to provide State supervision of the means and methods for payment of such principal and interest promptly as the same falls due: Now, therefore,

The General Assembly of North Carolina do enact:

Dates for filing statements.

SECTION 1. That on or before March first, one thousand nine hundred and twenty-two, it shall be the duty of the clerk or secretary or other recording officer of each board in the State of North Carolina which has heretofore authorized the issuance of county, township, school district, or municipal bonds or notes having a fixed maturity of one year or more from the date thereof, to file with the State Auditor a statement giving the amount of such bonds or notes then outstanding, their date, the time or times of maturity thereof and of the interest payable thereon, the rate of interest borne, the place or places at which the principal and interest are payable, the denomination of the bonds or notes, and the purpose of issuance. The statement shall also contain the name of the board in which is vested the authority and power to

Statements filed with State Auditor.

Contents of statements.

Information as to taxing power.

Reference to law.

levy the taxes for the payment of the principal and interest of said bonds or notes, and a reference to the law under which said bonds or notes are issued.

Debts hereafter incurred.

SEC. 2. That within thirty days after any bond or note having a fixed maturity at least one year after date thereof shall hereafter be issued by any county, township, school district, or municipal corporation, the recording officers of its governing body, or of the board thereof which has authorized such bonds or notes, shall file with the State Auditor a like statement as to such bonds or notes.

Auditor to furnish forms.

SEC. 3. That it shall be the duty of the State Auditor to prepare and furnish to all counties, townships, school districts, and municipal corporations throughout the State blank forms upon which such statements may be made, and to keep the statements made pursuant to this act in proper file, properly indexed, or to record the same in books to be kept by the State Auditor.

To file and index statements.

Auditor to certify necessary taxes.

SEC. 4. It shall be the further duty of the State Auditor to mail to the recording officer of each board having the power to levy taxes for the payment of the principal or interest of such obligations, as to which statements have been so filed, at least thirty days before the time for the levy of taxes in each year, a statement of the amount to be provided by taxation or otherwise for the payment of the interest accruing upon such bonds or notes within the following year, and for the payment of the bonds then maturing, if serial bonds, or for a sinking fund if such bonds do not mature serially.

Forfeit by members of boards failing to vote proper tax levy.

SEC. 5. If any board whose duty it shall be to provide for the payment by taxation, or otherwise, of the principal or interest of any such bonds or notes mentioned in sections one and two of this act shall willfully fail or refuse to make provision for such payment by the levy of such taxes as are authorized to be levied therefor, or otherwise, at or before the time provided for such tax levy, any member thereof who shall be present at the time for such levy who shall not have voted in favor thereof, or who shall not have caused his request that such provision be made to be recorded in the minutes of the meeting, shall be subject to a penalty of two hundred dollars ($200), which he shall forfeit and pay to any taxpayer or to any holder of such obligations or interest coupon who sues for the same.

Diversion of funds a misdemeanor.

SEC. 6. Any member of any board voting for any appropriation of money raised by taxation, or otherwise, for the payment of the interest and principal of any such bonds or notes to any other purpose until all of such principal and interest have been paid, and any disbursing officer who pays out any of such funds to any other purpose than the payment of such principal and interest

until all of such interest and principal have been paid, whether or not such payment shall have been ordered by any board, shall be guilty of a misdemeanor.

Officer failing to make payments guilty of misdemeanor.

SEC. 7. If any officer whose duty it shall be to pay any of such principal or interest, or to remit funds for such payment to an agreed place for the payment thereof, shall fail or refuse to do so in sufficient time for such payment, funds for such payment being in his hands, whether or not such payment or remission for payment shall have been ordered by any board or officer, the officer so failing or refusing shall be deemed guilty of a misdemeanor.

State Auditor to report to solicitors.

SEC. 8. It shall be the duty of the State Auditor to report to the solicitors of the respective districts for investigation and action thereon any violation of this act which may come to his attention. The State Auditor shall publish as a part of his annual report a statement of the bonded indebtedness of all the subdivisions mentioned in the bill in substance as herein required. That this act shall be immediately published, and a copy of same be sent forthwith by the Secretary of State to the clerk, secretary, or recording officer of each corporation included herein.

Auditor to make annual reports.

Act to be published.

Distribution of act.

Repealing clause.

SEC. 9. All laws or parts of laws in conflict herewith are hereby repealed.

SEC. 10. That this act shall be in force from and after its ratification.

Ratified this the 19th day of December, A.D. 1921.

CHAPTER 2

AN ACT TO PROVIDE FOR A COURT REPORTER FOR THE SUPERIOR COURT OF ALAMANCE COUNTY, AND TO PROVIDE MEANS FOR PAYING FOR THE WORK OF SUCH REPORTER.

The General Assembly of North Carolina do enact:

County commissioners to employ reporter.

SECTION 1. That the board of commissioners of Alamance County shall employ a competent person to take notes and report at all terms of the court held in said county for the trial of civil cases, and they may employ such reporter for all or any part of the terms of court held in said county for the trial of criminal cases.

Extent of employment.

Fees taxed as costs.

SEC. 2. That there shall be charged as a part of the bill of costs in every civil case in which a jury is impaneled, a stenographic fee of five dollars for every day or fraction of a day consumed in the trial of said case, which shall be paid by the party paying the other part of the bill of costs in said case.

STATE OF NORTH CAROLINA

1955

Session Laws and Resolutions

PASSED BY THE

GENERAL ASSEMBLY

AT THE

REGULAR SESSION

HELD IN THE CITY OF RALEIGH

BEGINNING ON

WEDNESDAY, THE FIFTH OF JANUARY, A. D. 1955

PUBLISHED BY AUTHORITY

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elections held for Congressmen the provisions of Section 163-105 G. S. shall apply.

"In the event of a vacancy in the office of a Clerk of a Superior Court within thirty days prior to a general election, then the nomination of a party candidate shall be made by the County Executive Committee."

Sec. 2. That all laws and clauses of laws in conflict with this Act are hereby repealed.

Sec. 3. That this Act shall be in full force and effect from and after its ratification.

In the General Assembly read three times and ratified, this the 14th day of April, 1955.

S. B. 402 CHAPTER 575

AN ACT TO AMEND HOUSE BILL NUMBER 484 RELATING TO THE FILING AND RECORDING OF PAPERS BY THE CLERKS OF SUPERIOR COURT AND REGISTER OF DEEDS OF SEVERAL COUNTIES.

The General Assembly of North Carolina do enact:

Section 1. Section 1 of House Bill Number 484, ratified the 18th day of March, 1955, is hereby amended by deleting the period at the end thereof and inserting in lieu thereof a colon and adding thereafter the following: "Further provided, that where the party presenting any paper or document for recordation, probate or registration cannot after due diligence procure the signature of the person preparing such paper, the same to be found as a fact by a Superior Court Judge, then the same Judge shall direct the Clerk to admit said instrument to recordation, probate or registration by proper notation thereon."

Sec. 2. Section 2 of House Bill Number 484 is further amended by placing a comma after the word "Rutherford" in line one and adding after the comma the words "Pasquotank, Camden, Chowan, Currituck".

Sec. 3. All laws and clauses of laws in conflict with this Act are hereby repealed.

Sec. 4. This Act shall be in full force and effect from and after its ratification.

In the General Assembly read three times and ratified, this the 14th day of April, 1955.

H. B. 213 CHAPTER 576

AN ACT TO AMEND ARTICLE 5, CHAPTER 147, OF THE GENERAL STATUTES RELATING TO THE STATE AUDITOR'S DUTIES.

The General Assembly of North Carolina do enact:

Section 1. Article 5, Chapter 147, of the General Statutes is hereby changed and amended by striking out all of the language of G. S. 147-58, and substituting in lieu thereof the following:

"G. S. 147-58. Duties and authority of State Auditor.—The duties and authority of the State Auditor shall be as follows:

1. The State Auditor shall except as provided in G. S. 143-25 be independent of any fiscal control exercised by the Director of the Budget or the Budget Bureau, and shall be responsible to the Advisory Budget Commission, the General Assembly and the people of North Carolina for the efficient and faithful exercise of the duties and responsibilities of his office.

2. The State Auditor shall be responsible for conducting a thorough post audit of the receipts, expenditures and fiscal transactions of each and every State agency which in any manner handles State funds; 'State agency' is hereby defined to mean any State department, institution, board, commission, commissioner, official or officer of the State.

3. The Auditor shall be responsible for conducting a complete and detailed audit of the fiscal transactions of each and every State agency, except his own office, at least once each year, such audit to cover the fiscal transactions entered into since the period covered by the previous annual audit of such State agency.

4. The Auditor is authorized to conduct special audits, in addition to the annual audits, of the accounts of every State agency whenever in his discretion he determines that such is necessary.

5. The Auditor is authorized to audit at such times as he deems necessary the records of all performances staged on State property under direction of any State agency or wherein any State agency shares in a percentage of gross admission receipts except athletic funds, and the accounts of any private or semi-private agency receiving State aid.

6. The Auditor shall make special investigations upon written request from the Advisory Budget Commission, or upon written request from the Governor.

7. Upon completion of each audit and investigation, the Auditor shall report his findings and recommendations to the Advisory Budget Commission, furnishing a copy of such report to the Governor, a copy to the head of the agency to which the report pertains, and copies to such other persons as he may deem advisable.

8. If the Auditor shall at any time discover any unauthorized, illegal, irregular, or unsafe handling or expenditure of State funds, or if at any time it shall come to his knowledge that any unauthorized, illegal, irregular, or unsafe handling or expenditure of State funds is contemplated but not consummated, in either case, he shall forthwith report the facts to the Governor with a copy of such report to the Advisory Budget Commission.

9. The Auditor is authorized and directed in his reports of audits or reports of special investigations to make any comments, suggestions or recommendations he deems desirable concerning any aspect of such agency's activities and operations.

10. In addition to regular audits, the Auditor shall check the Treasury records at the time a Treasurer assumes office (not to succeed himself), and therein charge him with the balance in the Treasury, and shall check

the Treasurer's records at the time he leaves office to determine that the accounts are in order.

11. The Auditor shall require, when deemed necessary, all persons who have received moneys or securities, or have had the disposition or management of any property of the State, to render statements thereof to him; and all such persons shall render such statements at such time and in such form as he shall require.

12. The Auditor shall require all persons who have received any moneys belonging to the State, and who have not accounted therefor, to settle their accounts; upon failure of any person to settle accounts, the Auditor is authorized and directed to call the matter to the attention of the Attorney General and furnish such information as he may direct.

13. The Auditor shall transmit to the Advisory Budget Commission annually a complete statement of the funds of the State, of its revenues and of the public expenditures during the preceding fiscal year, as revealed by his audits and investigations as herein prescribed, with copies of such statements furnished to the Governor and to such other persons as may be deemed advisable.

14. The Auditor shall examine as often as may be deemed necessary the accounts of the debits and credits in the bank book kept by the Treasurer, and if he discovers any irregularity or deficiency therein, unless the same be rectified or explained to his satisfaction, report the same forthwith in writing to the Advisory Budget Commission, with copy of such report to the Governor.

15. The Auditor may examine the accounts and records of any bank or trust company relating to transactions with the State Treasurer, or with any State department, institution, board, commission, officer, or other agency, or he may require banks doing business with the State to furnish him information relating to transactions with the State or State agencies.

16. The Auditor and his authorized agents shall have access to and may examine all books, accounts, reports, vouchers, correspondence, files, records, money, investments, and property of any State department, institution, board, commission, officer, or other agency as it relates to the handling of State funds. Every officer or employee of any such agency having such records or property in his possession or under his control shall permit access to and examination of them upon the request of the Auditor or any agent authorized by him to make such request. Should any officer or employee fail to perform the requirements of this Section, he shall be guilty of a misdemeanor. The Auditor and his authorized agents are authorized to examine all books and accounts of any individual, firm, or corporation only insofar as it relates to transactions with any department, board, officer, commission, institution, or other agency of the State; provided that such examination shall be limited to those things which might relate to irregularities on the part of any State agency.

17. The Auditor may, as often as he deems advisable, make a detailed examination of the bookkeeping and accounting systems in use in the various State agencies and make suggestions and recommendations to

the agencies for improvements, with a copy of such recommendations transmitted to the Budget Bureau. Any State department, board, commission, institution or agency which plans to change its accounting system must first submit its plan to the Director of the Budget and obtain approval in accordance with provisions of G. S. 143-22; prior to approval of any change in accounting systems, the Director of the Budget shall submit the proposed changes to the Auditor and receive and consider the Auditor's advice and recommendations with respect to such changes.

18. The Auditor, or his deputy, while conducting an examination authorized by these Sections, shall have the power to administer oath to any person whose testimony may be required in any such examination, and to compel the appearance and attendance of such person for the purpose of such an examination. If any person shall willfully swear falsely in such an examination, he shall be guilty of perjury.

19. The Auditor may appoint a deputy auditor to perform any duties pertaining to the office, and he may appoint a deputy auditor for any specific purpose; provided that any deputy so appointed shall not be authorized to transfer authority to any other person.

20. The Auditor shall in the case of audits of State agencies not supported from the State's General Fund charge and collect from such agencies the actual costs of audits made; provided, in the case of an agency supported in part out of the General Fund, the proportion of the actual costs of such audits to be assessed against the agency shall be equal to the proportion of its support received from other than the General Fund, such costs to be paid from such other fund or funds of the audited agency; and provided further, this subsection shall not apply to agencies, institutions or departments which are supported entirely by General Fund appropriations and departmental or institutional receipts. Costs collected under this subsection shall be based on the actual expenses incurred by the Auditor's office in making such audit and the affected agency shall be entitled to an itemized statement of such costs. Amounts collected under this subsection shall be deposited in the General Fund as non-tax revenue.

21. Effective July 1, 1955, or as soon thereafter as practical but not later than July 1, 1956, the functions of pre-audit of State agency expenditures, issuance of warrants on the State Treasurer for same, and maintenance of records pertaining to these functions shall be transferred from the Auditor's office to the Budget Bureau. All books, papers, reports, files and other records of the Auditor's office pertaining to and used in the performance of these functions shall be transferred to the Budget Bureau, and office machinery and equipment used primarily in the performance of these functions shall be transferred to the Budget Bureau. The Governor, with the advice and consent of the Advisory Budget Commission, is authorized to determine and declare the effective date of the transfer of these functions and to do all things necessary to effect an orderly and efficient transfer; and the Governor, with the advice and consent of the Advisory Budget Commission, is further authorized to transfer to the Budget Bureau the unused portion of such funds as may have been appropriated to the Auditor's office for the 1955-57 biennium for the per-

formance of the functions and duties transferred to the Budget Bureau under the provisions of this Act.

22. Nothing under this Article shall be construed to affect the right of the Director of the Budget to require information from State agencies under the provisions of Article 1, Chapter 143 of the General Statutes."

Sec. 2. All laws and clauses of laws in conflict with this Act are hereby repealed.

Sec. 3. This Act shall be in full force and effect from and after July 1, 1955.

In the General Assembly read three times and ratified, this the 14th day of April, 1955.

H. B. 214 CHAPTER 577

AN ACT TO AMEND ARTICLE 6, CHAPTER 147, OF THE GENERAL STATUTES RELATING TO THE STATE TREASURER'S DUTIES.

The General Assembly of North Carolina do enact:

Section 1. G. S. 147-68 is hereby changed and amended by striking out all of the language of such Section and substituting in lieu thereof the following:

"G. S. 147-68. To receive and disburse moneys; to make reports. —

1. It is the duty of the Treasurer to receive all moneys which shall from time to time be paid into the treasury of this State; and to pay all warrants legally drawn on the Treasurer by the State Disbursing Officer or the State Auditor or the State Treasurer in the lawful exercise of their duties and responsibilities.

2. No moneys shall be paid out of the treasury except on warrant of the State Disbursing Officer or the State Auditor or the State Treasurer, and unless there is a legislative appropriation or authority to pay the same.

3. It shall be the responsibility of the Treasurer to determine that all warrants presented to him for payment are valid and legally drawn on the Treasurer.

4. The Treasurer shall report to the Governor and Advisory Budget Commission annually and to the General Assembly at the beginning of each biennial session the exact balance in the treasury to the credit of the State, with a summary of the receipts and payments of the treasury during the preceding fiscal year, and so far as practicable an account of the same down to the termination of the current calendar year.

5. The State Treasurer shall except as provided in G. S. 143-25 be independent of any fiscal control exercised by the Director of the Budget or the Budget Bureau and shall be responsible to the Advisory Budget Commission, the General Assembly and the people of North Carolina for the efficient and faithful exercise of the responsibilities of his office."

Sec. 2. All laws and clauses of laws in conflict with this Act are repealed.

NORTH CAROLINA GENERAL ASSEMBLY
1969 SESSION

CHAPTER 932
HOUSE BILL 568

AN ACT TO AMEND THE CONSTITUTION OF NORTH CAROLINA TO REQUIRE THE GENERAL ASSEMBLY TO REDUCE THE STATE ADMINISTRATIVE DEPARTMENT TO 25 AND TO AUTHORIZE THE GOVERNOR TO REORGANIZE THE ADMINISTRATIVE DEPARTMENTS SUBJECT TO LEGISLATIVE APPROVAL.

The General Assembly of North Carolina do enact:

Section 1. The Constitution of North Carolina, as revised and amended by a revision and amendment submitted to the qualified voters by A Bill to be Entitled an Act to Revise and Amend the Constitution of North Carolina, H.B. 231, enacted as Chapter 1258 of the Session Laws of 1969, is amended as follows:

a. Article III, Sec. 5(10), is enacted to read follows:

"(10) Administrative reorganization. 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, but the Governor may make such changes in the allocation of offices and agencies and in the allocation of those functions, powers, and duties as he considers necessary for efficient administration. If those changes affect existing law, they shall be set forth in executive orders, which shall be submitted to the General Assembly not later than the sixtieth calendar day of its session, and shall become effective and shall have the force of law upon adjournment sine die of the session, unless specifically disapproved by resolution of either house of the General Assembly or specifically modified by joint resolution of both houses of the General Assembly."

b. Article III, Sec. 11, is enacted to read as follows:

"**Sec. 11. Administrative departments.** Not later than July 1, 1975, all administrative departments, agencies, and offices of the State and their respective functions, powers, and duties shall be allocated by law among and within not more than 25 principal administrative departments so as to group them as far as practicable according to major purposes. Regulatory, quasi-judicial, and temporary agencies may, but need not, be allocated within a principal department."

Sec. 2. The Constitution of North Carolina, as that document read on January 1, 1969, is amended as follows:

a. Article III, Sec. 19, is enacted to read as follows:

"**Sec. 19. Administrative departments.** Not later than July 1, 1975, all administrative departments, agencies, and offices of the State and their respective functions, powers, and duties shall be allocated by law among and within not more than 25 principal administrative departments so as to group them as far as practicable according to major purposes. Regulatory, quasi-judicial, and temporary agencies may, but need not, be allocated within a principal department."

b. Article III, Sec. 20, is enacted to read as follows:

"**Sec. 20. Administrative reorganization.** 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, but the Governor may make such changes in the allocation of offices and agencies and in the allocation of those functions, powers, and duties as he considers necessary for efficient administration. If those changes affect existing law, they shall be set forth in executive orders, which shall be submitted to the General Assembly not later than the sixtieth calendar day of its session, and shall become effective and shall have the force of law upon adjournment sine die of the session, unless specifically disapproved by resolution of either house of the General Assembly or specifically modified by joint resolution of both houses of the General Assembly."

Sec. 3. The amendment set out in Sections 1 and 2 of this Act shall be submitted to the qualified voters of the State at the next general election. That election shall be conducted under the laws then governing elections in this State.

Sec. 4. At that election, each qualified voter desiring to vote shall be provided a ballot on which shall be printed the following:

"□ FOR constitutional amendment to require General Assembly to reduce number of State administrative departments to 25 and to authorize Governor to reorganize administrative departments, subject to legislative approval.

"□ AGAINST constitutional amendment to require General Assembly to reduce number of State administrative departments to 25 and to authorize Governor to reorganize administrative departments, subject to legislative approval."

Those qualified voters favoring the amendment set out in Sections 1 and 2 of this Act shall vote by marking an X or a check mark in the square beside the statement beginning "FOR", and those qualified voters opposed to that amendment shall vote by making an X or a check mark in the square beside the statement beginning "AGAINST".

Notwithstanding the foregoing provisions of this Section, voting machines may be used in accordance with rules and regulations prescribed by the State Board of Elections.

Sec. 5. If a majority of the votes cast thereon are in favor of the amendment set out in Sections 1 and 2 of this Act, and if a majority of the votes cast on the revision and amendment submitted to the qualified voters by A Bill to be Entitled an Act to Revise and Amend the Constitution of North Carolina are in favor of that revision and amendment, then the Governor shall certify the amendment set out in Section 1 of this Act to the Secretary of State, who shall enroll that amendment so certified among the permanent records of his office, and the amendment shall become effective on July 1 next after its ratification by the voters.

Sec. 6. If a majority of the votes cast thereon are in favor of the amendment set out in Sections 1 and 2 of this Act, and if a majority of the votes cast on the revision and amendment submitted to the qualified voters by A Bill to be Entitled an Act to Revise and Amend the Constitution of North Carolina are against that revision and amendment, then the Governor shall certify the amendment set out in Section 2 of this Act to the Secretary of State, who shall enroll that amendment so certified among the permanent records of his office, and the amendment shall become effective on July 1 next after its ratification by the voters.

Sec. 7. All laws and clauses of laws in conflict with this Act are repealed.

Sec. 8. This Act shall become effective upon its ratification.

In the General Assembly read three times and ratified, this the 20th day of June, 1969.

NORTH CAROLINA GENERAL ASSEMBLY
1973 SESSION

CHAPTER 1409
SENATE BILL 1011

AN ACT TO PROVIDE THAT THE STATE BOARD OF ELECTIONS SHALL BE AN INDEPENDENT AGENCY.

The General Assembly of North Carolina enacts:

Section 1. G.S. 143A-22 is hereby repealed.

Sec. 2. Article 3 of Chapter 163 of the General Statutes is hereby amended by adding a new section immediately following G.S. 163-19 to be designated as G.S. 163-19.1 and to read as follows:

"**§ 163-19.1. State Board of Elections Independent Agency. —** The State Board of Elections shall be and remain an independent regulatory and quasi-judicial agency and shall not be placed within any principal administrative department. The State Board of Elections shall exercise its statutory powers, duties, functions, authority, and shall have all powers and duties conferred upon the heads of principal departments under G.S. 143B-10."

Sec. 3. Article 3 of Chapter 163 of the General Statutes is hereby amended by adding a new section immediately following G.S. 163-19.1 to be designated as G.S. 163-19.2 and to read as follows:

"**§ 163-19.2. Executive Secretary-Director to be appointed by Board. —** The appointment of the Executive Secretary-Director of the State Board of Elections is extended to May 15, 1977, unless removed for proper cause, and thereafter the Board shall appoint an Executive Secretary-Director for a term of four years with compensation to be determined by the Department of Personnel. He shall serve, unless removed for cause, until his successor is appointed. Such Executive Secretary-Director shall be responsible for staffing, administration, execution of the Board's decisions and orders and shall perform such other responsibilities as may be assigned by the Board. In the event of a vacancy, the vacancy shall be filled for the remainder of the term."

Sec. 4. All funds budgeted to the Department of the Secretary of State for the State Board of Elections are hereby transferred to the State Board of Elections.

Sec. 5. This act shall become effective upon ratification.

In the General Assembly read three times and ratified, this the 13th day of April, 1974.

NORTH CAROLINA GENERAL ASSEMBLY
1973 SESSION

CHAPTER 1415
SENATE BILL 1149

AN ACT TO MAKE TECHNICAL AMENDMENTS TO THE LAW RELATING TO THE DUTIES OF THE STATE AUDITOR.

The General Assembly of North Carolina enacts:

Section 1. G.S. 147-58(9) is amended by adding at the end thereof the following:

"He shall, from time to time as he deems desirable, make review concerning economy, and efficiency of agencies operation and program effectiveness and file reports of said operations review with the agency head, the Governor and the Advisory Budget Commission."

Sec. 2. This act shall become effective upon ratification.

In the General Assembly read three times and ratified, this the 13th day of April, 1974.

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2023

SESSION LAW 2024-57
SENATE BILL 382

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

The General Assembly of North Carolina enacts:

PART I. DISASTER RELIEF

SUBPART I-A. GENERAL PROVISIONS

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

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

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

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

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

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

SUBPART I-B. EDUCATION

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

(2) Seven hundred fifty thousand dollars ($750,000) to be divided equally between the 15 eligible entities previously funded for capacity-building grants pursuant to Section 14.7(c)(1) of S.L. 2023-134.

(3) Two hundred thousand dollars ($200,000) to the Great Trails State Coalition, a nonprofit corporation, for (i) a time-limited position to assist and coordinate trail planning and implementation for the nonprofit organizations in the State, (ii) marketing for trail events, and (iii) promoting outdoor trail recreation.

SUBPART II-I. TRANSPORTATION

AIRPORT IMPROVEMENT FUNDS SHALL NOT REVERT

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

REALLOCATE ROCKINGHAM SPEEDWAY PEDESTRIAN BRIDGE FUNDS

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

SUBPART II-J. FINANCE

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

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

SUBPART II-K. GENERAL PROVISIONS

STORMWATER AND STREAM REHABILITATION ALLOCATION CHANGE

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

PART III. VARIOUS LAW CHANGES

SUBPART III-A. ELECTIONS

TRANSFER STATE BOARD OF ELECTIONS TO STATE AUDITOR

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

…."

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(2) Holds any office in a state, congressional district, county or precinct political party or organization. Provided, however, that the position of delegate to a political party convention shall not be considered an office for the purpose of this subdivision.

(3) Is a campaign manager or treasurer of any candidate or political party in a primary or election.

(4) Is a candidate for nomination or election.

(5) Is the wife, husband, son, son in law, daughter, daughter in law, mother, mother in law, father, father in law, sister, sister in law, brother, brother in law, aunt, uncle, niece, or nephew of any candidate for nomination or election. Upon any member of the county board ~~of elections~~ becoming ineligible, that member's seat shall be declared vacant. This subdivision only applies if the county board ~~of elections~~ is conducting the election for which the relative is a candidate.

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

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

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

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

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

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

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

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

VARIOUS ELECTION CHANGES

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

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

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

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

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

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

…

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

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

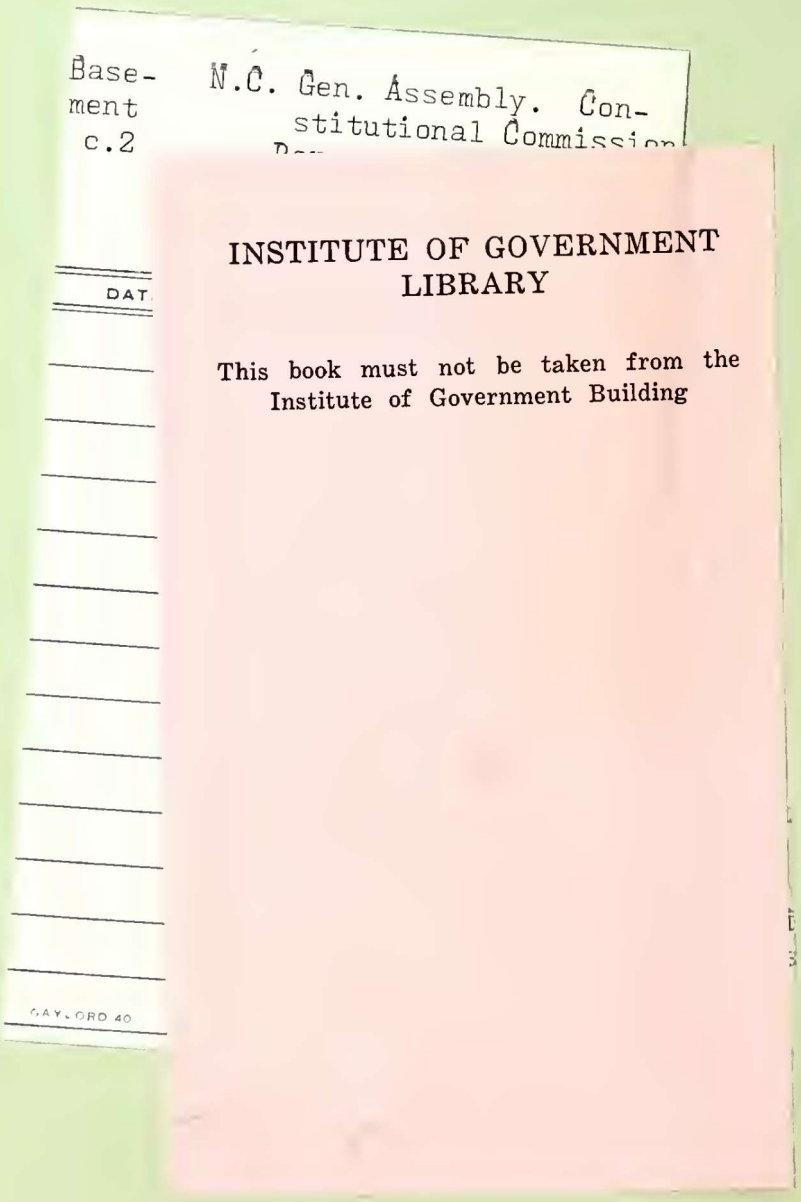
REPORT OF THE

NORTH CAROLINA CONSTITUTIONAL COMMISSION

TO THE GOVERNOR AND MEMBERS OF THE GENERAL ASSEMBLY OF THE STATE OF NORTH CAROLINA

RALEIGH, NORTH CAROLINA

1959



111 Corcoran Street
Durham, North Carolina
February 12, 1959

His Excellency,
Governor Luther H. Hodges
and
The Honorable Members of the General Assembly

Gentlemen:

The Commission appointed "to study the State Constitution and submit recommendations with respect to amendments or a revision thereof" (Joint Resolution 33, adopted May 31, 1957) has the honor to transmit the following report. It was made the duty of the Commission to report "on or after December 1, 1958."

The Commission, as constituted by the Joint Resolution and as appointed by the Governor, has served with the exception of Judge John J. Parker, who died while its work was in the initial stages of projection and organization. The members of this Commission have been conscious and regretful of the loss of the advice and guidance of this able jurist, who had served with distinction as a Judge of the United States Court of Appeals for the Fourth Circuit since 1925 and who was experienced in the work of constitutional revision, having been a member of the Commission of 1931-32. As his successor, we have welcomed Judge Johnson J. Hayes, Senior Judge of the United States District Court for the Middle District of North Carolina. The Commission chose as its Chairman Victor S. Bryant, of Durham, and as its Vice Chairman, W. Frank Taylor, of Goldsboro.

The services of Mr. George W. Hardy III, of the Faculty of Law of the University of North Carolina, were secured for the position of Executive Secretary. He has been painstaking in his research and most capable in his varied work. His clear perception of the background of the Commission's studies has been of inestimable benefit.

The Commission gratefully acknowledges the help of the Institute of Government. Its staff, its assembled research materials, its building and accommodations have been repeatedly used. Appreciation is also expressed to Mr. John L. Sanders of the Institute staff for his very competent assistance and to Dr. W. W. Pierson of the University of North Carolina Department of Political Science, whose knowledge and experience in the field of constitutional study have been of great value.

Conferences were held by the full Commission with the Governor, with members of the Council of State and with the Attorney General. The Commission conferred with a number of organizations, and with other legislative study commissions whose spheres of study embraced constitutional issues, notable among them being the Tax Study Commission.

The basic duty of this Commission, as indicated by the Joint Resolution, was that of recommending either amendments to or a revision of the present State Constitution. The studies of the Commission showed that in the history of this Constitution, now ninety years old, 135 amendments have been adopted (out of 158 submitted to the people of North Carolina).

Some provisions are now obsolete and outmoded; some lack clarity. There are duplications in the instrument as it stands, and there is, in the opinion of the Commission, the need for substantive changes in several areas. These considerations led to the conviction that only by revision could the numerous amendments necessary to remedy these defects and fulfill these ends be embodied in a Constitution having orderly sequence. A revised Constitution is, therefore, recommended.

To the end that any question as to the legal propriety of such a recommendation may be resolved in advance, we have been advised in writing by the Attorney General that such a revision, if submitted by the General Assembly to a vote of the people, would meet the legal requirements of the present Constitution.

In the work of revision, the steadfast effort of the Commission, in the style of expression used and in the employment of terms, has been to conserve traditional values and usages to which the people of North Carolina are accustomed. It has also been the effort to conserve the values of accumulated jurisprudence as embodied in the interpretation and construction of the language of the present Constitution. The changes made in many instances were adopted in order to express more clearly the understandings concerning certain provisions of the Constitution which have developed over the years through experience. The analysis of these changes, the reasons for their recommendation, and the merits of the revised version, as well as a brief history of the work of the Commission, are subjects of the commentary prepared by the Executive Secretary.

During the Commission's deliberations many questions of importance were presented. Divergences of opinion arose as to some of these. When, after careful study and debate, these differences still prevailed, they were resolved by majority vote. While we are in general accord, the signing of this report should not be interpreted as precluding any member of the Commission from expressing an individual viewpoint.

The work of the Commission is now completed, and this report is respectfully submitted for consideration by the Governor and members of the General Assembly.

Respectfully submitted,

W. Frank Taylor
Vice Chairman

Victor S. Bryant, Sr.
Chairman

Henry Brandis, Jr.
Harry B. Caldwell
Claude Currie
W. Ed Gavin
Johnson J. Hayes
Herschel V. Johnson
Woodrow Jones
John H. Kerr, Jr.
Charles Aycock Poe
Susie Sharp
William D. Snider
Lindsay C. Warren
Edward F. Yarborough

Report of the

NORTH CAROLINA STATE CONSTITUTION STUDY COMMISSION

Raleigh / 1968

Amendment No. 5

Providing for a Change in the Mode of Selection of Certain State Executive Officers

PROPOSED CONSTITUTION

Article III

Sec. 5(8). Appointments. Except as otherwise provided in this Constitution, the Governor shall appoint and may remove the heads of all administrative departments and agencies of the State. All other officers in the administrative service of the State shall be appointed and may be removed as provided by law.

Sec. 7(1). Officers. An Auditor, a Treasurer, and an Attorney General shall be elected by the qualified voters of the State in 1972 and every four years thereafter, at the same time and places as members of the General Assembly are elected. Their term of office shall be four years and shall commence on the first day of January next after their election and continue until their successors are elected and qualified.

Article IX

Sec. 4(2). Superintendent of Public Instruction. The Superintendent of Public Instruction shall be the secretary and chief administrative officer of the State Board of Education. He shall be elected by the State Board of Education.

PRESENT CONSTITUTION

Article III

Sec. 1. Executive power; Governor and Lieutenant Governor. The executive power of the State shall be vested in the Governor. The Governor and the Lieutenant Governor shall be elected by the qualified voters of the State

in 1972 and every four years thereafter, at the same time and places as members of the General Assembly are elected. Their term of office shall be four years and shall commence on the first day of January next after their election and continue until their successors are elected and qualified.

Sec. 3. Contested elections. A contested election for any office established by this Article shall be determined by joint ballot of both houses of the General Assembly in the manner prescribed by law.

Sec. 7. Information. The Governor may at any time require information in writing from the head of any administrative department or agency upon any subject relating to the duties of his office.

Sec. 10. Appointments. Except as otherwise provided in this Constitution, the Governor shall appoint and may remove the heads of all administrative departments and agencies of the State. All other officers in the administrative service of the State shall be appointed and may be removed as provided by law.

Sec. 12. Succession to office of Governor. [In paragraph 3, strike "Secretary of State" and insert "Attorney General" in lieu thereof.]

Sec. 13. Other elective officers.

(1) Officers. An Auditor, a Treasurer, and an Attorney General shall be elected by the qualified voters of the State in 1972 and every four years thereafter, at the same time and places as members of the General Assembly are elected. Their term of office shall be four years and shall commence on the first day of January next after their election and continue until their successors are elected and qualified.

(2) Duties. Their respective duties shall be prescribed by law.

(3) Vacancies. If the office of any of these officers shall be vacated

by death, resignation, or otherwise, it shall be the duty of the Governor to appoint another to serve until his successor is elected and qualified. Every such vacancy shall be filled by election at the first election for members of the General Assembly that occurs more than 30 days after the vacancy has taken place, and the person chosen shall hold the office for the remainder of the unexpired term fixed in this Section. When a vacancy occurs in the office of any of the officers named in this Section and the term expires on the first day of January succeeding the next election for members of the General Assembly, the Governor shall appoint to fill the vacancy for the unexpired term of the office.

(4) Interim officers. Upon the occurrence of a vacancy in the office of any one of these officers for any of the causes stated in the preceding paragraph, the Governor may appoint an interim officer to perform the duties of that office until a person is appointed or elected pursuant to this Section to fill the vacancy and is qualified.

(5) Acting officers. During the physical or mental incapacity of any one of these officers to perform the duties of his office, as determined pursuant to this Section, the duties of his office shall be performed by an acting officer who shall be appointed by the Governor.

(6) Determination of incapacity. The General Assembly shall by law prescribe with respect to those officers, other than the Governor, whose offices are created by this Article, procedures for determining the physical or mental incapacity of any officer to perform the duties of his office, and for determining whether an officer who has been temporarily incapacitated has sufficiently recovered his physical or mental capacity to perform the duties of his office. Removal of those officers from office for any other cause shall be by impeachment.

Sec. 14. Council of State. The Council of State shall consist of the officers whose offices are created by this Article.

Sec. 16. Seal of State. There shall be a seal of the State, which shall be kept by the Governor and used by him as occasion may require, and shall be called "The Great Seal of the State of North Carolina". All grants and commissions shall be issued in the name and by the authority of the State of North Carolina, sealed with "The Great Seal of the State of North Carolina", and signed by the Governor.

Article IX

Sec. 8. State Board of Education.

(1) Board. The State Board of Education shall consist of the Lieutenant Governor, the Treasurer, and eleven members appointed by the Governor, subject to confirmation by the General Assembly in joint session. The General Assembly shall divide the State into eight educational districts. Of the appointive members of the Board, one shall be appointed from each of the eight educational districts and three shall be appointed from the State at large. Appointments shall be for overlapping terms of eight years. Appointments to fill vacancies shall be made by the Governor for the unexpired term and shall not be subject to confirmation.

(2) Superintendent of Public Instruction. The Superintendent of Public Instruction shall be the secretary and chief administrative officer of the State Board of Education. He shall be elected by the State Board of Education.

Commentary on Amendment No. 5

We recommend that the list of elected state executive officers be reduced from ten to five. We propose that the Governor, Lieutenant Governor, Auditor, Treasurer, and Attorney General continue to be elected by the people for four-year terms; that the Superintendent of Public Instruction be chosen by the State Board of Education; and that the Secretary of State, Commissioner of Agriculture, Commissioner of Labor, and Commissioner of Insurance be appointed by the Governor.

From 1776 until 1835, the General Assembly elected the Governor. From 1776 until 1868 it also elected all of the other state executive officers and a seven-member Council of State, a part-time body that served solely as a check on the exercise of the Governor's few powers. The Constitution of 1868, belatedly reflecting the influence of Jacksonian democracy, made all of the state executives subject to popular election for four-year terms. The elected list then comprised the Governor, Lieutenant Governor (established in 1868), Secretary of State, Auditor, Treasurer, Attorney General, Superintendent of Public Instruction, and Superintendent of Public Works. (The last-named officer was eliminated in 1873.) In 1944, an amendment was adopted adding the Commissioners of Agriculture, Labor, and Insurance to the list of those constitutionally required to be elected, although they had been elected by requirement of statute for many decades.

In 1868, the elected executives were all of the principal executive officers of the State. As other executive offices were created in the late 1800's, they too were made elective -- the Commissioners of Agriculture, Labor, and Insurance being the only extant examples. Many executive offices with large responsibilities have been created since 1900, but none is filled by popular election. This group includes, for example, the Chairman of the

State Highway Commission, Commissioner of Motor Vehicles, Commissioner of Revenue, Commissioner of Public Welfare, Commissioner of Correction, Director of Conservation and Development, and Director of Administration, to name but a few. All are appointed by the Governor or (in two instances) are chosen by a board with the Governor's approval. Thus whether one of the state executive offices is filled today by vote of the people or by appointment appears to have more to do with the age of the office than with the nature and weight of its responsibilities.

The result is that each four years, the voter is confronted by a ballot listing candidates for ten executive positions. Relatively few of the State's two million voters have more than a faint idea of the duties of most of these offices; still fewer are in position to know the qualities of the occupants of and candidates for most of those posts. Thus the vast majority of the voters are poorly prepared to make an understanding selection of the men who are to fill those posts. The fact is that for many decades, nearly all of these officers (other than the Governor and Lieutenant Governor) have reached their places by appointment by the Governor to fill a vacancy, have won nomination in the party primary without significant opposition, and have shared the success of the Democratic state ticket in the general election.

From the constitutional standpoint, these officers nevertheless hold their offices by gift of the voters, and so are only indirectly subject to supervision by the Governor. Thus the Governor's ability to coordinate the activities of state government and to mount a comprehensive response to the problems of the day are handicapped if the elected department heads choose not to cooperate with him.

We believe that reducing the list of elected officers would make possible a more knowledgeable choice on the part of the voters, who would have a

smaller list of offices and candidates to consider; and it would make possible more effective coordination of the administrative operations of state government.

We would retain on the elective list the Governor and Lieutenant Governor, for obvious reasons; the Auditor, because of his function as the post auditor of state financial transactions; the Treasurer, because of his responsibilities as the custodian of state funds; and the Attorney General, because of his function as counsel to state government. These last three officers serve in part as observers of the Governor and should be sufficiently independent of his control to raise objections in case of fiscal or legal irregularities on his part.

These five officers would also constitute the Council of State. That body historically has not functioned in a manner comparable to the President's Cabinet. Its members have never been "the Governor's men," holding office by his appointment and subject to removal by him. For a long time, it has not included all of the heads of major state departments. Its assigned functions (most of them statutory) have been to serve as a check on the Governor and his actions. Currently the Council's concerns are largely confined to approving the Governor's actions with respect to property acquisitions and dispositions by the State, the borrowing of money, and the calling of extra sessions of the General Assembly. We believe that these functions could be as well and as independently performed by the revised Council of State as they could at present.

Our reasons for eliminating the Superintendent of Public Instruction from the ballot differ from those applying to the other four. Today, any voter in the State can be elected to any of these five offices, including that of Superintendent. Yet the job of administering a statewide school

system serving over 1,100,000 children is a difficult and complex one, requiring professional knowledge and ability of a high order. We believe that the choice of a person to fill this important post can be better made by the State Board of Education than by the voters at large or even by the Governor. The change would, among other things, relieve the Superintendent of the kind of political pressures and obligations that may logically accompany a periodic political candidacy.

We note that the Superintendent-elect has advocated that the office be filled by appointment of the Board, as did his opponents in the primary and general elections of 1968. (We note also that only 21 of the states now choose their Superintendent of Public Instruction or equivalent officer by popular election.)

While the office of Secretary of State is one of great antiquity and of prestige, we do not consider its present duties to be of such character as to require that it be filled by popular election.

The Commissioner of Agriculture heads an important state department, and is responsible for assistance and regulatory programs affecting not only the farmers but the processors, distributors, and consumers of farm products as well. For this reason, we believe that the post is one that should be subject to supervision and direction by the Governor, through his own appointee, as is the case with other comparable line agencies of the State (Of the 47 states with an officer equivalent to our Commissioner of Agriculture, only 12 choose him by popular election.)

The Commissioners of Labor and Insurance perform essentially regulatory functions of a nature that makes it more appropriate that their offices be filled by appointment than by popular election. (Only eight states elect their Commissioner of Insurance and only five elect their Commissioner of

Labor or equivalent.)

Even if taken out of the constitution, these five offices would continue to exist unless abolished by legislative action. Their duties would be subject to legislative determination, as they now are.

While the portion of this amendment dealing with the present constistution appears to be somewhat more extensive than is the portion dealing with the proposed constitution, that merely reflects the simpler and briefer character of the proposed document. As to the matter that Amendment No. 5 covers, the legal effects would be the same, whether it is adopted as an amendment to the proposed constitution or as an amendment to the present constitution.

Amendment No. 8

Requiring the General Assembly to Reduce the Administrative Departments to to 25 and Authorizing the Governor to Reorganize the Administrative Departments, Subject to Legislative Disapproval

PROPOSED CONSTITUTION

Article III

Sec. 5(10). Administrative reorganization. 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, but the Governor may make such changes in the allocation of offices and agencies and in the allocation of those functions, powers, and duties as he considers necessary for efficient administration. If those changes affect existing law, they shall be set forth in executive orders, which shall be submitted to the General Assembly while it is in session, and shall become effective and shall have the force of law 60 days after submission, or upon the adjournment sine die of the session, whichever is sooner, unless specifically modified or disapproved by joint resolution of both houses of the General Assembly.

Sec. 11. Administrative departments. Not later than July 1, 1975, all administrative departments, agencies, and offices of the State and their respective functions, powers, and duties shall be allocated by law among and within not more than 25 principal administrative departments so as to group them as far as practicable according to major purposes. Regulatory, quasi-judicial, and temporary agencies may, but need not, be allocated within a principal department.

PRESENT CONSTITUTION

Article III

Sec. 18. [Text same as Sec. 11, above.]

Sec. 19. [Text same as Sec. 5(10), above.]

Commentary on Amendment No. 8

Most of our effort with respect to state government has been directed at improving the organizational and administrative effectiveness of the executive branch. This amendment is another result of that effort. It would require the General Assembly to make a substantial reduction in the number of state departments and agencies, and it would give the Governor the initiative in reorganizing the state administrative structure, subject to legislative disapproval.

The Governor is elected to administer state government. Yet he must do so through an array of 200 state agencies of various titles and descriptions, all of them responsible to him in some way but many of them subject to little or no effective coordination or direction by him. He does well to recognize on sight the heads of all of these state agencies, much less to be able to have an informed view of the competence with which they are performing their jobs. His coordinative function is thwarted because it takes most of his term for a Governor to learn what all of these units under his nominal command are supposed to be doing.

One obvious prescription is to reduce to a reasonable number the agencies that the Governor must oversee. Yet each session of the General Assembly sees a net addition of five or ten agencies to the chart. The General Assembly has the authority to cut the number of state agencies to manageable proportions through consolidation and elimination, but experience indicates that it is most unlikely to do so in the absence of a clear mandate from the people that it be done. Hence this amendment.

Proposed Art. III, § 11, following a precedent found in several states, directs the General Assembly to reduce the number of administrative departments and agencies to not more than 25, and to do so by July 1, 1975. (Thus

it would have three regular sessions in which to accomplish the task.) This would have the effect of reducing the number of department heads whom the Governor must supervise to 25 -- a large number but still only one-eighth of the present number. Not only would the Governor be enabled to manage the business of the State more effectively, but in the course of reorganization, it should be possible to eliminate overlapping and duplication of functions among agencies now independent. The objective is not simply a more efficiently administered government, but one more capable of responding effectively to the needs of the people of the State.

The structure and powers of state agencies are prescribed in considerable detail by statute. Any significant reorganization of state government now requires legislative action changing the relevant statutes. The responsibility for pursuing in a continuous fashion the reorganization of state government in the interest of attaining a more efficiently designed and responsive structure of government is nowhere fixed in the constitution.

The second feature of this amendment (proposed Art. III, § 5[10]) attempts to meet these needs. It vests in the Governor the authority to prepare and submit to the General Assembly proposals for state governmental reorganization. The General Assembly will have 60 days or until the end of the session, whichever comes sooner, in which to act upon the plans. If it does not by joint resolution disapprove the proposed plans, they take effect.

The General Assembly will not be deprived of any of its present authority over the structure and organization of state government. It retains the power to make changes on its own initiative, it can disapprove any change initiated by the Governor, and it can alter any reorganization plan which it has allowed to take effect and then finds to be working

unsatisfactorily. The significant difference is that the amendment settles on the Governor the responsibility and authority for taking the initiative in state administrative reorganization.

The North Carolina State Constitution

Second Edition

John V. Orth &
Paul Martin Newby

Foreword to First Edition by James G. Exum, Jr.
Foreword to Second Edition by Sarah Parker

THE OXFORD COMMENTARIES ON THE STATE CONSTITUTIONS OF THE UNITED STATES
G. Alan Tarr, Series Editor

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of an editorial blue pencil on the second section of the Virginia Declaration of Rights: "That all power is vested in, and consequently derived from, the people; that magistrates are their trustees and servants, and at all times amenable to them."[38] Similarly, the section on separation of powers is almost identical to that in the Maryland Declaration of Rights,[39] while the section on freedom of religion follows almost word for word a section of the Pennsylvania Declaration of Rights.[40]

American constitutionalism, as the revolutionaries themselves loudly protested, was nothing new; rather, it was deeply rooted in English tradition. When North Carolina declared "[t]hat excessive Bail should not be required, nor excessive Fines imposed, nor cruel or unusual punishments inflicted,"[41] it was not merely repeating the antecedent declarations of Virginia[42] and Maryland.[43] It was also deliberately echoing the English Bill of Rights of 1689,[44] a product of the Glorious Revolution that checked Stuart absolutism. (In due course, the provision was to make its way into the U.S. Bill of Rights as the Eighth Amendment.)

Some sections were of even older provenance. For example, North Carolina declared "[t]hat no Freeman ought to be taken, imprisoned or disseissed of his Freehold, Liberties or Privileges, or outlawed or exiled, or in any Manner destroyed or deprived of his Life, Liberty or Property, but by the Law of the Land,"[45] a provision traceable, by way of the Maryland Declaration of Rights,[46] all the way back to the Magna Carta in 1215.[47] Although the "law of the land" as a phrase was often supplanted elsewhere by "due process of law," for instance in the Fifth and Fourteenth amendments to the U.S. Constitution, it was—and remains—North Carolina's guarantee of the rule of law.

The nature of the English contribution to American constitutionalism must be expressly recognized. It was a legacy about how power ought to be exercised, not about what ought to be done with it or who ought to have it. How things ought to be done—for example, that neither bail nor fines should be excessive; that punishment should not be cruel or unusual; that life, liberty, and property should be protected by the law of the land—these were the immensely valuable lessons of centuries of struggle over power's inordinate claims. The proper exercise of power earned the government respect and affection; it focused

[38] Va. Const. of 1776, Declaration of Rights, § 2.
[39] Md. Const. of 1776, Declaration of Rights, § 6.
[40] Pa. Const. of 1776, Declaration of Rights, § 2.
[41] N.C. Const. of 1776, Declaration of Rights, § 10.
[42] Va. Const. of 1776, Declaration of Rights, § 9.
[43] Md. Const. of 1776, Declaration of Rights, § 22.
[44] 1 W. & M., st. 2, ch. 2, § I, cl. 10 (1689).
[45] N.C. Const. of 1776, Declaration of Rights, § 12.
[46] Md. Const. of 1776, Declaration of Rights, § 21.
[47] Magna Carta, § 39 (1215).

they owe their state, the citizens of North Carolina owe "paramount allegiance" to the United States.

Secession, too, had had its logic. The people of North Carolina had debated long and hard before joining the American Union. At the Hillsborough convention in 1788, the ordinance of ratification had been rejected, a decision reversed a year later at the Fayetteville convention. What was attempted in 1861 was the repeal of the ratification ordinance. The legal argument of the victor in the Civil War was that secession was, and always had been, an utter impossibility; in other words, while the Hillsborough decision (not to join the Union) had been reversible, the Fayetteville decision (to join) was irrevocable. For that reason, in 1865 the secession ordinance did not technically need to be repealed; only a "supposed ordinance" in the first place, it was subsequently declared never to have been effective. Sections 4 and 5 are intended to preclude the possibility of future attempts at secession.

Section 6

Separation of powers. The legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other.

Along with popular sovereignty, separation of powers is one of the fundamental principles on which state government is constructed. In the exercise of their right to regulate the state's internal government, North Carolinians separated political power into its constituent parts: legislative, executive, and judicial. The language of the original provision in the state's first constitution was copied almost verbatim from a section of the Maryland Declaration of Rights and reflected contemporary analysis of the functions of government.[6] The order in which this trinity of powers is listed was not accidental. Experience with the British Parliament had convinced Americans of the primacy of the lawmaking power; the executive carried out laws made elsewhere, while the judiciary resolved legal disputes brought to it by litigants.

Separated powers naturally suggested separate branches of government. Although the institutional lines were not sharply drawn in 1776, American experience during the first century of independence greatly clarified matters. The U.S. Constitution in 1787, without specific mention of the principle, had provided a suggestive blueprint: Legislative, executive, and judicial powers were neatly distributed in Articles I, II, and III. Once the declaration of rights was prefaced to the state constitution as Article I in 1868, it was almost inevitable that the following three articles would constitute the state's three branches of government.

Nowhere was it stated that the three powers or branches had to be equal. In fact, although the balance occasionally shifted, the preponderant power has always rested with the legislature. Even the separateness of the powers could

[6] Cf. Md. Const. of 1776, Declaration of Rights, § 6.

Carolina" and the state motto *Esse Quam Videri* (to be rather than to seem), a quotation from the Roman orator Cicero.[44]

Section 11

Administrative departments. Not later than July 1, 1975, all administrative departments, agencies, and offices of the State and their respective functions, powers, and duties shall be allocated by law among and within not more than 25 principal administrative departments so as to group them as far as practicable according to major purposes. Regulatory, quasi-judicial, and temporary agencies may, but need not, be allocated within a principal department.

Coincident with adopting the 1971 constitution, the voters also adopted an amendment adding this section and Section 5, Subsection 10 of this article (empowering the governor to implement administrative reorganization). Effective July 1, 1971, the present section gave the General Assembly four years within which to reorganize the administration into no more than twenty-five departments, this number being thought the maximum that can be effectively supervised. Presumably this section limits the permitted number of departments thereafter.

[44] Cicero, *De amicitia* 98 (*"Virtute enim ipsa non tam multi praediti esse quam videri volunt."*) ("For many wish not so much to be, as to seem to be, endowed with real virtue.") (translation by William Armistead Falconer in Loeb Classical Library, Cicero vol. XX (1923)).

No. COA 25-652 TENTH DISTRICT

NORTH CAROLINA COURT OF APPEALS
****

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

Plaintiff-Appellee,

v.

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

Defendants-Appellants,

and

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

Defendant-Intervenor-Appellant.

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

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ADDENDUM

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CONTENTS OF ADDENDUM

Cuomo v. N.Y. State Comm'n on Ethics & Lobbying in Gov't,
2025 WL 515384,
(N.Y. Feb. 18, 2025) (pending publication) ..... Add. 1-27

2025 WL 515384

THIS DECISION IS UNCORRECTED AND SUBJECT TO REVISION BEFORE PUBLICATION IN THE NEW YORK REPORTS.

Court of Appeals of New York.

Andrew M. CUOMO, Respondent,

v.

NEW YORK STATE COMMISSION ON ETHICS AND LOBBYING IN GOVERNMENT, Appellant.

No. 1

|

Decided February 18, 2025

Synopsis

Background: Former Governor brought action against Commission on Ethics and Lobbying in Government, seeking a judgment declaring the Ethics Commission Reform Act facially unconstitutional and enjoining an ethics investigation into former Governor. The Supreme Court, Albany County, Thomas Marcelle, J., 81 Misc.3d 246, 196 N.Y.S.3d 668, declared the Act's investigation and enforcement provisions unconstitutional and enjoined the proceedings against former Governor. Commission appealed. The Supreme Court, Appellate Division, 228 A.D.3d 175, 210 N.Y.S.3d 822, affirmed, granted Commission's motion for leave to appeal, and certified the question whether it erred in affirming the trial court's order.

Holdings: The Court of Appeals, Rivera, J., held that:

[1] Act did not facially violate separation of powers concerning appointments;

[2] Independent Review Committee's (IRC) role in vetting nominees for the Commission did not facially violate separation of powers concerning appointments;

[3] inability of Governor to members of Commission did not facially violate separation of powers;

[4] Act did not upset the careful balance among the coordinate branches and thus did not facially violate the separation of powers;

[5] Commission was not a department for purposes of New York Constitution's appointments clause; and

[6] Commission's power to impose a fine on a Governor did not encroach on the Legislature's exclusive impeachment power.

Order of Appellate Division reversed.

Garcia, J., dissented and filed opinion, in which Singas and Scarpulla, JJ., concurred.

Procedural Posture(s): On Appeal; Motion for Declaratory Judgment.

West Headnotes (19)

[1] **Constitutional Law** Presumptions and Construction as to Constitutionality

Duly enacted legislation is entitled to a strong presumption of constitutionality.

[2] **Evidence** State governments

All the legislators and the Legislature itself are entitled to the presumption that they act only in accordance with the fulfillment of their oaths of office.

[3] **Constitutional Law** Burden of Proof

Party challenging constitutionality of statute has heavy burden to establish unconstitutionality.

[4] **Constitutional Law** Facial invalidity

On a facial challenge to a statute's constitutionality, plaintiff must establish, in any degree and in every conceivable application, the law suffers wholesale constitutional impairment.

[5] **Constitutional Law** Encroachment in general

While doctrine of separation of powers does not require maintenance of three airtight

departments of government, it does require that no one branch be allowed to arrogate unto itself powers residing entirely in another branch.

[6] **Constitutional Law** Separation of Powers

Constitutional Law Encroachment in general

Courts view the separation-of-powers doctrine from a commonsense perspective; the branches are not hermetically sealed, and some overlap is permissible so long as core duties and responsibilities are retained.

[7] **Constitutional Law** Separation of Powers

The separation of powers is functional and flexible rather than formalistic and rigid.

[8] **States** Executive Authority, Powers, and Functions

States Authority to select

States Power to remove

The executive power entrusted to the Governor through the New York Constitution's Vesting and Take Care Clauses does not encompass exclusive, indefeasible powers to appoint or remove non-constitutional state officers. N.Y. Const. art. 4, §§ 1, 3.

[9] **Public Employment** Ethics Boards and Commissions

Ethics Commission Reform Act furthers the singular purpose of regaining and retaining public confidence in government by creating an independent mechanism for ensuring that executive officials comply with the ethics and lobbying laws. N.Y. Executive Law § 94.

1 Case that cites this headnote

[10] **Constitutional Law** Appointment, tenure and removal of public employees and officials

Public Employment Ethics Boards and Commissions

States Creation and Abolition of Public Offices

States Ethics and conflicts of interest in general

Ethics Commission Reform Act did not facially encroach upon executive's power of appointment in violation of separation of powers, despite argument that the Commission on Ethics and Lobbying in Government, which was established by the Act, was controlled by legislative agents; structure for appointing Commission, pursuant to which Governor appointed three members, the Executive Branch cumulatively appointed five members, and the Legislature appointed six members spread between the controlling parties, was wholly consistent with New York's constitutional tradition that generally allowed the Legislature to direct the appointment of non-constitutional officers. N.Y. Executive Law §§ 94(5)(a), 94(5)(c), 94(10), 94(14).

[11] **Constitutional Law** Appointment, tenure and removal of public employees and officials

Public Employment Ethics Boards and Commissions

States Creation and Abolition of Public Offices

States Ethics and conflicts of interest in general

Independent Review Committee's (IRC) role in vetting nominees for the Commission on Ethics and Lobbying in Government, which was a commission set up by the Ethics Commission Reform Act, did not facially violate separation of powers concerning Executive's power of appointment; IRC did not appoint any member, and while IRC could approve or deny a nominee, only a "selection member," which, by law, meant a legislator or executive official, could appoint a member to the Commission. N.Y. Executive Law §§ 94(2)(b), 94(3)(d), 94(3)(e).

[12] **Constitutional Law** Appointment, tenure and removal of public employees and officials

Public Employment Ethics Boards and Commissions

States Creation and Abolition of Public Offices

States Ethics and conflicts of interest in general

Inability of Governor to remove members of Commission on Ethics and Lobbying in Government, which was a commission set up by the Ethics Commission Reform Act, which allowed for removal of commissioners only for good cause and by majority vote of the Commission, did not facially violate separation of powers; it was the Legislature's long-held constitutional power to set the terms on which non-constitutional officials could be removed from office, and to permit the Governor, or any other executive official, to remove Commissioners could be tantamount to permitting those officials to dominate the Commission and thereby to control the enforcement of the ethics laws against themselves and their political allies. N.Y. Const. art. 4, §§ 1, 3; N.Y. Executive Law § 94(4)(c).

[13] **Constitutional Law** Nature and scope in general

Public Employment Ethics Boards and Commissions

States Creation and Abolition of Public Offices

States Ethics and conflicts of interest in general

Inability of Legislature to remove members of Commission on Ethics and Lobbying in Government, which was a commission set up by the Ethics Commission Reform Act, which allowed for removal of commissioners only for good cause and by majority vote of the Commission, did not facially violate separation of powers; allowing Legislature to wield removal power might have allowed it to assert undue influence on the Commission. N.Y. Executive Law § 94(4)(c).

[14] **Constitutional Law** Appointment, tenure and removal of public employees and officials

Public Employment Ethics Boards and Commissions

States Creation and Abolition of Public Offices

States Ethics and conflicts of interest in general

Ethics Commission Reform Act, which created the Commission on Ethics and Lobbying in Government, did not upset the careful balance among the coordinate branches by encroaching on the Executive's power of appointment, and thus did not facially violate the separation of powers; in addition to appointments being split between the Executive Branch and Legislature, Executive Branch had certain supervisory powers over the Commission, such as the Governor's power under the Moreland Act to investigate the Commission, Commission's executive powers were limited, and Act provided for judicial review in an Article 78 proceeding. N.Y. CPLR § 7803; N.Y. Executive Law §§ 6, 94.

[15] **District and Prosecuting Attorneys** Jurisdiction and authority to act

District Attorneys have plenary prosecutorial power in counties where they are elected. N.Y. County Law § 700(1).

[16] **States** Members of Legislature

The Legislature is indeed generally entitled to discipline its own work and power as it sees fit.

[17] **Public Employment** Ethics Boards and Commissions

States Creation and Abolition of Public Offices

States Ethics and conflicts of interest in general

Commission on Ethics and Lobbying in Government, which was created by the

Ethics Commission Reform Act, was not a "department" for purposes of New York Constitution's provision that heads of department were to be appointed by the Governor by and with the advice and consent of the Senate and could be removed by the Governor in a manner prescribed by law; Act expressly established the Commission within the Department of State. N.Y. Const. art. 5, § 4; N.Y. Executive Law § 94(1)(a).

[18] **Constitutional Law** Nature and scope in general

Public Employment Ethics Boards and Commissions

States Legislative Investigations, Commissions, and Committees

States Ethics and conflicts of interest in general

Power of Commission on Ethics and Lobbying in Government, which was created by the Ethics Commission Reform Act, to impose a fine on the Governor did not encroach on the Legislature's exclusive impeachment power; that power of the Commission only constituted an additional means of exposing and punishing corruption, which was not inherently unconstitutional, given that the Attorney General could criminally or civilly prosecute a Governor without disrupting the Legislature's impeachment authority and that District Attorneys could prosecute Governors for violations of ethics laws. N.Y. Const. art. 6, § 24; N.Y. Executive Law § 94.

[19] **Constitutional Law** Nature and scope in general

Public Employment Ethics Boards and Commissions

States Legislative Investigations, Commissions, and Committees

States Ethics and conflicts of interest in general

Power of Commission on Ethics and Lobbying in Government, which was created by the Ethics Commission Reform Act, to recommend impeachment did not encroach on the Legislature's exclusive impeachment power; Legislature could always ignore the Commission's recommendation. N.Y. Const. art. 6, § 24; N.Y. Executive Law § 94.

1 Case that cites this headnote

West Codenotes

Negative Treatment Reconsidered
N.Y. Executive Law § 94(5)(a), (5)(c), (10), (14)

Attorneys and Law Firms

Dustin J. Brockner, for appellant.

Gregory J. Dubinsky, for respondent.

New York City Bar Association et al., amici curiae.

OPINION

RIVERA, J.:

***1** The issue on this appeal is whether, on its face, the Ethics Commission Reform Act of 2022 unconstitutionally vests the State Commission on Ethics and Lobbying in Government with executive power. Plaintiff's principal argument is that because the Commission exercises executive power, the Governor must have power to appoint and remove the Commissioners. In New York, however, the Legislature—not the Governor—may ordinarily define the terms on which non-constitutional state officers may be appointed and removed. Moreover, the Legislature structured the Commission to address a narrow but crucial gap arising from the inherent disincentive for the Executive Branch to investigate and discipline itself, which has serious consequences for public confidence in government. The Act does not displace the Executive Branch to accomplish that goal; instead, it confers upon an independent agency power to enforce a narrow set of laws, thus mitigating the unique danger of self-regulation. The Act addresses a threat to the legitimacy of government itself with an extraordinary response. While the Act extends very close to the boundary of permissible legislation, it is not "intrinsically a constitutional affront to the separation of powers doctrine" (*Cohen v. State,* 94 N.Y.2d 1, 15, 698 N.Y.S.2d 574, 720 N.E.2d 850 [1999]). We

therefore conclude that the Act is not unconstitutional in every conceivable application.

Plaintiff's secondary arguments are likewise unavailing. The Commission's placement within the Department of State does not violate Article V of the State Constitution. The Court has previously recognized the propriety of independence from the departmental head where necessary to achieve the purposes of a new entity and the Commission falls squarely within that precedent. And, despite what plaintiff contends, the Commission's power to investigate the Governor and possibly impose a fine does not interfere with the Legislature's impeachment power. Accordingly, we conclude that plaintiff has not carried his burden and reverse the order of the Appellate Division.

I.

A.

Joint Commission on Public Ethics

In 2011, in response to highly public cases of unchecked corruption and graft at the highest levels of New York State government, then-Governor, and plaintiff on this appeal, Andrew M. Cuomo and the Legislature agreed to create an agency responsible for enforcing the state's ethics and lobbying laws against legislative and executive officials, among others. [1] The Governor proposed and the Legislature enacted former Executive Law § 94, which established within the Department of State the Joint Commission on Public Ethics (JCOPE) (*see* former Executive Law § 94). Its fourteen members generally served five-year terms and were appointed as follows: six by the Governor and the Lieutenant Governor; and eight by the Legislature, with three each appointed by the Senate's Temporary President and the Assembly's Speaker and one each by the Senate's and the Assembly's Minority Leaders (*see id.* § 94[2]). Of the six members appointed by the Executive Branch, at least three had to belong to a political party different from the Governor's (*see id.*). Members were removable by the appointing official if that official determined there was good cause (*see id.* § 94[7]). The Governor was authorized to "designate the chair[person] of the commission," who held that position at the Governor's pleasure (*id.* § 94[4]).

***2** Early in its establishment and throughout its tenure, JCOPE was criticized for its lack of independence and ineffectiveness. Good-government advocates argued that JCOPE suffered fundamental structural deficiencies. They noted the deleterious effects of what was commonly called the "special vote" or "minority veto," which limited JCOPE's ability to investigate certain officials (*see e.g.* Danny Hakim & Thomas Kaplan, *Though Hailed, Albany Ethics Deal Is Seen as Having Weaknesses,* N.Y. Times, June 6, 2011, § A at 24). For example, under one of the "special vote" provisions, when a JCOPE member sought to investigate a statewide elected official or a direct appointee of such an official, JCOPE's members had to approve the action by a majority, including two of the Governor's three appointees (*see* former Executive Law § 94[13][a]). This meant that two of the Governor's politically aligned appointees could block an investigation of the Governor, even if the remaining 12 members voted to investigate. An analogous provision restricted investigations into legislative officials unless at least two members who voted to authorize the investigation were appointed by a legislative leader from the same party as the subject of the investigation (*see id.*). Observers also raised concerns about the appointments process and individual members' independence, including the Governor's authority to appoint the Chair, the appearance of appointments based on political relationships rather than experience and ability, and removal by the appointing official based on easily manipulated grounds (*see e.g.* Mike Vilensky & Josh Dawsey, *Ethics Panel under Fire,* Wall St J, Jan. 31, 2015, § A at 15). These criticisms gained purchase as cases of corruption and misuse of power continued to surface, leading to resignations and criminal prosecutions while JCOPE remained on the sidelines.

B.

Commission on Ethics and Lobbying in Government

At the 2022 State of the State Address, a new Governor declared that "JCOPE is irreparably broken and has failed to earn the public's trust." The Governor specifically identified the "special vote" and the appointments process as requiring change and proposed a new ethics law as part of the 2022–2023 budget. The Legislature thereafter enacted and the Governor signed into law the Ethics Commission Reform Act of 2022 (the Act), which amended Executive Law § 94 and replaced JCOPE with the Commission on Ethics and Lobbying in Government. Like JCOPE, the Commission is

established in the Department of State and charged with the investigation and enforcement of the ethics and lobbying laws (*see* Executive Law § 94[1][a]). Those under the Commission's jurisdiction include statewide elected officials; members and employees of the Legislature; certain statutorily defined state officers and employees; current and former candidates for statewide office, Senate, and Assembly; the political party chair; and current and former lobbyists and their clients (*id.*). The Commission also enforces financial disclosure requirements and reviews disclosure forms of statewide elected officials, their officers and employees and other persons subject to disclosure under Public Officers Law 73–a (*see* Executive Law § 94[9]). As part of its specific grant of authority under the Act, the Commission has rulemaking power to "adopt, amend and rescind any rules and regulations pertaining to" Public Officers Law § 73 (concerning official ethics), Public Officers Law § 73–a (financial disclosure), Legislative Law Article 1–a (lobbying) and Civil Service Law § 107 (political activities and contributions) (Executive Law § 94[5][a]). With respect to members and employees of the Legislature, the Commission's powers are limited: the Commission may investigate such persons but must refer any potential violations of the ethics laws to the legislative ethics commission (*see id.* § 94[10][p][i]).

The 11 members of the Commission are appointed to four-year terms as follows: three members are nominated by the Governor; two by the Temporary President of the Senate; one by the Minority Leader of the Senate; two by the Speaker of the Assembly; one by the Minority Leader of the Assembly; one by the Attorney General; and one by the Comptroller (*id.* § 94[3][a]). [2] Thus, five members are appointed by Executive officials and six by legislators.

The Act provides that each nominee must be approved by an Independent Review Committee (IRC), composed of the state's accredited law schools' deans or their designees (*see id.* § 94[2][c]). [3] The IRC "review[s] the qualifications of the nominated candidate" and "[t]hose candidates that the [IRC] deems to meet the qualifications necessary for the services required based on their background and expertise ... shall be appointed." If the IRC does not approve a nominee, the appointing official nominates another person (*id.* § 94[3][d]). The Act expressly prohibits appointment of a person who is, or within the last two years was, a registered lobbyist, a legislative employee or member, a statewide elected official, or a qualifying State officer or employee (*see id.* § 94[3][e]).

***3** Whereas JCOPE members could be removed by their appointing authority, Commission members may be removed under the Act only by a majority vote of the Commission (*see id.* § 94[4][c]). Removal is limited by statute to cases where there is good cause—substantial neglect of duty, misconduct in office, violation of confidentiality restrictions, inability to discharge the powers or duties of office or violation of the Act—and must follow written notice and opportunity for a reply (*id.*).

Another significant difference is the omission of the "special vote" provisions. Under the Act, the Commission may initiate an investigation of the ethics and lobbying laws by simple majority vote (*see id.* §§ 94[4][h], [10][c], [d], [f]).

If the Commission concludes that there is credible evidence of a violation, it provides the subject of the investigation with the opportunity for a hearing before an independent arbitrator, who may hear sworn testimony and receive evidence (*see id.* §§ 94[10][h], [i]). After the hearing, the Commission decides whether there exists a substantial basis to find a violation (*see id.* § 94[10][p]). Upon such finding, the Commission may impose civil penalties, which are capped at either $10,000 or $40,000, depending upon the nature of the violation, plus the value of any gift, compensation, or benefit received as a result of the violation (*see id.* §§ 94[10][n][i], [ii]). The Commission may also refer a matter for criminal investigation upon a finding of sufficient cause (*see id.* § 94[10][n][iv]). If the Commission concludes that a person who is neither a member of the Legislature, a legislative employee, nor a candidate for the Legislature has violated the ethics or lobbying laws, the Commission may, "in addition to or in lieu of any fine authorized by [the Act]," refer the matter "to their employer for discipline with a warning, admonition, censure, suspension or termination or other appropriate discipline" (*id.* § 94[10][p][ii]).

II.

In 2020, during his tenure as Governor, plaintiff sought approval from JCOPE to publish a book, which JCOPE granted, and the book was published later that year. In 2021, JCOPE notified plaintiff that he may have violated Public Officers Law § 74(3)(a), (b), (c), (d), and (h), by "abus[ing][his] State position for personal benefit, including but not limited to utilizing State property, personnel or other resources of the State for activities associated with the book and promoting the book during State appearances" (*Cuomo*

v. New York State Joint Commn. on Pub. Ethics, 76 Misc.3d 1036, 1041, 174 N.Y.S.3d 550 [Sup Ct, Albany County 2022]). Plaintiff denied any violation. After plaintiff's resignation, JCOPE issued plaintiff a notice of investigation and hearing. When the Commission replaced JCOPE, it authorized continuation of the investigation into plaintiff and scheduled a hearing.

Plaintiff then filed this action against the Commission seeking a judgment declaring the Act facially unconstitutional and enjoining the investigation. Plaintiff asserted that the Act violates constitutional principles of separation of powers because the Commission exercises investigatory and enforcement powers constitutionally entrusted to the Executive, without sufficient oversight by the Governor. Plaintiff also asserted that the Act violates Article V of the State Constitution because, although the Commission is formally within the Department of State, it functions as a separate department without a head appointed by the Governor with the advice and consent of the Senate. Finally, plaintiff claimed that the Act unconstitutionally displaces the constitutional impeachment process, by permitting the Commission to sanction the Governor for putative violations of the Public Officers Law.

***4** Plaintiff moved for a preliminary injunction and the Commission cross-moved for summary judgment. Supreme Court declared unconstitutional the investigation and enforcement provisions of the Act (Executive Law §§ 94[5][a], [c]; [10]; [14]) and enjoined the proceedings against plaintiff (81 Misc.3d 246, 196 N.Y.S.3d 668 [Sup Ct, Albany County 2023]). The Appellate Division stayed the order pending resolution of the Commission's appeal, except insofar as Supreme Court enjoined the hearing proceeding against plaintiff (2023 N.Y. Slip Op. 75090[U], 2023 WL 6801391 [3d Dept 2023]). The Appellate Division thereafter affirmed, concluding that the Act violates the separation of powers by encroaching on the powers of the Executive Branch to expand those of the Legislature (228 A.D.3d 175, 210 N.Y.S.3d 822 [3d Dept 2024]). The Appellate Division granted the Commission's motion for leave to appeal to this Court and certified the question whether it erred in affirming the order of Supreme Court. [4]

III.

A.

[1] **[2]** **[3]** **[4]** Duly enacted legislation is entitled to a strong presumption of constitutionality (*see White v. Cuomo,* 38 N.Y.3d 209, 216, 172 N.Y.S.3d 373, 192 N.E.3d 300 [2022], citing *Dalton v. Pataki,* 5 N.Y.3d 243, 255, 802 N.Y.S.2d 72, 835 N.E.2d 1180 [2005]; *Schulz v. State,* 84 N.Y.2d 231, 241, 616 N.Y.S.2d 343, 639 N.E.2d 1140 [1994]; *Van Berkel v. Power,* 16 N.Y.2d 37, 40, 261 N.Y.S.2d 876, 209 N.E.2d 539 [1965]; *In re Fay,* 291 N.Y.198, 207, 52 N.E.2d 97 [1943]). Moreover, "all the legislators and the Legislature itself are entitled to the presumption that they act only in accordance with the fulfillment of their oaths of office" (*Cohen,* 94 N.Y.2d at 13, 698 N.Y.S.2d 574, 720 N.E.2d 850). Plaintiff, as the party challenging the constitutionality of the Act, has a heavy burden to establish its unconstitutionality (*see Stefanik v. Hochul,* —— N.Y.3d ——, ——, —— N.Y.S.3d ——, —— N.E.3d ——, 2024 N.Y. Slip Op. 04236, *3, 2024 WL 3868644 [2024]; *People v. Viviani,* 36 N.Y.3d 564, 576, 145 N.Y.S.3d 512, 169 N.E.3d 224 [2021]). On this facial challenge, plaintiff must establish "in any degree and in every conceivable application, the law suffers wholesale constitutional impairment" (*White,* 38 N.Y.3d at 216, 172 N.Y.S.3d 373, 192 N.E.3d 300 [internal quotation marks omitted]). There are no facts in dispute, and thus summary judgment in the Commission's favor is warranted if plaintiff fails to establish that, in every possible case, the Act is unconstitutional.

Plaintiff argues that the Act is facially unconstitutional because it empowers the Commission to exercise quintessentially executive powers free from gubernatorial accountability. Plaintiff focuses on the absence of statutory authority for the Governor either to appoint a majority of the Commissioners or to remove any of them. The Commission, plaintiff claims, is controlled by "legislative agents." The Commission principally responds that New York's constitution permits the Legislature to vest some executive power with politically independent bodies to meet practical demands and that enforcing ethics and lobbying laws against executive officials requires such autonomy.

We conclude that plaintiff has failed to establish the facial unconstitutionality of the Act. Three factors compel our decision. First, our separation of powers doctrine is flexible and based on a commonsense view of the workings of government, thus allowing for some overlap between the coordinate branches. Second, New York's Governor does not

have sole and unlimited powers to appoint or remove state officers because our State Constitution disperses those powers between the Legislature and the Governor. Third, the integrity of our constitutional design depends on the public's trust in government, and the Act provides an additional ethics enforcement mechanism narrowly targeted to the problems inherent in the Executive Branch's self-regulation.

B.

i.

Separation of Powers is a Flexible Doctrine

***5** **[5]** "Because any 'assign[ment] by law [of] new powers and functions to ... commissions" is [s]ubject to the limitations contained in [the state] constitution,' we must ... consider whether the enabling act violates the separation of powers doctrine" (*Delgado v. State,* 39 N.Y.3d 242, 255, 185 N.Y.S.3d 729, 206 N.E.3d 598 [2022 plurality], quoting N.Y. Const art V, § 3 [citation omitted]). "The doctrine has deep, seminal roots in the constitutional distribution of powers among the three coordinate branches of government" (*Cohen,* 94 N.Y.2d at 11, 698 N.Y.S.2d 574, 720 N.E.2d 850, citing N.Y. Const, art III, § 1; art IV, § 1; art VI, § 1; *Clark,* 66 N.Y.2d at 189, 495 N.Y.S.2d 936, 486 N.E.2d 794). "[O]ne of the plain purposes of the separation of powers theory is to guard against one Branch seeking to maximize power" (*Cohen,* 94 N.Y.2d at 13, 698 N.Y.S.2d 574, 720 N.E.2d 850, citing Charles D. Breitel, *The Lawmakers,* in 2 Benjamin N. Cardozo Memorial Lectures, at 798; *see Delgado,* 39 N.Y.3d at 271, 185 N.Y.S.3d 729, 206 N.E.3d 598 [Wilson Ch. J., concurring]). "[I]t is the correlative oversight of each lawmaking Branch over one another—in essence a dependency, rather than a separation—that balances the overall power to protect the *public's* interests, not those individuals who occupy the offices of those Branches at varying times" (*Cohen,* 94 N.Y.2d at 13, 698 N.Y.S.2d 574, 720 N.E.2d 850). "While the doctrine [ ] does not require the maintenance of three airtight departments of government, it does require that no one branch be allowed to arrogate unto itself powers residing entirely in another branch" (*Under 21 v. City of New York,* 65 N.Y.2d 344, 356, 492 N.Y.S.2d 522, 482 N.E.2d 1 [1985] [internal quotation marks and citations omitted]).

Contrary to the dissent's view, the maxim that the separation of powers "is necessary *for the preservation of liberty itself* " does not require the dissent's rigid analytical framework (dissenting op at ——, —— N.Y.S.3d at ——, —— N.E.3d at ——). As Justice Story explained, the separation of powers does not demand that the branches "must be kept wholly and entirely distinct, and have no common link of connection or dependence, the one upon the other, in the slightest degree" (*see Dreyer v. Illinois,* 187 U.S. 71, 84, 23 S.Ct. 28, 47 L.Ed. 79 [1902], quoting Joseph Story, Commentaries on the Constitution of the United States 393 [5th ed 1891]). Instead, as the Court has continually reaffirmed, "it is *institutional interdependence* rather than *functional independence* that best summarizes the American idea of protecting liberty by fragmenting power. The genius of the system is synergy and not 'separation,' in the common connotation of that latter word" (*Cohen,* 94 N.Y.2d at 13–14, 698 N.Y.S.2d 574, 720 N.E.2d 850 [internal quotation marks and citations omitted]; *see also Dreyer,* 187 U.S. at 84, 23 S.Ct. 28).

[6] **[7]** We are guided here by "this Court's long-standing and steadfast refusal to construe the separation of powers doctrine in a vacuum" (*Bourquin v. Cuomo,* 85 N.Y.2d 781, 785, 628 N.Y.S.2d 618, 652 N.E.2d 171 [1995]). Instead, we "view[ ] the doctrine from a commonsense perspective" (*id.*). Indeed, the "exigencies of government have made it necessary to relax a merely doctrinaire adherence to a principle so flexible and practical, so largely a matter of sensible approximation, as that of the separation of powers" (*Matter of Richardson,* 247 N.Y. 401, 410, 160 N.E. 655 [1928] [Cardozo, Ch. J.]). Thus, as our caselaw makes clear, the branches are not hermetically sealed and " 'some overlap' " (*Bourquin,* 85 N.Y.2d at 785, 628 N.Y.S.2d 618, 652 N.E.2d 171, quoting *Clark,* 66 N.Y.2d at 189, 495 N.Y.S.2d 936, 486 N.E.2d 794) is permissible so long as core duties and responsibilities are retained. Each of our cooperative branches has a particular role that serves our constitutional design, which strikes a carefully balanced relationship among the three that provides for a check on governmental overreach. [5]

ii.

Power of Appointment and Removal

***6** Under our state's constitutional scheme, the Governor does not have exclusive powers of appointment and removal. Quite the contrary, the constitutional text and history make clear that those powers generally are divided between the Legislature and the Governor. On that score, we reaffirm

that the question before us is one of State law, and Federal precedent has limited significance (*see Prentis v. Atlantic Coast Line Co.,* 211 U.S. 210, 225, 29 S.Ct. 67, 53 L.Ed. 150 [1908] ["Whether the legislative, executive, and judicial powers of a state shall be kept altogether distinct and separate, or whether persons or collections of persons belonging to one department may, in respect to some matters, exert powers which, strictly speaking, pertain to another department of government, is for the determination of the state"]).

In support of his expansive view of gubernatorial power, plaintiff relies on a misinterpretation of the Constitution's Vesting and Take Care clauses. New York's original Vesting Clause provided "[t]hat the supreme executive power and authority of this state shall be vested in a governor" (1777 N.Y. Const, art XVII). It now provides that "[t]he executive power shall be vested in the governor" (N.Y. Const, art IV, § 1). The original Take Care Clause stated "[t]hat it shall be the duty of the governor ... to take care that the laws are faithfully executed, to the best of [the governor's] ability" (1777 N.Y. Const, art XIX). It currently states that "[t]he governor ... shall take care that the laws are faithfully executed" (N.Y. Const, art IV, § 3). That the Governor is now vested only with "[t]he executive power" rather than with "the supreme executive power and authority" belies plaintiff's expansive theory of executive power. As the dissent notes, this change reflects the intended diffusion of the power within the Executive Branch. However, the change is also consistent with the diffusion of appointment and removal power between the Legislative and Executive branches (*see* 4 Lincoln, The Constitutional History of New York at 456).

Plaintiff ignores the import of this change and instead erroneously equates our State Vesting and Take Care clauses with those found in the Federal Constitution. Indeed, plaintiff's reliance on federal caselaw to argue for an expansive executive dominance in our constitutional design ignores that, unlike the federal government, New York does not have a unitary Executive. The powers of the President of the United States derive from the Federal Constitution, under which "the 'executive Power'—all of it—is 'vested in a President,' who must 'take Care that the Laws be faithfully executed.' " (*Seila Law LLC v Consumer Fin. Protection Bur.,* 591 U.S. 197, 203, 140 S.Ct. 2183, 207 L.Ed.2d 494 [2020], quoting U.S. Const art II, § 1, cl 1; *id.* § 3).

Apart from the text, history further demonstrates that the appointment and removal powers are shared between the two branches. In fact, our State Constitution grants the Legislature extensive power over the appointment and removal of state officers.

As early as 1776, more than a decade before the federal framers met in Philadelphia, New York's First Constitutional Convention gathered in White Plains (1 Charles Z. Lincoln, The Constitutional History of New York at 484 [1906]). The next year, the Convention adopted a document that, although similar to its federal successor in some respects, created a distinct governmental structure (*see* Charles C. Thach, The Creation of the Presidency 1775–1789: A Study in Constitutional History at 34–43, 52–54 [1969]; Wood, The Creation of the American Republic, 1776–1787 at 463). New York's 1777 Constitution, like its later federal analog, contained a Vesting Clause and a Take Care Clause. However, the 1777 Constitution contained no precursor to the federal Appointments Clause. That provision requires that the President appoint "principal officers" (*Seila Law,* 591 U.S. at 217 n 3, 140 S.Ct. 2183), while reflecting "Congress's central role in structuring the Executive Branch" (*id.* at 266, 140 S.Ct. 2183 [Kagan, J., dissenting in part]). New York's Constitution, by contrast, gave the Governor "very little voice in either appointments or removals" of state officers (Edward S. Corwin, *Tenure of Office and the Removal Power Under the Constitution,* 27 Colum L Rev 353, 385 [1927]). Instead, those powers generally rested with a Council of Appointment, which comprised the Governor and four Senators (*see* 1777 N.Y. Const, art XXIII; *Matter of Trustees of Vil. of Saratoga Springs v Saratoga Gas, Elec. Light & Power Co.,* 191 N.Y. 123, 132, 83 N.E. 693 [1908]; *People v. Foot,* 19 Johns. 58, 59 [Sup Ct 1821]; 1 Lincoln, The Constitutional History of New York at 611). [6] Thus, the executive power vested in the Governor included only limited control over appointments and removals.

***7** In 1821, New York adopted its Second Constitution, which abolished the Council. However, the appointment and removal powers generally did not revert to the Governor. To the contrary, the 1821 Constitution created a default rule that the power to determine methods of appointing officers rested with the Legislature. Article IV, § 15 provided: "All officers heretofore elected by the people shall continue to be elected; and all other officers whose appointment is not provided for by this constitution, and all officers whose offices may be hereafter created by law, shall be elected by the people, or appointed, as may by law be directed" (1821 N.Y. Const, art IV, § 15; *see also People ex rel. Whiting v Carrique,* 2 Hill 93, 104 [Sup Ct 1841] [per Bronson, J.]). Concomitantly, section 16 established a presumption that the appointing

authority had power to remove, unless the Legislature said otherwise: "Where the duration of any office is not prescribed by this Constitution, it may be declared by law; and if not so declared, such office shall be held during the pleasure of the authority making the appointment" (1821 N.Y. Const, art IV, § 16). Elsewhere, the 1821 Constitution specified that certain officers would be appointed or removed by the Governor, the Legislature, or some combination of the two (*see e.g. id.* §§ 2, 4, 6). Together, these reforms largely transferred power from the Council of Appointment to the Senate—not to the Governor (*see* 1 Lincoln, The Constitutional History of New York at 750).

This balance of power between the Legislature and the Governor persisted even amid other constitutional changes. In 1846, a new Constitution made certain executive officers —including the Secretary of State, the Comptroller, the Treasurer, and the Attorney General—elective (*see* 1846 N.Y. Const, art V, §§ 1, 2). These alterations diminished legislative control without enhancing gubernatorial power. For one thing, they created a plural executive, with multiple officials accountable to a statewide public. [7] Moreover, they did not change the general rule of legislative control over appointment to and removal from offices about which the Constitution was silent (*see* 1846 N.Y. Const, art X, § 2 [appointment power]; *id.* § 3 [removal power]). [8] Nor did that rule change in subsequent decades, much to some Governors' disappointment (*see e.g. People ex rel. Gere v. Whitlock,* 92 N.Y.191, 198 [1883]; *Sturgis v. Spofford,* 45 N.Y. 446, 449 [1871]; *People ex rel. Miller v. Peck,* 73 A.D. 89, 93, 76 N.Y.S. 328 [4th Dept 1902]; *People ex rel. Williams v. Zucca,* 36 Misc. 260, 261, 73 N.Y.S. 311 [Sup Ct, New York County 1901]). In 1872, Governor John T. Hoffman proposed to amend the 1846 Constitution so that the Governor would appoint the Secretary of State, the Attorney General, and the State Engineer and Surveyor (2 Lincoln, The Constitutional History of New York at 520–521). This was a "radical change" (*id.* at 521), meant to remake New York's Executive Branch in the model of its federal counterpart (*see id.* at 469). But Governor Hoffman's proposal failed to become law (*see id.* at 523–524; 1846 N.Y. Const, art V, §§ 1, 2, as amended to 1880; 1894 N.Y. Const, art V, § 1).

Nor were the Governor's powers of appointment and removal materially changed by adoption of the 1894 Constitution. Historian Charles Z. Lincoln—who had served as legal adviser to Governor Theodore Roosevelt (*see* 1 Lincoln, The Constitutional History of New York at iii)—explained in 1906 that "[m]any officers are beyond the governor's immediate control, for, as to them, [the governor] has no power of removal" (4 Lincoln, The Constitutional History of New York, at 456; *see also id.* at 456–458). Three years later, Governor Charles Evans Hughes agreed: "the Legislature with few exceptions has reserved final administrative control in making the heads of departments, to whose appointment the Senate's consent is necessary, removable only by it" (3 Public Papers of Charles Evans Hughes at 8–9 [1910]). [9]

***8** Even sweeping reorganizations of the State Government preserved the Legislature's presumptive control over the power to appoint and remove state officers. In 1925, the State amended the Constitution to create the two-tiered civil-department structure still in place today. This structure consists of "subordinate ... commission[s] within the departments," which operate "under" " 'heads of Departments' " who form "the Governor's 'Cabinet' " and are appointed by the Governor with the approval of the Senate (*Matter of Cappelli v. Sweeney,* 167 Misc.2d 220, 226, 229, 634 N.Y.S.2d 619 [Sup Ct 1995], *affd on op below,* 230 A.D.2d 733, 646 N.Y.S.2d 454 [2d Dept 1996]; *see generally* 1894 N.Y. Const, art V, as amended 1925). These amendments "confer[red] greater power and, concomitantly, greater accountability upon the Governor" (*Cappelli,* 167 Misc.2d at 232, 634 N.Y.S.2d 619). However, they did not alter the residual "executive power" vested in the Governor. Indeed, the amended Constitution, much like its predecessors since 1821, continued to provide that "[a]ll other officers, whose election or appointment is not provided for by this Constitution, and all officers, whose offices may hereafter be created by law, shall be elected by the people, or appointed as the Legislature may direct" (1894 N.Y. Const, art X, § 2; *see also* 1939 N.Y. Const, art IX, § 8). This Court later explained that this language "mean[t] precisely what it says," that "the Constitution itself grants to the Legislature the power to prescribe the method by which officers other than those provided for by the Constitution shall be selected or chosen (*Lanza v. Wagner,* 11 N.Y.2d 317, 329, 330, 229 N.Y.S.2d 380, 183 N.E.2d 670 [1962]).

In 1963, New York amended Article IX to reform the State's "home rule" scheme (*see* Richard Briffault, *Local Government and the New York State Constitution,* 1 Hofstra L & Pol'y Symp 79, 87–89 [1996]). Those amendments removed the language authorizing the Legislature to "direct" the appointment of offices "created by law." However, the new Constitution still contained a catch-all: "Except as expressly provided, nothing in [Article IX] shall restrict or impair any power of the legislature in relation to," among

other things, "[m]atters other than the property, affairs or government of a local government" (N.Y. Const, art IX, § 3[a][3]). And as this Court had previously explained, "[t]he reservation of this power is merely another way of saying that the Legislature is unfettered as to 'matters of state concern' " (*Adler v. Deegan,* 251 N.Y. 467, 167 N.E. 705 [1929], *amended,* 252 N.Y. 615, 170 N.E. 164 [1930], quoting City Home Rule Law, § 30). Consequently, nothing in the 1963 amendments suggested that the appointment and removal powers were suddenly and silently vested with the Governor after nearly two centuries of legislative preeminence.

[8] We glean from this history that the executive power entrusted to the Governor through our Constitution's Vesting and Take Care Clauses does not encompass exclusive, indefeasible powers to appoint or remove non-constitutional state officers. Those clauses were never understood to confer an exclusive power on the Governor to appoint and remove executive officers. Plaintiff's contrary claim thus lacks textual and historical support.

iii.

The Act is Intended to Regain and Retain Public Confidence in Government, by Limiting Executive Self–Regulation in Public Ethics

***9 [9]** New York's functional approach to the separation of powers requires that we consider the intent of the legislation and the realities of governing within a system of cooperative branches. These considerations establish that the Act furthers a singular purpose: regaining and retaining public confidence in government by creating an independent mechanism for ensuring that executive officials comply with the ethics and lobbying laws.

Regulation by the Governor and senior executive officials of their own ethical obligations has distinct implications for the separation of powers. Our Constitution secures government for the people through government by the people, guaranteeing a broad franchise, robust participation rights, and public officials whose power depends upon electoral approval (*see e.g.* N.Y. Const, art I, §§ 1, 8, 9, 11; art II, § 1; art III, § 1; art IV, § 1; art V, § 1). The separation of powers supports this strategy, by ensuring that the public knows who exercises what authority and can readily hold them to account (*cf.* Jonathan L. Marshfield, *America's Other Separation of Powers Tradition,* 73 Duke LJ 545, 628 [2023]). For that reason, in nearly every context, New York's separation-of-powers principles do not countenance laws that insulate appointees from supervision by officials directly accountable to the public to the extraordinary degree authorized by the Act.[10] With respect to official ethics, however, matters are different. The ethics laws alone presume that public accountability is insufficient to ensure the government's integrity. Were it otherwise, those laws would be unnecessary. The same presumption suggests that self-regulation in public ethics is illusory—or, at least, so the Legislature might conclude. Put differently, it is only in matters of public ethics that executive officials risk truly serving as judges in their own cases, despite our law's condemnation of such a practice (*see Orange County v. Storm King Stone Co.,* 229 N.Y. 460, 463, 128 N.E. 677 [1920]). So far as we can discern, similar concerns arise in no other legislative domain.

These are not merely prudential concerns, but rather implicate fundamental constitutional values. Public corruption and the misuse of power leads to public distrust in government and its officials (*see* Jong–Sung You, *Trust and Corruption, in* The Oxford Handbook of Social and Political Trust at 486 [2018] ["(T)here is very strong and robust empirical evidence of the causal effect of corruption and institutional fairness on social trust as well as institutional trust"]). As public confidence in government erodes, disaffection leads to reduced political participation and distrust of civic institutions (*see* Eduardo Rivera, Enrique Seira & Saumitra Jha, *Democracy Corrupted: Apex Corruption and the Erosion of Democratic Values* at 42–43 [May 15, 2024], *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4828243). This loss of trust is increasing, along with its attendant negative impact on public engagement (*see* Pew Research Center, *Public Trust in Government: 1958–2024* [June 24, 2024], *available at* https://www.pewresearch.org/politics/2024/06/24/public-trust-in-government-1958-2024/ [finding that public trust in the federal government is near historic lows]). Experience confirms that democracy cannot thrive and institutions cannot function where the public perceives that government actors use their power to serve their personal interests rather than those of their constituents (*see e.g.* Rivera, Seira & Jha, *Democracy Corrupted; see also* Olivier Bargain & Ulugbek Aminjonov, *Trust and Compliance to Public Health Policies in Times of COVID–19,* 192 J Pub Econ 1, 13 [2020] ["Trust in governments is an important determinant of citizens' compliance with public health policies, especially in times of crisis"]). More pointedly as to the matter before us, the foundation of our constitutional system and

our republican form of government may be jeopardized when New Yorkers no longer believe in the integrity of their government. Retaining public trust is essential for our government to function effectively and secure the freedom of its citizens, and thus is a paramount State interest (*see* Philip Pettit, *Republican Theory and Political Trust, in* Trust and Governance 295, 304 [Valerie Braithwaite & Margaret Levi, eds., 2003]). Greater flexibility in applying separation-of-powers principles is wholly—and uniquely—appropriate when adjudicating an effort to promote public confidence by limiting self-regulation of ethics and lobbying laws by government officials.

***10** It is undisputed that the Act and the Commission structure are designed to address a serious threat to public confidence in government identified by both branches and by advocates. As such, the Act furthers "a paramount State interest" (*Cohen,* 94 N.Y.2d at 12, 698 N.Y.S.2d 574, 720 N.E.2d 850), in ensuring that executive officials comply with the ethics laws, which is essential to regaining and retaining public trust in government. Given the significant challenges posed by executive officials' self-regulation, including the risk that an individual might elevate their private interests over those of the communities they are charged to serve, the joint decision of the Governor and Legislature to create an ethics commission independent of direct political control is entitled to substantial consideration by this Court.

To be clear, the mere fact that the two branches seek to address a vital issue of public concern is insufficient basis for us to overcome the separation of powers doctrine; otherwise, the doctrine would be rendered nugatory by the simple expedient of identifying a problem and designing some governmental "fix." Here, however, the branches are not dealing with the common problems of governing by which elected officials regularly pass and enforce laws to improve New Yorkers' lives—such as, for example, the health code or sanitation rules—but rather with a means to ensure the foundational precept of a government for the people. The Act seeks to achieve that singular and paramount goal. [11]

C.

Applying these constitutional standards here, we conclude that the Act neither unconstitutionally encroaches upon the Executive nor otherwise deviates from constitutional requirements.

[10] First, the Act violates no constitutional command concerning appointments. Of the Commission's eleven members, the Governor appoints three and the Executive Branch cumulatively appoints five. The six members appointed by the Legislature are spread between the controlling parties: two by the Temporary President of the Senate; one by the Minority Leader of the Senate; two by the Speaker of the Assembly; and one by the Minority Leader of the Assembly (Executive Law § 94[3][a]). [12] This structure is wholly consistent with New York's constitutional tradition that generally allows the Legislature to direct the appointment of non-constitutional officers. Moreover, plaintiff's own reasoning makes plain that not all appointees are agents of those who appointed them. Were it otherwise, further accountability mechanisms—including the removal power—might well be unnecessary to ensure that appointees carry out the commands of their "principals." Thus, plaintiff's contention that the Commission is controlled by "legislative agents" is without merit.

[11] The same is true of his subsidiary claim that the Commission is appointed by a non-constitutional body, the IRC. The IRC does not appoint any member; it merely vets each nominee and ensures their qualifications to serve on the Commission. While the IRC may approve or deny a nominee, only a "selection member"—by law, a legislator or executive official—may appoint a member to the Commission (*see* Executive Law §§ 94[2][b]; [3][d]). Indeed, the IRC has no power to consider, let alone appoint, someone who has not been nominated by a selection member or a person statutorily ineligible to serve on the Commission (*see id.* §§ 94[3][d], [e]). The Court has previously upheld as constitutional an arrangement where the Legislature created a "selection board" composed of eleven representatives of private universities and civic organizations to prepare a list of nominees for appointment to the New York City Board of Education, from which the City Mayor was required to choose (*see Lanza,* 11 N.Y.2d at 322–323, 229 N.Y.S.2d 380, 183 N.E.2d 670). The Court concluded that the board ensured the appointment of qualified individuals based on an "objective and nonpartisan basis" (*id.* at 333, 229 N.Y.S.2d 380, 183 N.E.2d 670). Although *Lanza* involved a claim based upon the alleged delegation of legislative power, the animating principle applies with equal force to plaintiff's separation of powers argument against the IRC: the Constitution does not bar the Legislature from relying on experts to assist with appointments that the Legislature is free to make on its own. [13]

***11** The Board of Commissioners of Pilots also offers some precedent for the Commission's structure. That entity may make, promulgate, and enforce regulations, including by seeking penalties (*see* Navigation L §§ 95[1]; 97[1]). Currently, the Governor may appoint one of its six members (*see id.* § 87). But for over a century until 1999, the Commissioners of Pilots were chosen exclusively by private parties (*see Sturgis,* 45 N.Y. at 449; Senate Introducer's Mem, Bill Jacket L 1999, ch 258). Contrary to plaintiff's suggestion, we cannot dismiss that longstanding body as an unconstitutional anomaly (*cf. Seila Law,* 591 U.S. at 220, 140 S.Ct. 2183, citing *Myers v. United States,* 272 U.S. 52, 47 S.Ct. 21, 71 L.Ed. 160 [1926]).

[12] **[13]** Second, the Act remains within constitutional bounds respecting the removal power. The Supreme Court has observed that "it is 'only the authority that can remove' [executive] officials that they 'must fear and, in the performance of [their] functions, obey' " (*Seila Law,* 591 U.S. at 213–214, 140 S.Ct. 2183, quoting *Bowsher v. Synar,* 478 U.S. 714, 726, 106 S.Ct. 3181, 92 L.Ed.2d 583 [1986]). It is precisely because removal so forcefully commands obedience that the Legislature had sound reason to shield the Commission from it. To permit the Governor —or any other executive official—to remove Commissioners might well have been tantamount to permitting those officials to dominate the Commission and thereby to control the enforcement of the ethics laws against themselves and their political allies. This, in turn, might have engendered the very public distrust the Legislature sought to avoid. Considering the Legislature's long-held constitutional power to set the terms on which non-constitutional officials may be removed from office, we cannot conclude that it acted unlawfully in declining to grant the Governor the power to remove Commissioners. [14]

[14] Third, and finally, the Legislature has not upset the careful balance among the coordinate branches (*see Delgado,* 39 N.Y.3d at 264, 185 N.Y.S.3d 729, 206 N.E.3d 598 [Wilson Ch. J., concurring]). In addition to the appointment powers discussed above, the Executive Branch has certain supervisory powers over the Commission. Primary among these is the Moreland Act, which empowers the Governor to investigate the Commission. Executive Law § 6 provides in relevant part:

> "The governor is authorized at any time, either in person or by one or more persons appointed by [the governor] for the purpose, to examine and investigate the management and affairs of any department, board, bureau or commission of the state. The governor and the persons so appointed ... are empowered to subpoena and enforce the attendance of witnesses, to administer oaths and examine witnesses under oath and to require the production of any books or papers deemed relevant or material."

This law "recognize[s] explicitly the need for and the power in the Governor to oversee, but ... not necessarily to direct, the administration of the various entities in the executive branch" (*Rapp v. Carey,* 44 N.Y.2d 157, 162, 404 N.Y.S.2d 565, 375 N.E.2d 745 [1978]). Nothing in the Ethics Commission Reform Act diminishes this power, which "has been employed by virtually every governor to investigate problems of waste, mismanagement, and corruption at all levels of state government and recommend reforms" (Bennett Gershman, *Constitutionalizing Ethics,* 38 Pace L Rev 40, 43–44 [2017]). [15]

***12** The Governor also exerts influence through budgeting. In brief, the Governor submits a budget, exercising "certain legislative powers" vested by Article VII, §§ 1–7 of the Constitution (*Pataki v. New York State Assembly,* 4 N.Y.3d 75, 83, 791 N.Y.S.2d 458, 824 N.E.2d 898 [2004]). The Legislature then reviews it, wielding only "a limited grant of authority from the People to the Legislature to alter the budget proposed by the Governor," and even then, "only in specific instances" (*id.* at 84, 791 N.Y.S.2d 458, 824 N.E.2d 898 [internal quotation marks omitted]). The Act does not purport to alter this arrangement, but rather recognizes that "[t]he annual budget submitted by the governor shall ... state the recommended appropriations" for the Commission" (Executive Law § 94[1][f]). The budget process is not, as the dissent colorfully describes it, a shaming exercise (*see* dissenting op at ——, —— N.Y.S.3d at ——, —— N.E.3d at ——). Instead, New York's executive budgeting procedure, much like the federal congressional appropriations power, provides a "most complete and effectual weapon" against Commission overreach (Madison, Federalist No. 58).

[15] In addition to supervising the Commission, the Executive Branch also retains concurrent enforcement authority. The Governor retains the power to discipline Executive staff (or not) even if the Commission chooses to impose fines (or not). Moreover, while responsibility for civil enforcement of the Act and the ethics and lobbying laws rests with the Commission (*see* Executive Law §§ 94[10][n][i], [ii]; Public Officers Law §§ 73[18]; 73–a [4]; 74[4]), criminal enforcement remains with appropriate executive authorities

(*see* Executive Law § 94[10][n][iv]). These include the Attorney General who, upon request from the Governor, the Comptroller, or any State department head, may investigate and prosecute any alleged criminal offense (*see* Executive Law § 63[3]). Even absent such request, the Attorney General may "commence civil investigations in the public interest" and may "prosecute 'all persons indicted for corrupting or attempting to corrupt any member or member-elect of the legislature, or the commissioner of general services' " (*People v. Gilmour,* 98 N.Y.2d 126, 131, 746 N.Y.S.2d 114, 773 N.E.2d 479 [2002], first citing Executive Law § 63[8] and then quoting Executive Law § 63[4]). District Attorneys, for their part, "have plenary prosecutorial power in the counties where they are elected" (*People v. Romero,* 91 N.Y.2d 750, 754, 675 N.Y.S.2d 588, 698 N.E.2d 424 [1998]; *see* County Law § 700[1]). Thus, the Act grants the Commission enforcement power without wholly displacing that of the Executive Branch. This arrangement reflects the Act's intended purpose: where an Executive official or their supervisor would have a conflict in investigating or disciplining themselves, the Commission has authority to do so.

[16] Conversely, the Commission's executive powers are limited. Although the Commission possesses the power to "implement" through monetary penalties the Legislature's "critical policy decisions" (*Matter of LeadingAge N.Y., Inc. v Shah,* 32 N.Y.3d 249, 259, 90 N.Y.S.3d 579, 114 N.E.3d 1032 [2018]), that power is subject to important constraints. [16] First, the penalties are statutorily capped, providing a limitation on the Commission's enforcement discretion (Executive Law §§ 94[10][n][i], [ii]). And second, the Act provides for judicial review in an Article 78 proceeding, which is another control on potential Commission abuse or overreach (*see id.* § 94[10][o]; CPLR 7803). Thus, we cannot agree with plaintiff either that the Commission operates without executive oversight or that the Legislature has taken the "*whole* power" of the Executive to expand its own (*Cohen,* 94 N.Y.2d at 13, 698 N.Y.S.2d 574, 720 N.E.2d 850). A facial separation-of-powers challenge cannot stand on the Commission's civil penalty powers alone when the Commission's structure is otherwise constitutional.

***13** We emphasize that the Act goes very near the line of what is constitutionally permissible without crossing it. As discussed, the State has a paramount interest in promoting public trust in government by ensuring impartial enforcement of the ethics and lobbying laws and the Act furthers that goal. Critically, the substantial limitations built into the Act ensure that the Commission remains within the constitutional guardrails we herein recognize. Our decision is thus narrow and limited to the unique problem of self-regulation and enforcement of the ethics and lobbying laws.

Plaintiff has brought a facial challenge, and he has not carried the heavy burden that lies with that choice. We hold only that the Act does not, in every possible application, unconstitutionally encroach upon the powers of the Governor or the Executive Branch. We express no view as to any issues plaintiff does not raise, including the constitutionality of the Act as applied to any other person subject to the Commission's authority.

IV.

[17] Plaintiff's remaining challenges to the Act are also without merit. Under Article V, except as otherwise provided, "the heads of all ... departments and the members of all boards and commissions ... shall be appointed by the governor by and with the advice and consent of the senate and may be removed by the governor, in a manner to be prescribed by law" (N.Y. Const art V, § 4). Plaintiff contends that the Commission unconstitutionally operates as a department without a "head" removable by the Governor. This argument is unpersuasive because the Commission is not a "department" in the constitutional sense. The Act expressly establishes the Commission "within the department of state" (Executive Law § 94[1][a]). This Court has explained—and the constitutional structure effectively requires—that an entity "within an existing government department" is not a "department" for purposes of Article V, § 4 (*Matter of Metropolitan Life Ins. Co. v New York State Labor Relations Bd.,* 280 N.Y.194, 208, 20 N.E.2d 390 [1939]). This rule reflects that the 1925 constitutional amendments that produced Article V "left the question of supervision and control by the Governor an open one to a large extent, and passed that problem along to the Legislature" (8 N.Y. Constitutional Convention Comm., *Problems Relating to Executive Administration and Powers* at 268 [1938]). Thus, Article V enshrines a formal principle of governmental organization, not a substantive requirement of direct gubernatorial control of every state entity.

[18] **[19]** Plaintiff's additional claim that impeachment is the only remedy for any alleged ethics violation by a Governor requires little comment. Plaintiff's argument, although somewhat undeveloped, appears to be that the Legislature may discipline a Governor only by exercising

the power of impeachment vested by Article VI, section 24 of the Constitution and that the Commission's disciplinary authority permits an unconstitutional end run around this limitation. [17] But the Commission's power to impose a fine on the Governor does not encroach on the Legislature's exclusive impeachment power. It only constitutes an additional means of exposing and punishing corruption, which is not inherently unconstitutional. Indeed, the Attorney General can criminally or civilly prosecute a Governor without disrupting the Legislature's impeachment authority and District Attorneys can prosecute Governors for violations of ethics laws. By any measure, the power given to the Commission is far more limited than either the Attorney General's or District Attorneys' power to prosecute the Governor criminally. Thus, the mere power of the Commission to investigate and fine is permissible. Further, insofar as plaintiff takes issue with the Commission's power to recommend impeachment, that power does not encroach on the Legislature because the Legislature can always ignore the Commission's recommendation.

V.

***14** In conclusion, we emphasize the unique constellation of factors that lead to our holding. Under our Constitution, the Governor does not have unfettered powers of appointment and removal. Trust in government is essential to democracy because its erosion leads to apathy, disaffection, and the breakdown of civic institutions. Indeed, government cannot function if the public perceives that those entrusted with public power are unaccountable when they misuse their authority for private gain. Maintaining public confidence is thus a foundational State interest and a core governmental responsibility. Given the danger of self-regulation, the Legislature and the Governor have determined that there is an urgent need for the robust, impartial enforcement of the State's ethics and lobbying laws. That task is assigned to the Commission. Neither the Legislature nor the Executive Branch has undue influence over the Commission, a structural characteristic lawfully chosen to ensure the integrity of the Commissioners and to instill public faith in government. Finally, the Legislature has not otherwise encroached upon the exclusive constitutional purview of the Executive Branch. Plaintiff has thus failed to establish that the Act is unconstitutional on its face.

Accordingly, the order of the Appellate Division should be reversed, with costs, judgment declared in accordance with this opinion, and the certified question answered in the affirmative.

GARCIA, J. (dissenting):

The two courts below concluded that the Ethics Commission Reform Act of 2022 (the Act), which grants to the New York State Commission on Ethics and Lobbying in Government (the Commission) unprecedented responsibility for "administering, enforcing, and interpreting New York state's ethics and lobbying laws" (Executive Law § 94[1][a]), violates the State Constitution. The majority reaches a different conclusion, finding no separation of powers violation by relying on approbation of the Act's goals, a "flexible" application of that doctrine that effectively eliminates a structural constitutional safeguard, and a focus on isolated provisions of the legislation. This novel approach, lauding the purported good government goals of the legislation at the expense of constitutional guardrails on interbranch encroachment, finds no support in this Court's precedent. I agree with the courts below that the Act violates bedrock principles of separation of powers enshrined in our State Constitution and therefore I dissent.

I.

To describe the way in which the Commission is appointed, how it operates, who is—and who is not—subject to its enforcement power, and how its members may be removed is to fairly answer the constitutional question. By legislative design, the Commission is comprised of eleven members, a majority of whom (six) are nominated by the legislative branch and a minority (five) by the executive branch (Executive Law § 94[3][a]). But those "nominations" do not technically mean appointment. For that to happen, an Independent Review Committee (IRC) made up of "the American Bar Association accredited New York state law school deans or interim deans" must approve those nominations pursuant to self-devised criteria (*id.* § 94[2][c])—including apparently whether a nominee's "lived experience allows them to understand the range of perspectives needed to effectively serve as a member of an ethics commission that has broad oversight of a large and diverse public workforce" (*see* State of New York Independent Review Committee, *Committee Procedures Updated August 2024*). Once vetted for life experience and other attributes by the law school deans and installed, members are removable only by "a majority vote of the

commission" (Executive Law § 94[4][c]). Of course, the legislature's nominees constitute a majority of members, and a simple majority of Commission members constitutes a quorum (*id.* § 94[4][h]).

The majority, in its celebration of the good government aims of the legislation, neglects to detail the range—and limits—of these powers. The Commission's executive authority is sweeping, both to investigate violations of sections of the Public Officers Law, the Lobbying Act, and the Civil Service Law, and to impose penalties (*id.* § 94[10][a], [n]), yet at the same time restricted in scope. The Commission has the authority to investigate both public officials—statewide elected officials, executive branch employees, legislative branch members and employees, candidates for elected office, and political party chairs—and private citizens, in the form of current or former "lobbyists and clients of lobbyists"—potentially thousands of individuals (*id.* § 94[1][a]). Upon determining that a violation of the law has occurred, the Commission may impose financial penalties of up to $40,000, seek to recover the value of any benefit received from the alleged violation, and refer the matter to a respondent's employer for discipline or to law enforcement for potential criminal violations (*id.* §§ 94[10][n], [p]). [1]

***15** There is one catch, one limit to that authority that goes unexamined by the majority in championing the statute's aim of addressing "the inherent disincentive" for one branch "to investigate and discipline itself" (majority op at ——, —— N.Y.S.3d at ——, —— N.E.3d at ——). The statute prohibits the Commission from "impos[ing] penalties or discipline upon members of or candidates for member of the legislature or legislative employees" (*id.* § 94[10][p]). Investigations of these individuals are permitted, but upon finding a violation the Commission, although composed of a majority of appointments made by representatives of the legislature, may only "prepare a written report of its findings and provide a copy of that report to the legislative ethics commission" (*id.* § 94[10][p][i]). And while reports of investigations into executive branch members and private citizens must be published on its website within twenty days of delivery to the parties (*id.* § 94[10][p][ii]), there is no such mandate for reports of violations by legislative members or staff.

There was a time when this Court would not have hesitated to hold such a blatant encroachment on the power of another branch unconstitutional (*see e.g. Rapp v. Carey,* 44 N.Y.2d 157, 404 N.Y.S.2d 565, 375 N.E.2d 745 [1978]; *People v. Tremaine,* 252 N.Y. 27, 168 N.E. 817 [1929]). Not today. Vigilance in enforcing the separation of powers doctrine is relaxed in deference to a law that, according to the majority, will increase "public confidence in government," reduce "apathy [and] disaffection," and prevent "the breakdown of civic institutions" (majority op at ——, —— – ——, ——, —— N.Y.S.3d at ——, —— – ——, ——, —— N.E.3d at ——, —— – ——, ——). These blessings seem unlikely to flow from today's decision.

II.

As an initial matter, I agree with the majority that in applying our separation of powers doctrine we must look to the New York State Constitution, its history, and to this Court's interpretation of both (*see* Robert F. Williams & Lawrence Friedman, The Law of American State Constitutions 270 [2d ed 2023] ["State constitutional separation of powers questions ... call for a state-specific form of analysis rather than one applying a more generalized, or universalist, American-constitutional separation of powers doctrine" (emphasis omitted)]). I do, however, reject the suggestion (majority op at ——, —— N.Y.S.3d at ——, —— N.E.3d at ——) that our State's constitutional separation of powers doctrine is somehow less vital than its federal counterpart or that this Court is permitted to be less vigilant in enforcing that doctrine depending on our assessment of the merits of the alleged encroachment (*see* majority op at ——, —— N.Y.S.3d at ——, —— N.E.3d at —— ["New York's functional approach to separation of powers requires that we consider the *intent of the legislation* and the realities of governing within a system of cooperative branches" (emphasis added)]). The majority understandably neglects to provide any authority for such a means-ends balancing test; it has no place in this Court's separation of powers jurisprudence.

To understand the contours of a state constitution's separation of powers doctrine, we must "account for historical development and synthesize the distinct constitutional visions of several generations of constitution-makers" (G. Alan Tarr, *Interpreting the Separation of Powers in State Constitutions,* 59 NYU Ann Surv Am L 329, 332–333 [2003]). [2] In New York, those generations span more than 200 years, providing a rich and layered account of the development and strengthening of the doctrine, from our first state charter through the creation of the modern executive in the twentieth century. New York courts, like the Appellate Division and

the Supreme Court in this case, have enforced separation of powers safeguards to protect that constitutional legacy.

***16** There can be no dispute that the concept of separation of powers is deeply rooted in our State Constitution. While the doctrine finds no standalone expression in that document, it is, as we have "consistently recognized," a principle nevertheless enshrined in the structure of the Constitution and "included by implication in the pattern of government adopted by the State of New York" in every Constitution from 1777 to the present iteration (*Under 21, Catholic Home Bur. for Dependent Children v City of New York,* 65 N.Y.2d 344, 355–356, 492 N.Y.S.2d 522, 482 N.E.2d 1 [1985]; *see also Clark v. Cuomo,* 66 N.Y.2d 185, 189, 495 N.Y.S.2d 936, 486 N.E.2d 794 [1985] [separation of powers is "implied by the separate grants of power to each of the coordinate branches of government"]; Madison, Federalist No. 47 ["The (1777) constitution of New York contains no declaration on this subject (of separation of powers); but appears very clearly to have been framed with an eye to the danger of improperly blending the different departments"]). This Court has explained that "[t]he concept of the separation of powers is the bedrock of the system of government adopted by this State in establishing three coordinate and coequal branches of government, each charged with performing particular functions" (*Matter of Maron v. Silver,* 14 N.Y.3d 230, 258, 899 N.Y.S.2d 97, 925 N.E.2d 899 [2010]; *see also Matter of County of Oneida v Berle,* 49 N.Y.2d 515, 522, 427 N.Y.S.2d 407, 404 N.E.2d 133 [1980]). While "some overlap between the three separate branches does not violate the constitutional principle of separation of powers" (*Clark,* 66 N.Y.2d at 189, 495 N.Y.S.2d 936, 486 N.E.2d 794), the doctrine is a "*structural safeguard* rather than a remedy to be applied only when specific harm, or risk of specific harm, can be identified" (*Matter of Maron,* 14 N.Y.3d at 260–261, 899 N.Y.S.2d 97, 925 N.E.2d 899 [internal quotation marks omitted]).

In the most basic terms, the aim of the doctrine is not merely the mechanical separation of the functions of government but the preservation of liberty. In rebuffing past attempts to erode that doctrine by casting it as an outdated "relic" that impedes, rather than protects, democracy, this Court has warned that "[t]he separation of the three branches is necessary *for the preservation of liberty itself* and it is fundamental of the organic law that each department should be free from interference, in the discharge of its peculiar duties, by either of the others" (*Matter of Maron,* 14 N.Y.3d at 258, 899 N.Y.S.2d 97, 925 N.E.2d 899 [emphasis added and internal citations and quotation marks omitted]; *see also Under 21,* 65 N.Y.2d at 356, 492 N.Y.S.2d 522, 482 N.E.2d 1 ["contrary to the Appellate Division's characterization of the doctrine as a 'vestigial relic,' we have recently unanimously reaffirmed its continuing vitality"]). Or, as one leading state constitutional scholar has explained, "[a]s important as the 'protection' of one branch from another is, such as the executive from the legislature, *the underlying goal of the judicial enforcement of separation of powers principles is the liberty of the citizens* " (Williams & Friedman at 275 [emphasis added]; *see also* Ellen A. Peters, Getting Away from the Federal Paradigm: Separation of Powers in State Courts, 81 Minn. L.Rev. 1543, 1564 [1997] ["It is appropriate to wonder whether unchecked governmental power anywhere, no matter how well intentioned and how expedient, can provide enduring assurance of the full protection of individual and civil rights that is basic to a democracy"]).

It is that overarching goal, the preservation of liberty, which has guided this Court in its application of our separation of powers restraints (*County of Oneida,* 49 N.Y.2d at 522, 427 N.Y.S.2d 407, 404 N.E.2d 133 ["Extended analysis is not needed to detail the dangers of upsetting the delicate balance of power existing among the three, for history teaches that a foundation of free government is imperiled when any one of the coordinate branches absorbs or interferes with another"]). We lose sight of that goal today by employing a "balancing test" that weighs this Court's assessment of the benefits of the alleged encroachment against a bedrock principle of constitutional law.

The repercussions of the majority's approach are all the more alarming given that this Court's role in enforcing the balance of power among the branches of State government is vital—and unique. "[T]he federal separation of powers doctrine, unlike the federal analysis of individual rights incorporated through the Fourteenth Amendment, provides no binding 'floor' to the distribution of powers under the state constitution" (James A. Gardner, *The Positivist Revolution that Wasn't: Constitutional Universalism in the States,* 4 Roger Williams U L Rev 109, 116 [1998]; *see Prentis v. Atlantic Coast Line Co.,* 211 U.S. 210, 225, 29 S.Ct. 67, 53 L.Ed. 150 [1908] ["We shall assume that when, as here, a state Constitution sees fit to unite legislative and judicial powers in a single hand, there is nothing to hinder, so far as the Constitution of the United States is concerned"]). Accordingly, our role "in separation of powers cases, particularly those involving encroachment, 'ought to be as vigilant arbiter of process for the purpose of protecting

individuals from the dangers of arbitrary government' " (Williams & Friedman at 275, quoting Rebecca L. Brown, *Separated Powers and Ordered Liberty,* 249 U Pa L Rev 1513, 1565 [1991]). New York courts alone have this responsibility to the People of the State.

***17** In addition to the lack of a federal backstop, the retention of plenary power by the legislature also counsels in favor of vigilance by this Court in enforcing the separation of powers doctrine when that branch is charged with encroaching on the authority of another. "The legislature has all the power ... there is, except as limited by the Constitution" (*People ex rel. Cent. Trust Co. v Prendergast,* 202 N.Y. 188, 197, 95 N.E. 715 [1911]; *see also People ex rel. Wood v. Draper,* 15 N.Y. 532, 543 [1857] ["(T)he people, in framing the constitution, committed to the legislature the whole law making power of the state"]). As a result, restraints on this power are found only "expressly or by necessary implication" in the language of the constitution (*Silver v. Pataki,* 96 N.Y.2d 532, 537, 730 N.Y.S.2d 482, 755 N.E.2d 842 [2001]). In other words, "a state constitution serves as a charter of law and government for the state ... provid[ing] *limitations* on the otherwise plenary, residual, sovereign power of states to make laws and govern themselves" (Williams & Friedman at 4). The effect of this residual plenary power of the legislature is that "[i]n determining the distribution of powers among the branches of state government, the underlying premise must be that the powers of the executive and the judicial branches are defined by the constitution, where the legislature's are not" (G. Alan Tarr, Understanding State Constitutions 16 [1998]). Defined executive power represents one of the few limits on legislative authority, an implied structural constraint the enforcement of which is a vital check on that plenary power.

Finally, the nature of the encroachment here, far from providing a reason for reduced vigilance, increases the threat and itself requires rigorous scrutiny. The legislature passed a law creating a "commission" with a majority of its own appointees, to exercise a quintessentially executive function—to enforce the law—without executive oversight, in effect a forced delegation of executive power. This form of encroachment, by which the legislature appoints members to executive boards, "constitutes a sort of 'reverse delegation'—an encroachment that should be subjected to rigorous judicial scrutiny" (Williams & Friedman at 275). Because delegation "constitutes ... a ceding of authority" while "reverse delegation is a form of legislative encroachment on the executive," "[i]t can be argued persuasively that reverse delegation, therefore, should receive more rigorous judicial scrutiny than delegation" (*id.* at 276). Certainly, it should not be given less.

III.

In addition to these structural safeguards protecting the power of each branch, our constitutional history reflects the intention of the People to equip the executive with the power necessary to govern a modern state. At the same time, this enhanced power was balanced by intra-branch checks on the executive achieved by distributing certain powers to other executive officers. The majority both fails to acknowledge the development of robust executive power in New York and misunderstands the separation of powers implications of a non-unitary executive.

From the first Constitution in 1777, New York chose to "provide[ ] for a stronger executive than all the other states" to "keep the weaker branches (executive and judiciary) separate and independent" (Peter J. Galie, Ordered Liberty 4 [1996]; *see also* Tarr, Understanding State Constitutions at 87 ["The New York Constitution ... provid(ed) a model for republican government with a substantially enhanced executive"]). At this point, however, the separation between the branches was very much a work in progress—for example, the Constitution "blend[ed] the executive and judiciary departments" by establishing a Council of Appointment (Madison, Federalist No. 47 [describing instances of state constitutions that "violated the (separation of powers) rule established by themselves" because "the appointment to offices, particularly executive offices, is in its nature an executive function," and using as an example New York, where "members of the legislative are associated with the executive authority, in the appointment of officers"]; *see* 1777 N.Y. Const art XXIII).

Those defects were addressed in the 1821 Constitution, which eliminated the Council of Appointment as well as the Council of Revision, a committee made up of the governor, state chancellor, and members of the judiciary empowered to revise and veto all proposed legislation (*see* 1 Charles Z. Lincoln, The Constitutional History of New York 611 [1906]; James T. Barry III, *The Council of Revision and the Limits of Judicial Power,* 56 U Chi L Rev 235, 245[1989]). Described as "flagrant violations of the strict doctrine of separation of powers," these entities were removed as part of an attempt to "realign[ ] the constitutional structure with notions of separation of powers and checks and balances" (Ordered

Liberty at 89). In place of the Council of Revision, the governor was given veto power (*id.* at 81; *see* 1821 N.Y. Const, art I, § 12). Debate about "substitute plans" for appointment power occupied the convention, and "[t]he practical result of the change was the enlargement of the council from four to thirty-two members, and vesting in the governor the exclusive right of nomination" (1 Lincoln at 750 [the "thirty-two members" represented the size of the State Senate, the body charged with confirming the Governor's nominations]; *see also* Jabez D. Hammond, The History of Political Parties in the State of New York 69–71 [1842] [The delegates were unanimous in the decision to "vest( ) (appointment power) in the governor and the senate" and came "to the determination to place the general appointing power in the governor, by and with the advice and consent of the senate"]). The 1821 Constitution thus "firmly fixed in the Constitution" "the nominating power of the governor" (1 Lincoln at 750). The majority's statement that the abolition of the Council "transferred power from the Council of Appointment to the Senate—not to the Governor" is incorrect (majority op at ——, —— N.Y.S.3d at ——, —— N.E.3d at ——).

***18** Also added in 1821 was a "Take Care" clause, identical to the federal counterpart (*id.*), which "provide[s] the governor with the power to supervise and control the executive branch" (Peter J. Galie & Christopher Bopst, The New York State Constitution 142 [2d ed 2012]; *see* 1821 N.Y. Const, art III, § 4).[3] Building on the work done in 1821, constitutional amendments passed in 1846 placed "many restrictions on legislative power" and ceased to identify "the legislative will ... with the people's will" (Ordered Liberty at 105 ["Taken as a whole, the reduction of legislative power was a most striking aspect of the work of the 1846 convention"]). This power, removed from the legislature, was transferred "from the government directly to the people, diminishing the power of all three branches" (*id.* at 111).

The increasing power of the executive is most strikingly evidenced by the proposals made at the 1915 convention, which included an attempt at placing "centralized authority in the hands of a single executive" (Ordered Liberty at 200). While the proposed constitution was rejected by voters, a majority of the changes recommended in 1915 ultimately passed through the amendment process (*see id.* at 201). As described in a leading treatise of New York State Constitutional history, "[t]he major developments in the constitutional powers of the [executive] office took place during the first half of the twentieth century and include a four-year term (1937), the executive budget (1927) and the executive reorganization and greater appointment powers (1925)" (Galie & Bopst at 137; *see also Tremaine,* 252 N.Y. at 45, 168 N.E. 817 [in considering an allegation of legislative overreach in the budget process, the Court concluded that "(t)he provision for the budget system is a new and complete article of the Constitution," and in light of the executive branch's budgetary authority, the conferral of "powers on the legislative chairmen ... is unconstitutional and void"]). With these revisions, the power of the executive was made commensurate with the evolving challenges of governing a modern state:

> "The focus inevitably shifted to the executive branch. An effective executive, one in control of his [or her] own ... budget, was identified with a responsible executive able to make government work to meet the needs of the people. It was an easy step to the conclusion that a more effective and responsible executive meant a more democratic government. One hundred and fifty years after the adoption of the first constitution, the branch of government most identified at the founding with tyranny came to be seen as the branch most likely to provide democratic responsiveness" (Galie & Bopst at 31).

By the mid–1920s, changes to article V reinforced the effectiveness of the executive. These amendments "complete[d] the [executive] branch by providing the ground rules for the organization of the civil departments" (Galie & Bopst at 151). Section 4, which provides for the only two department heads not appointed by the Governor because of a decision to ensure the independence of those departments, "confirms the governor's power to appoint and remove heads of civil departments, which along with the executive budget, constitutes the basis of the governor's power to supervise and control the executive branch" (Galie & Bopst at 156). As one historian summed up, after the passage of these amendments, "[t]he Governor of the State of New York possessed at last the power the Governor had always been intended to possess" (Robert A. Caro, The Power Broker 260 [1975]).

***19** Ignoring this record of increasing executive power, done in careful increments over the course of 250 years, the majority instead selects somewhat puzzling features for its own analysis. For example, the majority places great weight on the change in phrasing from the 1777 Vesting Clause's reference to "the supreme executive power and authority" to the current description of "executive power" (majority op at ——, —— N.Y.S.3d at ——, —— N.E.3d at —— [this change in language "belies plaintiff's expansive theory of

executive power"]). This reliance on a title change that took place in 1821 when the substantive powers of the executive were being enhanced and protected from encroachment is misplaced, as is the majority's unsupported conclusion that this "change is also consistent with the diffusion of appointment and removal power between the Legislative and Executive branches" (majority op at ——, —— N.Y.S.3d at ——, —— N.E.3d at ——), a conclusion firmly rebutted by the history of executive power in New York. [4]

Reliance on this title change reflects a more fundamental flaw in the majority's analysis. In fact, the change in phrasing has been explained not as a reduction in executive power in favor of the legislative branch, but as "leaving room for the application of other elements of executive authority by means of other officers who were ... vested with large executive powers" (4 Lincoln at 456 [1906]). That is, contrary to the majority's assessment (majority op at ——, —— N.Y.S.3d at ——, —— N.E.3d at ——), a fractured executive does not result in more power given to the legislature or otherwise diminish the executive branch's power as a whole. Instead, the dispersal of gubernatorial power was instituted as executive branch power increased; with that enhanced role came concern that a too powerful individual executive may pose a threat to liberty. Accordingly, the answer was the imposition of "intra-branch" separation of powers (*see e.g.* Robert A. Schapiro, *Contingency and Universalism in State Separation of Powers Discourse,* 4 Roger Williams Univ L Rev 79, 102 [1998] [compared with the federal government and its unitary executive, "(e)xecutive branches of state governments often have a more diffused assignment of authority ..., affording independence to other executive officers in addition to the governor ... (to) act as an internal check on the state executive power"]; *see also* 81 Misc.3d at 251, 196 N.Y.S.3d 668 ["rival executive officers( ) scrapping over their domains has nothing to do with this case"]). The majority's focus on the creation of "a plural executive, with multiple officials accountable to a statewide public" (majority op at ——, —— N.Y.S.3d at ——, —— N.E.3d at ——), speaks not to a diminishment of executive power but to an intra-branch dispersal of power.

IV.

The majority ignores, or in the case of the non-unitary executive misinterprets, the relevant history representing distinct lines of power drawn by the People of this State, and in doing so diminishes this Court's important role in preserving that separation. Instead, the majority relies on three factors that "compel" the conclusion that the law is constitutional: (1) a general "flexible" or "commonsense" approach to the separation of powers doctrine; (2) the fractured nature of executive power in New York and the fact that the Governor does not have the sole and unlimited powers of appointment and removal; and (3) a sense that "the integrity of our constitutional design depends on the public's trust in government" and its view that the act accomplishes this goal (majority op at ——, —— N.Y.S.3d at ——, —— N.E.3d at ——). This novel approach finds no support in our caselaw and sets a new, and dangerous, precedent for evasion of separation of powers constraints.

To take the last factor first, this Court has never recognized an exception to the separation of powers restraints based on legislative intent. To the contrary, we have explained that, when considering the constitutionality of a statute, "[w]e are not concerned with the policy or expediency of the legislation," and "statutes which are beyond the power of the Legislature are invalid, though they may be politically wise" (*Village of Kenmore v. Erie County,* 252 N.Y. 437, 441, 169 N.E. 637 [1930]); *see also Rapp,* 44 N.Y.2d at 160, 404 N.Y.S.2d 565, 375 N.E.2d 745 [in analyzing whether a separation of powers violation has occurred, noting that "(n)ot at issue is the wisdom of" the challenged executive action]; *People ex rel. Wood,* 15 N.Y. at 546 ["(T)he business of the courts is with the text of the fundamental law as they find it. They have no political maxims and no line of policy to further or to advance"]). The majority substitutes an "ends justifies the encroachment" approach for that policy-neutral analysis (*see* majority op at —— n 11, —— N.Y.S.3d at —— n 11, —— N.E.3d at —— n 11["[O]ur point is that the precise requirements of the separation of powers vary with the constitutional ends at stake"]).

***20** This is perhaps the deepest flaw in the majority's reasoning: heavy reliance on the purpose of the statute, which it promotes as "intended to regain ... public confidence in government" as a remedy for a prior statute which the majority concludes was ineffective (majority op at —— – ——, —— – ——, —— N.Y.S.3d at —— – ——, —— – ——, —— N.E.3d at —— – ——, —— – ——). In other words, we accept encroachment because it is the only way to accomplish the goal of "regaining and retaining public trust as a means to ensure the legitimacy of government" (majority op at —— – ——, —— N.Y.S.3d at —— – ——, —— N.E.3d at —— – ——). This is simply wrong as a matter of constitutional process. Moreover, the "last best hope" rhetoric is based on a false premise, namely that the only

way to achieve this goal is an unconstitutional arrogation of executive power. Instead of a choice between allowing the threat to democracy that self-policing of the apparently rampant corruption in the executive branch poses (majority op at —— – ——, —— N.Y.S.3d at —— – ——, —— N.E.3d at —— – ——) or adherence to constitutional separation of powers constraints, the legislature could have opted to put to the People for a vote a constitutional amendment enacting the Commission. Indeed, this was the path taken to create the commission that imposes discipline on the judicial branch (N.Y. Const, art VI, § 22), and members of the legislature attempted to begin the process of passing a constitutional amendment to enact an ethics agency to enforce ethics and lobbying laws in 2021 (2019 N.Y. Senate Bill S855 [concurrent resolution proposing "that the constitution be amended by adding a new article V–A; in relation to state government integrity"]). Such an approach would have given voters the opportunity to approve—or disapprove—of a Commission that removes such substantial power from the executive. And, if the legislature chose to, it could have put to the People the question of placing itself beyond the reach of that Commission. But the legislature, as the sole gatekeeper of the amendment process (*see* N.Y. Const, art XIX; Jerald A. Sharum, Note, *A Brief History of the Mechanisms of Constitutional Change in New York and the Future Prospects for the Adoption of the Initiative* Power, 70 Albany L Rev 1055, 1080 [2007]), chose not to do so. And this choice, in the majority's view, instills confidence in our democracy.

The majority also errs by focusing solely on the appointment and removal process without accounting for the full range of powers bestowed on the Commission. While perhaps the executive appointment or removal power may individually and in certain circumstances be constrained, removing both with respect to a Commission that also has the power to enforce the law has never been condoned by this Court. We have cautioned that each of these features is vital in its way to the exercise of executive power; more so in combination.

The majority assures us that in any event, the statute permits the Governor to maintain meaningful control over the Commission. First, the majority posits that statutory caps on the financial penalties the Commission may impose "provid[e] a limitation on the Commission's enforcement discretion" (majority op at ——, —— N.Y.S.3d at ——, —— N.E.3d at ——). To an individual penalized with a $40,000 fine, a significant amount of money to most, this is cold comfort. Exemption from rigorous scrutiny, or indeed any level of scrutiny, based on our own assessment of the severity of the penalties a commission may impose is unprecedented. [5] Of course, once this Court determines that the statute is constitutional, the financial cap could always be increased—perhaps prompting a subsequent "how much is too much" constitutional challenge. [6]

Next, the majority notes that the governor's budgeting powers remain, and thus serve as a limit on the Commission's power. The statute of course does not "alter [the] arrangement" pursuant to which the Governor submits a budget that the legislature has limited power to change (majority op at ——, —— N.Y.S.3d at ——, —— N.E.3d at ——)—what it does instead is arguably more troubling. It requires the Governor to specifically and separately "state the recommended appropriations" for the Commission, requiring separate and public disclosure of any attempt to reduce the Commission's budget (*see* Executive Law § 94[1][f]). What is the purpose of this specific provision in the Act if the general executive control over budgeting were enough to constitute "control" over the Commission? This provision is aimed at shaming, not empowering, the Governor. That the only way the Governor can exercise power over the Commission is to openly starve it of its funding demonstrates how far beyond her control the Commission operates.

***21** The majority also takes comfort in the fact that the "Governor retains the power to discipline Executive staff (or not) even if the Commission chooses to impose fines (or not)" (majority op at ——, —— N.Y.S.3d at ——, —— N.E.3d at ——). It is unclear how the retention of any such power mitigates the grant of that same power to a body outside the executive branch. Granting this Commission "parallel power" does not cure the unlawful delegation of executive authority.

In its effort to save the statute, the majority goes so far as to pre-approve an investigation under the Moreland Act of the workings of the Commission (*see* majority op at ——, —— N.Y.S.3d at ——, —— N.E.3d at ——). Executive authority under the Moreland Act to investigate within the legislative sphere has been subject to dispute since its enactment in 1907 (*see* Ernst Henry Breuer, Moreland Act Investigations in New York: 1907–65 at 2–7 [1965]; *see also* Richard J. Meislin, *Cuomo Pledges $5 Million Budget in Announcing Corruption Panel,* N.Y. Times, Jan 16, 1987, available at https://www.nytimes.com/1987/01/16/nyregion/cuomo-pledges-5-million-budget-in-announcing-corruption-panel.html] [last accessed Feb 7, 2025] [Governor Mario Cuomo acknowledging that the Feerick Commission's "powers to investigate practices in the Legislature would

be limited by legal separations between the branches of government"]). Certainly, the issue might arise again should a future governor decide to investigate the "independent" committee stocked with legislative nominees empowered (to some extent) to investigate the legislature. Perhaps the majority's advisory opinion on the scope of executive power under the Moreland Act is an admission that today's decision indeed ushers in a post-separation of powers inter-branch free-for-all.

As a third pillar of support, the majority leans heavily on the elasticity and "flexibility" of the separation of powers doctrine, selectively citing to Chief Judge Cardozo's statement that "[t]he exigencies of government have made it necessary to relax a mere doctrinaire adherence to a principle so flexible and practical, so largely a matter of sensible approximation, as that of the separation of powers" (*see Matter of Richardson,* 247 N.Y. 401, 410, 160 N.E. 655 [1928]; majority op at ——, —— N.Y.S.3d at ——, —— N.E.3d at ——). As the very next sentence of *Richardson* makes clear, however, for that Court, if not for the majority here, flexibility had its breaking point: "Elasticity has not meant that what is of the essence of the judicial function may be destroyed by turning the power to decide into a pallid opportunity to consult and recommend" (*id.*). *Richardson* is but one example of this Court rejecting attempts to substitute "academic debate" over "flexibility" in favor of vigilance in striking down blatant separation of powers violations (*see County of Oneida,* 49 N.Y.2d at 523, 427 N.Y.S.2d 407, 404 N.E.2d 133 ["A failure (by the executive) to fulfill th(e) obligation (to carry out the laws of the State) violates the unequivocal command of the Constitution—it is not subject to academic debate concerning the proper division of governmental powers"]). As in *Richardson,* the statute here passes the breaking point.

V.

Instead of the majority's piecemeal approach, we must consider the overall effect of the statute, that is, whether the power granted to the Commission and the way that power is exercised results in an unconstitutional encroachment on executive authority (*see e.g. Matter of NYC C.L.A.S.H. Inc. v New York State Off. of Parks, Recreation & Historic Preserv.,* 27 N.Y.3d 174, 180, 32 N.Y.S.3d 1, 51 N.E.3d 512 [2016] [all factors of the challenged action should be "taken together" in assessing whether agency rulemaking violated separation of powers by encroaching on the province of the legislature (internal quotation marks omitted)]; *see* John Devlin, *Toward a State Constitutional Analysis of Allocation of Powers: Legislators and Legislative Appointees Performing Administrative Functions,* 66 Temp L Rev 1205, 1248 [1993] [recommending an analytical approach to the question of whether legislative appointment power over administrative agencies violates separation of powers principles by focusing "instead on the particular circumstances of each case and the real possibility of interference with the goals served by separation of powers if legislative appointees were permitted to exercise those particular functions, regardless of how those functions might be conceptually classified"]; Charles Herman Winfree, *State ex rel Martin v Melott: The Separation of Powers and the Power to Appoint,* 66 N C L Rev 1109, 1118–1119 [1988] [criticizing focus on "the appointments provision, divorced from the separation of powers provision," in reviewing separation of powers challenges]). The Act fails this test.

***22** The Act gives the legislature the majority of appointments and a majority is a quorum, meaning that the Commission can act by vote of only legislative appointees. But retention of some degree of appointment power in the executive is an obvious and necessary check on the balance of powers (*see e.g.* Devlin, 66 Temp L Rev at 1245–1246 [separation of powers concerns arise "if the legislature purports to reserve ... appointment authority for itself or its leadership," because "(e)ven if such an exercise of appointment authority by the legislative branch survives scrutiny under the appointments or vesting clauses of a state constitution, it may still fall afoul of more general distribution of powers concerns"]). Once appointed, members are only removable by a majority—which, again, may occur by vote of only legislative appointees. But we long ago explained that "[i]n this country the power of removal is an executive power and in this state it has been vested in the governor by the people" (*Matter of Guden,* 171 N.Y. 529, 532, 64 N.E. 451 [1902];[7] *but see* majority op at ——, ——, —— N.Y.S.3d at ——, ——, —— N.E.3d at ——, —— [despite acknowledging the "limited significance" of federal precedent, relying on one federal case to support its statement that "the Act remains within constitutional bounds respecting the removal power"]). Both the appointment and removal power are placed beyond executive control (*see e.g. Devlin,* 66 Temp L Rev at 1210 n 16 ["(A)ny attempt to exercise indirect control over the administration of laws through appointment of administrators may violate basic allocation of powers principles by impermissibly joining lawmaking and law-applying power or by infringing on the ability of

the executive branch to carry out its constitutionally assigned duties"]).

The Commission, composed in this way, is empowered to enforce the law. But our constitutional structure provides that "the Legislature makes laws and the Executive enforces them when made and each is, in the main, supreme within its own field of action" (*Tremaine,* 252 N.Y. at 39, 168 N.E. 817; *see also Rapp,* 44 N.Y.2d at 163, 404 N.Y.S.2d 565, 375 N.E.2d 745 ["(I)n this State the executive has the power to enforce legislation and is accorded great flexibility in determining the methods of enforcement"]). Instead the Act permits the Commission to undertake investigations, issue subpoenas, hold hearings, impose penalties, and demand forfeiture—all the ways in which a member of the executive branch would typically go about enforcing the laws (*see County of Oneida,* 49 N.Y.2d at 523, 427 N.Y.S.2d 407, 404 N.E.2d 133 ["(I)t cannot be denied that a principal function of the executive is to carry out the laws of the State"]; 4 Lincoln at 471 [The Take Care clause "gives the governor general supervision of all officers, state or local, who may have any part in the administration of the law"]). [8] Particularly troubling is that the enforcement power delegated to the Commission is the power to enforce the State's ethics and lobbying laws. The power of an outside body to discipline the executive branch is potentially the power to influence the actions of that branch —which may be why the legislature placed itself beyond the Commission's reach. On the other hand, the Commission's enforcement mandate reaches lobbyists and their clients, giving it unprecedented authority to penalize private citizens.

At this point, given the combination of constitutional infirmities already identified, the requirement of IRC approval of nominees is mere piling on. But discount this oddity the majority must, relying on *Lanza v. Wagner* and *Sturgis v. Spofford* (majority op at ——, —— N.Y.S.3d at ——, —— N.E.3d at ——). Of course, the nature of the executive action in *Sturgis* —the licensing of New York harbor pilots—makes it a poor comparator (45 N.Y. 446 [1871]). And the selection board in *Lanza* operated in reverse —the selection board provided names to the mayor, who then made the ultimate appointments from that list (11 N.Y.2d 317, 332, 229 N.Y.S.2d 380, 183 N.E.2d 670 [1962]). Indeed, in *Lanza* this Court explained that its "decision in the present case does not require us to decide whether the Legislature could have validly conferred on the selection panel the power of ultimate appointment," as the selection board "merely serves the purpose of providing by statutory sanction expert advice of unusual quality for the aid of the appointing power" (*id.* at 332, 229 N.Y.S.2d 380, 183 N.E.2d 670 [internal quotation marks omitted]). Today, the majority decides that the reverse—diminishing the executive authority with a selection board of private citizens and giving to that board the ultimate appointment power [9] —passes constitutional muster (*see* majority op at ——, —— N.Y.S.3d at ——, —— N.E.3d at ——).

***23** This case is not *Bourquin v. Cuomo,* 85 N.Y.2d 781, 628 N.Y.S.2d 618, 652 N.E.2d 171 (1995) (creation of a Citizens Utility Board by Executive Order) or *Cohen v. State of New York,* 94 N.Y.2d 1, 698 N.Y.S.2d 574, 720 N.E.2d 850 (1999) (applying presumption that legislators "act only in accordance with the fulfillment of their oaths of office" in challenge by certain legislators to law that restricted their own pay if appropriations submitted by the Governor were not acted upon in a timely manner) (*see* majority op at ——, —— – ——, ——, ——, —— N.Y.S.3d at ——, —— – ——, ——, ——, —— N.E.3d at ——, —— – ——, ——, ——) but *Richardson:* the Act takes from the Governor what is "of the essence" of the executive function—the power to enforce the law—and "turn[s it] ... into a pallid opportunity" for doing so through minority representation on a Commission controlled by legislative appointees (*Richardson,* 247 N.Y. at 410, 160 N.E. 655). This encroachment demands the same response given in *Richardson,* but the unwavering commitment to separation of powers protections expressed by Chief Judge Cardozo is absent from today's decision.

VI.

After delineating all of the reasons that the Act is comfortably within constitutional limits, the majority "emphasize[s]"—suddenly—that "the Act goes very near the line of what is constitutionally permissible without crossing it" (majority op at ——, —— N.Y.S.3d at ——, —— N.E.3d at ——). This inkling that something is terribly wrong is fleeting. What we come away with instead is the conviction that the majority is taken in by the form assumed by this legislation. It may have some rough features, the majority concedes, yet it means well. But a separation of powers issue will often come before a court as a wolf "clad, so to speak, in sheep's clothing" (*Morrison v. Olson,* 487 U.S. 654, 699 108 S.Ct. 2597, 101 L.Ed.2d 569 [1988, Scalia, J., dissenting]). Wide-eyed, the majority closely examines individual parts of the statute before us—the appointment power, the removal power, the IRC—and pronounces each, in turn, not wolf. But step back—it's not grandma; it's a wolf.

Chief Judge Wilson and Judges Troutman and Halligan concur. Judge Garcia dissents and votes to affirm in an opinion, in which Judges Singas and Scarpulla concur. Judge Cannataro took no part.

Order reversed, with costs, judgment declared in accordance with the opinion herein and certified question answered in the affirmative.

All Citations

--- N.E.3d ----, 2025 WL 515384, 2025 N.Y. Slip Op. 00902

Footnotes

1 *See* Jacob Gershman, *At Deadline, Ethics Unit Is in Limbo,* Wall St J, Dec. 12, 2011, § A at 21 ("[The Governor] hailed the creation of the joint commission as a historic effort to end 'the dysfunction and corruption that has plagued Albany' "); *see e.g.* Michael Cooper, *Hevesi Pleads Guilty to a Felony and Resigns,* N.Y. Times, Dec. 23, 2006, § B at 1.

2 The original terms were staggered (*see* Executive Law § 94[4][a]).

3 There are currently fifteen such law schools in New York.

4 A severability issue has been briefed at Supreme Court, but judicial action is stayed pending resolution of this appeal.

5 The dissent relies pervasively upon scholarly publications concerning state constitutions (*see e.g.* dissenting op at ——, —— N.Y.S.3d at ——, —— N.E.3d at ——, quoting Robert F. Williams & Lawrence Friedman, The Law of American State Constitutions 275 [2d ed 2023]; dissenting op at ——, —— N.Y.S.3d at ——, —— N.E.3d at ——, quoting G. Alan Tarr, Understanding State Constitutions 16 [1998]; dissenting op at ——, —— N.Y.S.3d at ——, —— N.E.3d at ——, quoting John Devlin, Toward a State Constitutional Analysis of Allocation of Powers: *Legislators and Legislative Appointees Performing Administrative Functions,* 66 Temp L Rev 1205, 1248 [1993]). Such publications, although helpful, cannot substitute as sources of law for the text of our Constitution or the holdings and analyses of this Court. Contrary to the dissent, our caselaw makes clear that in New York, the separation of powers is functional and flexible rather than formalistic and rigid.

6 Following some dispute, the Constitution, as adopted, clarified that the power to nominate prospective officers rested concurrently with each of the Council's members, including the Governor (*see* 1777 N.Y. Const, art XXIII, as amended 1801; 1 Lincoln, The Constitutional History of New York at 596–612). In so doing, the State rejected a proposal to give the Governor the exclusive power of nomination (*see* 1 Lincoln, The Constitutional History of New York at 610).

7 The dissent argues that the creation of a plural executive is irrelevant to this appeal (*see* dissenting op at ——, —— N.Y.S.3d at ——, —— N.E.3d at ——). But plaintiff argues that the Act unconstitutionally limits *the Governor's* appointment and removal powers. It is to this point that the fracturing of power within the Executive Branch is pertinent. We elsewhere consider—and reject—plaintiff's suggestion that the Act unconstitutionally encroaches upon the broader power of the Executive Branch.

8 At the same time, the 1846 Constitution omitted § 15 of the 1821 Constitution. Whatever effect that may have had on the Legislature's power to appoint officers, there is no indication that the 1846 Constitution was understood to confer upon the Governor an exclusive power to appoint and remove officers.

9 This Court's language in *Matter of Guden,* upon which plaintiff and the dissent rely (*see* dissenting op at —— & n 7, —— N.Y.S.3d at —— & n 7, —— N.E.3d at —— & n 7), does not require a different reading of this history. There, the Court stated that "the power of removal is an executive power, and in this state it has been vested in the governor" (*Matter of Guden,* 171 N.Y. 529, 531, 64 N.E. 451 [1902]). That statement, however, is narrower than plaintiff claims. *Guden* concerned only the power to remove a sheriff (*see id.*) Since 1821, the New York Constitution had vested that power explicitly with the Governor (*see id.;* 1894 N.Y. Const, art X, § 1; Reports of the Proceedings and Debates of the Convention of 1821, at 389–391 [1821]). *Guden* thus addressed removal of an officer as to whom the Constitution was clear, not silent. Similar is this Court's reference to "the removal of a public officer" as "an executive act" (*Richardson,* 247 N.Y. at 410, 160 N.E. 655, citing *Guden*). In *Richardson,* the Court considered the conduct of a "justice of the Supreme Court" who had been "made the delegate of the Governor in aid of the removal of a public officer" by statute (*id.*). The dissent ignores this plain distinction that the Legislature—not the Constitution—made the removal at issue an executive act.

10 Even though liberty is not the only purpose against which our application of the doctrine should be measured (*see supra* at ——, —— N.Y.S.3d at ——, —— N.E.3d at ——, citing *Dreyer,* 187 U.S. at 84, 23 S.Ct. 28), we disagree with the dissent's implication that flexibility in the separation of powers necessarily comes at liberty's expense. There is good reason to think—and the Legislature was entitled to conclude—that robust, independent enforcement of the ethics laws against public officials promotes individual liberty.

11 The dissent misunderstands our discussion of the statutory purpose (*see* dissenting op at ——, —— N.Y.S.3d at ——, —— N.E.3d at ——). Our point is not that the Act is good policy; on that, we express no view. Rather, our point is that the precise requirements of the separation of powers vary with the constitutional ends at stake, even as the doctrine's basic contours remain fixed (*see Bourquin,* 85 N.Y.2d at 785, 628 N.Y.S.2d 618, 652 N.E.2d 171; *Matter of Richardson,* 247 N.Y. at 410, 160 N.E. 655) To conclude otherwise would be to impose the very rigidity that our precedent has consistently rejected.

12 The dissent ignores that this arrangement minimizes the risk of unified legislative control of the Commission.

13 The dissent's analysis of this issue contradicts itself. Either the IRC has "the ultimate appointment power" and private citizens dominate the process (dissenting op at ——, —— N.Y.S.3d at ——, —— N.E.3d at ——) or "the legislature appoints members to executive boards" and thereby encroaches upon the Executive Branch (dissenting op at ——, —— N.Y.S.3d at ——, —— N.E.3d at ——). It cannot be both; indeed, it is neither.

14 Nor is the Act's insulation of the Commission's members from removal by the Legislature fatal. Allowing the Legislature to wield removal power might have allowed it to assert undue influence on the Commission, which might itself have raised separation of powers concerns.

15 The dissent observes that "[e]xecutive authority under the Moreland Act to investigate within the legislative sphere" is disputed (dissenting op at ——, —— N.Y.S.3d at ——, —— N.E.3d at ——). Unlike the dissent, however, we do not view the Commission as an extension of the Legislature (*see supra* at ——, —— N.Y.S.3d at ——, —— N.E.3d at ——). Thus, we view that dispute as immaterial. In any event, what the dissent characterizes as an "advisory opinion" (dissenting op at ——, —— N.Y.S.3d at ——, —— N.E.3d at ——) in fact reflects only our Court's "principle of party presentation" (*Paramount Pictures Corp. v. Allianz Risk Transfer AG,* 31 N.Y.3d 64, 82, 73 N.Y.S.3d 472, 96 N.E.3d 737 [2018] [Rivera, J., concurring]). Defendant represented that the Governor retained the authority under the Moreland Act to investigate the Commission; plaintiff did not dispute that representation. Aside from rejecting the dissent's characterization of the Commission, we express no view as to any potential future investigation.

16 The dissent contends that the limitations placed on the Commission's ability to impose fines or discipline people within the Legislative Branch is part of the reason that the Act constitutes "a blatant encroachment

on the power of another branch" (dissenting op at ——, —— N.Y.S.3d at ——, —— N.E.3d at ——). The Legislature is indeed generally entitled to "discipline its own work and power" as it sees fit (*Cohen,* 94 N.Y.2d at 14, 698 N.Y.S.2d 574, 720 N.E.2d 850). However, its determination not to extend the full force of the Act's supplemental enforcement authority to legislative members, candidates, and employees creates no facial constitutional defect. By prohibiting the Commission from "impos[ing] penalties or discipline upon" such persons (Executive Law at § 94[10][p]), the Act neither enlarges the power of the Legislative Branch nor diminishes that of the Executive Branch. Moreover, members of the Legislative Branch remain subject to enforcement actions by the Attorney General or the District Attorneys. Thus, the Executive Branch retains ample authority to secure the Legislative Branch's rigorous adherence to the ethics and lobbying laws.

17 We understand plaintiff to argue that only the Legislature may punish the Governor and only by impeachment, and that because the Legislature did not exercise that power during plaintiff's gubernatorial tenure, the Commission cannot lawfully investigate and discipline him now without encroaching upon the Legislature's exclusive authority. That claim is meritless for the reasons we discuss. Plaintiff does not raise, and we do not consider, whether the impeachment power may be exercised against a former Governor.

1 On this point, the Attorney General conceded at oral argument that the statute is ambiguous as to the effect of such a disciplinary "referral." The Act provides that, for statewide elected officials the Commission may recommend only impeachment and "may not *order* " suspension or termination (Executive Law § 94[10][p][ii] [emphasis added]), implying that for all other respondents, the Commission's recommendation as to discipline must be followed.

2 The majority complains that this dissent relies "pervasively" on "scholarly publications" related to issues of state constitutional interpretation and separation of powers doctrine in a case involving state constitutional interpretation and a separation of powers challenge (*see* majority op at —— n 5, —— N.Y.S.3d at —— n 5, —— N.E.3d at —— n 5; *see e.g.* Robert F. Williams & Lawrence Friedman, The Law of American State Constitutions 270 [2d ed 2023]; G. Alan Tarr, Understanding State Constitutions; John Devlin, *Toward a State Constitutional Analysis of Allocation of Powers: Legislators and Legislative Appointees Performing Administrative Functions,* 66 Temp L Rev 1205, 1248 [1993]; *but see* majority op at ——, ——, —— – ——, —— N.Y.S.3d at ——, ——, —— – ——, —— N.E.3d at ——, ——, —— – —— [citing, for example, *Democracy Corrupted: Apex Corruption and the Erosion of Democratic Values,* Stanford University Graduate School of Business Research Paper No. 4166 and *Trust and Compliance to Public Health Policies in Times of COVID–19* from the Journal of Public Economics]).

3 The majority implies the existence of a meaningful difference between the State and Federal Take Care clauses, without articulating any basis for that conclusion (*see* majority op at ——, —— N.Y.S.3d at ——, —— N.E.3d at ——). As discussed further below, the important distinction between the Federal and State Constitutions relevant to this clause—that is, the state's fractured executive power—does not bear on the inter-branch encroachment of executive power but instead concerns the apportionment of the exercise of power within that branch.

4 It is unclear how the 1821 change in title could reflect the "diffusion of appointment and removal power" when, as even the majority recounts, the executive possessed "only limited control over appointments and removals" prior to that time (majority op at ——, —— N.Y.S.3d at ——, —— N.E.3d at ——) and the 1821 constitution enhanced that executive authority.

5 The Kansas Supreme Court, in upholding that state's Governmental Ethics Commission against a challenge that the legislature had improperly usurped executive power, considered as the first of four relevant factors in assessing whether the separation of powers doctrine had been violated that "[n]otably absent is any means for the Commission to enforce compliance with the act or penalize violators thereof," and instead the Commission

"only investigates and reports to those who have authority to penalize or enforce" (*Parcell v. State,* 228 Kan. 794, 797, 620 P.2d 834, 836 [1980]).

6 In addition, the majority fails to consider the statute's clawback provision, which may represent a much larger dollar amount—as it does here (*see* Executive Law § 94[10][n]).

7 The majority rejects this language because the holding in *Guden* concerned removal power expressly vested in the Governor (majority op at —— n 9, —— N.Y.S.3d at —— n 9, —— N.E.3d at —— n 9). But the Court's statement with respect to removal power appears in a discussion of the State's separation of powers principles and well before the specific language of the provision was analyzed (171 N.Y. at 531, 64 N.E. 451). That the holding was "narrower" than the statement does not call into question the legitimacy of the principle, namely a settled understanding of the removal power as executive (majority op at —— n 9, —— N.Y.S.3d at —— n 9, —— N.E.3d at —— n 9).

8 From this same material, the majority quotes that "[m]any officers are beyond the governor's immediate control, for, as to them, [the governor] has no power of removal" (majority op at ——, —— N.Y.S.3d at ——, —— N.E.3d at ——). Yet again, the majority mistakes power dispersed within the executive branch for power removed from that branch.

9 The dissent highlights two independent problems with the Commission—that the legislature has a greater number of nominees and that unelected individuals from non-profit organizations possess approval power over those nominees (majority op at —— n 13, —— N.Y.S.3d at —— n 13, —— N.E.3d at —— n 13).