NO. COA 25-652 TENTH JUDICIAL DISTRICT

NORTH CAROLINA COURT OF APPEALS

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

Plaintiff-Appellee,

v.

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

Defendants-Appellants,

and

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

Intervenor-Defendant-Appellant.

From Wake County

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GOVERNOR'S APPELLEE BRIEF

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GOVERNOR'S APPELLEE BRIEF

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INTRODUCTION

Weeks after the people of North Carolina elected Josh Stein Governor, the General Assembly enacted Session Law 2024-57 (Senate Bill 382) over Governor Roy Cooper's veto. That legislation divests the Governor of authority

to supervise the administration of North Carolina election law. For the first time in the State's history, the General Assembly assigned complete authority to appoint, supervise, and remove members of the State Board of Elections and the chairs of all 100 county boards of election to the State Auditor, an official whose constitutional authority, unlike that of the Governor, has never been understood to encompass election administration.

No matter, Appellants argue, transferring the Governor's authority to the State Auditor does not even raise a separation of powers issue. Leg. Def. Br. 4-6; Auditor Br. 2-3. Moreover, it's a political question that courts should not even decide. Leg. Def. Br. 31-33; Auditor Br. 38-45. Appellants' short-sighted arguments neglect the actual text of our Constitution and the history and controlling precedent behind it.

More troubling, if the courts acquiesce to the General Assembly's "shift-the-power" strategy, the General Assembly can effectively control the executive branch, no matter who the people elect to be Governor or to the Council of State. Fundamentally, the General Assembly here claims a power to—on its whim—transfer *any* executive duty or power from the Governor to *any* other executive official that it favors more at *any* time. The Constitution, however, does not allow the legislature to exert that "degree of control . . . over the execution of the laws." *State ex rel. McCrory v. Berger*, 368 N.C. 633, 647 (2016).

If the General Assembly has free rein to transfer enforcement of any set of laws to its preferred executive-branch official at any time without regard to the historical understanding of that official's constitutional authority, the legislature can direct the execution of the law in real time. That is paradigmatic executive-branch power. This time, it is the administration of election laws assigned to the Auditor, but next time election laws could go to the Treasurer, agricultural laws to the State Superintendent of Public Instruction, or transportation laws to the Commissioner of Labor. If the separation of powers that our Constitution has mandated since 1776 means anything at all, it means that the General Assembly cannot so intrude on the execution of the law. Appellants' arguments have no limiting principle. If accepted, they would rebalance the powers between the executive and legislative branches contrary to our Constitution's design and read the Separation of Powers Clause out of existence.

Although the General Assembly is empowered to assign duties through legislation to the Council of State, N.C. CONST. art. III, § 7(2), it cannot, in so doing, ignore the rest of the Constitution. When passing such legislation, the General Assembly must honor the plain meaning of the word "Auditor," the State Auditor's historical role and responsibilities, the settled expectations of the voters who elected the Governor and the Auditor, and the constitutional command to group functions, powers, and duties "as far as practicable

according to major purposes." N.C. CONST. art. III, § 11. The General Assembly can, for example, assign the State Auditor duties and powers to conduct independent reviews of state agencies, including the State Board and county boards of elections. But it cannot grant the State Auditor final executive authority over implementation of the election laws, a role that has no constitutional foundation.

Our Supreme Court has repeatedly held that the separation of powers is violated "when the actions of one branch prevent another branch from performing its constitutional duties." *McCrory*, 368 N.C. at 645. Senate Bill 382 fails that test. Because Senate Bill 382 contravenes the plain text of the Constitution, constitutional history and context, and binding Supreme Court precedent by assigning to the State Auditor the sole power to supervise the administration of our state's election laws, it violates the separation of powers. The trial court's judgment should be affirmed and the stay of its permanent injunction dissolved.

STATEMENT OF FACTS

From 1901 until the enactment of Senate Bill 382 in December 2024, the State Board of Elections consisted of five members, appointed by the Governor, no more than three of whom were members of the same political party. *See* N.C. Gen. Stat. § 163-19(b) (2024); 1901 Session Law Ch. 89 at p. 244 § 5.

In the past decade, the General Assembly has repeatedly attempted to take control over the execution of the state's election laws. These efforts have been rejected by the courts and the people. Session Law 2017-6, for example, would have required the Governor to appoint eight members of a new version of the elections board, selecting four members each from two lists supplied by the chairs of the Republican and Democratic parties. *Cooper v. Berger*, 370 N.C. 392, 396 (2018) ("*Cooper I*"). The legislation was struck down by our Supreme Court. *Id.* at 414-15.

Soon thereafter, the General Assembly proposed a constitutional amendment creating a new State Board of Ethics and Elections Enforcement, which echoed the board structure declared unconstitutional in *Cooper I.* Session Law 2018-133. The voters rejected that amendment resoundingly.[1]

Before Senate Bill 382, the Governor appointed the members of the State Board from a list of four nominees submitted by the state party chairman of each of the two largest political parties in the State. N.C. Gen. Stat. § 163-19(b) (2024). No more than three members could be from the same political party.

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[1] *See* North Carolina State Board of Elections, 11/06/2018 Official General Election Results – Statewide, available at: https://er.ncsbe.gov/?election_dt=11/06/2018&county_id=0&office=REF&contest=1422. The Court properly takes judicial notice of the results of the election. *State v. Swink*, 151 N.C. 726 (1909) (taking judicial notice of holding of election and resulting referendum vote in favor of new law); *see also In re Peoples*, 296 N.C. 109, 142 (1978) (taking judicial notice of records of the North Carolina State Board of Elections); *see also* N.C. R. Evid. 201(b).

Id. The Governor similarly filled vacancies based on a list of nominees from the chair of the political party of the departing member. *Id.* § 163-19(c). The Governor could summarily remove any member who failed to attend meetings of the State Board. *Id.* § 163-20(d).

Senate Bill 382 changes this structure by replacing the Governor with the State Auditor in supervising the execution of the relevant statutes. Specifically, Senate Bill 382 transfers the Governor's authority to appoint members of the State Board to the State Auditor. Session Law 2024-57 § 3A.3.(c) (amending N.C. Gen. Stat. § 163-19(b)). It does the same for the Governor's authority to fill vacancies or remove members who fail to attend State Board meetings. *Id.* § 3A.3.(d) (amending N.C. Gen. Stat. § 163-20(d)). Senate Bill 382 also transfers the State Board to the Department of State Auditor and provides that "budgeting functions" for the State Board "shall be performed under the direction and supervision of the State Auditor." *Id.* § 3A.2(a).

Senate Bill 382 adopts much the same approach with respect to county boards of elections. Before Senate Bill 382, county boards were composed of five members. The State Board itself appointed four members, two each from lists of three nominees provided by the two political parties receiving the most votes in the previous election. N.C. Gen. Stat. § 163-30(a), (c) (2024). The Governor appointed the chair of each county board. *Id.* § 163-30(a). The State

Board could remove any county board member for cause and fill the vacancy created by that removal, selecting from a list of two nominees provided by the political party of the departing member. *Id.* §§ 163-22(c), 163-30(d).

Just as Senate Bill 382 changes the State Board, it changes the county boards by transferring the Governor's powers to the State Auditor. The State Auditor now appoints the chair of each county board instead of the Governor. Session Law 2024-57 § 3A.3.(f) (amending N.C. Gen. Stat. § 163-30(a)). And the State Auditor, not the Governor, now indirectly controls the composition of county boards through the Auditor's power to appoint, supervise, and remove all members of the State Board.

Earlier this year, a three-judge panel appointed by Chief Justice Newby ruled that the challenged provisions of Senate Bill 382 were unconstitutional beyond a reasonable doubt and permanently enjoined them. (R pp 191-211). A week later, this Court granted Appellants a writ of supersedeas, staying the trial court's permanent injunction pending appeal. The order, which was issued without briefing on the merits or oral argument, did not provide any reasoning. (R p 232).

The Supreme Court subsequently issued an order denying the Governor's request to dissolve the writ. In so doing, the Supreme Court declared, "[T]he Governor's filings do not ask this Court to decide the substantive constitutional issue, *nor do we decide it here*." *Stein v. Berger*, 387

N.C. 575, 575 (2025) (emphasis added). To avoid any doubt, the Court confirmed that the "constitutionality of Session Law 2024-57 remains vigorously contested." *Id.* at 579.

ARGUMENT

I. Standard of Review

This Court reviews a trial court's decision to grant summary judgment *de novo*. *N.C. Farm Bureau Mut. Ins. Co. v. Herring*, 385 N.C. 419, 422 (2023).

North Carolina courts have the power and the duty to determine the constitutionality of statutes. *E.g.*, *Bayard v. Singleton*, 1 N.C. (Mart.) 5, 6-7 (1787). Courts look to constitutional text, history, and precedent to make that determination. *Cooper I*, 370 N.C. at 413. When construing the Constitution, courts seek to effectuate the intent of the people who ratified it. *Martin v. State*, 330 N.C. 412, 415-16 (1991). Generally, courts interpret the Constitution using the same tools they use to interpret other written laws. *Id.* Thus, "[t]he best way to ascertain the meaning of a word or sentence in the Constitution is to read it contextually and to compare it with other words and sentences with which it stands connected." *Id.* (quoting *State v. Emery*, 224 N.C. 581, 583 (1944)).

Laws enacted by the General Assembly are presumed constitutional[2] and will not be declared invalid unless it is determined that they are unconstitutional beyond a reasonable doubt. *Cooper I*, 370 N.C. at 413. When a statute "plain[ly] and clear[ly]" exceeds an express or necessarily implied constitutional limit, a court must declare it invalid. *McCrory*, 368 N.C. at 639; *Cooper v. Berger*, 371 N.C. 799, 811 (2018) ("*Cooper Confirmation*"). If a statute can be interpreted to allow the legislature—in any circumstance—to violate separation of powers, it is facially invalid. *See Cooper I*, 370 N.C. at 416 n.12; *see also McCrory*, 368 N.C. at 645–47.

II. The Supreme Court's order does not resolve the merits of this case.

Appellants are at pains to argue that the Supreme Court's prior order in this case—which denied the Governor's request to dissolve this Court's writ of supersedeas—resolves this appeal. Not so.

The Supreme Court itself repeatedly said that its order *did not* resolve the appeal. "[T]he Governor's filings do not ask this Court to decide the substantive constitutional issue," the Court said, "*nor do we decide it here*." *Berger*, 387 N.C. at 575 (emphasis added). For that reason, the

[2] This Court is concededly bound by the Supreme Court's decisions. If this matter reaches the Supreme Court, though, the Governor intends to argue that the legislature is not entitled to a presumption of constitutionality in separation-of-powers cases.

"constitutionality of Session Law 2024-57 remains vigorously contested." *Id.* at 579.

We do know, of course, that the Supreme Court did not overturn the Court of Appeals' decision to allow Senate Bill 382 to take effect while this appeal proceeded. *Id.* at 576-78. But that conclusion was based on an equitable analysis and a standard of review that are inapposite here. *See id.* at 575-76. First, the Court of Appeals was required to consider a range of factors, including the public interest and the balance of the equities. *See* N.C. R. App. P. 23(c). Then, the Supreme Court was tasked with deciding whether the Court of Appeals' analysis of those factors was "manifestly unsupported by reason, or so arbitrary that it could not have been the result of a reasoned decision." *Berger*, 387 N.C. at 576 (quoting *Cryan v. Nat'l Council of YMCAs*, 384 N.C. 569, 573 (2023)). The fact that the Supreme Court concluded that the Court of Appeals "could have made a reasoned decision to stay the three-judge panel's order" tells us very little about how the Supreme Court would resolve the actual merits of this appeal, which this Court must now take up de novo. *Id.* at 576.

And that is on top of the fact that interlocutory orders like the one in *Berger* are, by definition, nonprecedential. *See, e.g.*, Scherer & Leerberg, 1 North Carolina Appellate Practice and Procedure § 16.05 (Lexis 2025) ("[A]ppellate orders are generally considered not to have any precedential

value in other cases."); *Precedent: the relationship between structure and function*, 1 Shuford's N.C. Civil Practice and Procedure § 85:9 (6th ed., West 2024) ("[P]recedential effect, though, only flows from a decision on the merits."). No mandate issues from orders like *Berger*, and those kinds of interlocutory orders may be revisited. *See, e.g.*, N.C. R. App. P. 32, 37; *Kirkpatrick v. Town of Nags Head*, 213 N.C. App. 132, 138 (2011) ("The 'law of the case' doctrine does not limit an appellate court's right to revisit an interlocutory order which has not been reviewed on appeal or otherwise become final.").

To be sure, the *Berger* order does provide some helpful insight into how the Supreme Court might approach this appeal. We know, for instance, that a majority of Justices understand this case to present a question of first impression left open in *McCrory*, *Cooper I*, and *Cooper Confirmation*. *See Berger*, 387 N.C. at 577-78. Beyond that, however, the Supreme Court has expressly declined to weigh in prematurely. *Id.* at 575, 579. Appellants are wrong to suggest otherwise.

III. The General Assembly cannot assign responsibility for election administration to the State Auditor.

As the leader of the executive branch, the Governor enjoys a special role within our plural executive. He performs not only the duties assigned specifically to him by the Constitution, but also any executive duties not

assigned or inherent to another member of the Council of State. The General Assembly may assign certain executive functions to the members of the Council of State, but only duties that the Constitution does not assign to a specific official and only if the duty relates to a major purpose of the member's core constitutional functions. The General Assembly, moreover, cannot use its limited power to allocate duties among the Council of State in a way that subverts the Separation of Powers Clause.

Because of these limits, the General Assembly cannot assign the responsibility to administer elections to the Auditor. Administering elections is wholly unrelated to the Auditor's core constitutional function. And, equally importantly, for the entire life of this State, the Auditor has never played a meaningful role in our State's elections. The Governor, by contrast, has overseen the faithful execution of our State's elections laws for well over a century.

The General Assembly's decision nevertheless to appoint the Auditor as our State's chief elections administrator also violates the Separation of Powers Clause. If the General Assembly can freely reallocate responsibility for administering elections among Council of State members, it can effectively control elections administration itself. The Constitution forbids that result. And because the General Assembly cannot task the Auditor with administering elections, that responsibility must revert to the Governor, who

enjoys any residual executive authority. Because Senate Bill 382 adopts a contrary regime, the provisions challenged here are unconstitutional.

A. The North Carolina Constitution reserves a special role for the Governor.

As originally conceived, the Governor was a short-term, legislatively appointed official almost entirely beholden to the General Assembly. North Carolina's 1776 Constitution provided for the Governor to be selected jointly by the House and the Senate to a one-year term. 1776 N.C. CONST. art. XV. The people amended the Constitution in 1835 to provide for direct election of the Governor to a two-year term, but the Governor's powers remained relatively circumscribed. Orth & Newby, THE NORTH CAROLINA STATE CONSTITUTION 15 (2d ed. 2013).

Over time, the Governor's role in our state government has continued to evolve and expand. The 1868 Constitution established a much more independent Governor, popularly elected by the people to a four-year term. Importantly, for the first time, the Constitution expressly vested in the Governor "the Supreme executive power of the State" and assigned to the Governor the obligation to ensure faithful execution of the laws. 1868 N.C. CONST. art. III, § 1 ("The Executive Department shall consist of a Governor (*in whom shall be vested the Supreme executive power of the State*) a Lieutenant Governor, a Secretary of State, an Auditor, a Treasurer, a Superintendent of

Public Works, a Superintendent of Public Instruction, and an Attorney General." (emphasis added)).

Our current North Carolina Constitution continues to carve out a special place for the Governor among the State's many executive officials. Article III, the section of our Constitution that focuses on the executive branch, begins by declaring: "The executive power of the State shall be vested in the Governor." N.C. CONST. art. III, § 1. Though the Constitution names several other "elective officers" within the executive branch, N.C. CONST. art. III, § 7(1), it contains no provision that explicitly vests those officers with executive power. Similarly, although the Constitution tasks the Governor with the "[e]xecution of laws" and directs him to "take care that the laws be faithfully executed," it includes no such directive for any other members of the executive branch. N.C. CONST. art. III, § 5(4).

The drafters of the 1971 Constitution explained the special role the Governor serves in this way:

> State government is rapidly becoming more complex, its concerns more ramified, its operations more expensive, and its management more difficult and demanding. It is the Governor who is looked to to give direction and leadership to this massive activity. No one else in state government has the breadth of view and responsibility and *no one else has the authority to do the job*.

Report of the North Carolina State Constitution Study Commission 109 (1968) ("*Constitution Study Commission*") (emphasis added).

North Carolina's executive branch, to be sure, is different from the federal government's. Our State relies on a plural executive, as opposed to the unitary executive employed at the federal level. These additional executive officials, however, do not alter the Governor's special position atop the executive branch or his unique role in ensuring the laws are faithfully executed. Notwithstanding the other members of the Council of State, the Governor still "wield[s] the bulk of what is considered executive authority." *Berger*, 387 N.C. at 580 (Berger, J., concurring). In addition to the various responsibilities that the Constitution expressly assigns to the Governor, "[a]ny unassigned and noninherent executive functions, powers, and duties [also] fall to [him]." *Id.* at 579 (majority opinion).

B. The Constitution authorizes the General Assembly to assign executive power to the Council of State, but only within certain limits.

Although the Constitution reserves a special role for the Governor as the leader of the executive branch, he is aided by the Council of State, nine officials

elected statewide to lead certain executive departments. N.C. CONST. art. III, §§ 2, 7(1), 8; *Cooper Confirmation*, 371 N.C. at 800.[3]

All of the Council of State members, including the Governor, have core "functions and duties under the constitution" that they alone may perform. *See Martin v. Thornburg*, 320 N.C. 533, 546 (1987); *see also Berger*, 387 N.C. at 581 (Dietz, J. concurring). For example, the Constitution provides that the Superintendent of Public Instruction is the chief administrator of the State Board of Education and that the Lieutenant Governor breaks ties in the Senate. N.C. CONST. art. IX, § 4; *id.* art. III, § 6. Though these core duties are often specified in the Constitution's text, they may also be "inherent" to the office. *Berger*, 387 N.C. at 579 & n.5; *Martin*, 320 N.C. at 545 (describing Attorney General's inherent constitutional duty to represent the State in state and federal court).

The General Assembly may prescribe additional duties to Council of State members by statute. N.C. Const. art. III, § 7(2). But the legislature's power is not unlimited. Just like any other exercise of its legislative authority, the General Assembly's authority to reassign executive duties is subject to textual limits imposed by the Constitution. *Cooper I*, 370 N.C. at 410 (holding

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

that "[t]he General Assembly's authority" recognized in "Article III, Section 5(10) is necessarily constrained by the limits placed upon that authority by other constitutional provisions"). And the Constitution textually limits this power in at least three ways.

First, the General Assembly cannot reassign a duty the Constitution has textually or inherently assigned to a particular Council of State member. *Berger*, 387 N.C. at 579. Thus, the General Assembly could not designate the Attorney General acting Governor, N.C. CONST. art. III, § 3 (assigning that role to the Lieutenant Governor), or task the Commissioner of Labor with publishing an account of State funds each year, *id.* art. V, § 7 (assigning that duty to the Treasurer). Similarly, the General Assembly could not give the Attorney General's inherent constitutional authority to represent the State in legal proceedings to the Secretary of State. *See Martin*, 320 N.C. at 545.

Second, the General Assembly's power to prescribe duties to the Council of State is constrained by the text establishing the Council of State offices, as well as the Constitution's command that "all administrative departments, agencies, and offices of the State and their respective functions, powers and duties shall be allocated" in administrative departments that are "group[ed] … as far as practicable according to major purposes." N.C. CONST. art. III, §§ 7(1), 11. Voters adopted this limit on the General Assembly in 1971 to make the responsibilities of elected executives more predictable and therefore make

the executive branch more responsive to the people. *Constitution Study Commission* 130-131. Thus, in reassigning executive duties, the General Assembly can assign a Council of State member only duties that are sufficiently related to a "major purpose" of the member's core constitutional duties. *Berger*, 387 N.C. at 581-582 (Dietz, J., concurring). A member's original historical role, as well as the types of responsibilities the member has "typically" performed, inform whether a statutorily-assigned duty is sufficiently related to a member's core constitutional function. *See id.* at 582 (Dietz, J., concurring).

Finally, the General Assembly remains bound by the Separation of Powers Clause. The people of North Carolina chose to protect executive authority from encroachment by the other branches with an express separation-of-powers guarantee: "The legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other." N.C. CONST. art. I, § 6; *see also* 1776 N.C. CONST., Decl. of Rights, § IV; 1868 N.C. CONST. art. I, § 8. As explained by the Supreme Court, "[o]ur founders believed that separating the legislative, executive, and judicial powers of state government was necessary for the preservation of liberty." *McCrory*, 368 N.C. at 635.

Appellants argue (Leg. Defs.' Br. 19; Auditor's Br. 21) that the Separation of Powers Clause can never be violated when the General Assembly

is reallocating responsibilities within the executive branch, but that is plainly wrong. True, the "clearest violation" of the separation of powers clause occurs when "one branch exercises power that the constitution vests exclusively in another branch." *McCrory*, 368 N.C. at 645. But the Separation of Powers Clause equally forbids one branch from "prevent[ing] another branch from performing its constitutional duties." *Id.* In other words, it matters little whether the legislature attempts directly to wield executive power or whether it instead merely interferes with the exercise of executive power.

As shown below, Senate Bill 382 runs afoul of these limits. Thus, responsibility for ensuring that the State Board faithfully executes the law reverts to the Governor. *Cooper Confirmation*, 371 N.C. at 799 (noting that the Governor performs any executive function that is not assigned to, or a core constitutional duty of, another Council of State member); *Berger*, 387 N.C. at 579 (same).

C. Senate Bill 382 exceeds the General Assembly's authority to reallocate executive responsibilities among the Council of State.

Senate Bill 382 transgresses the limits the Constitution places on the General Assembly's authority to reallocate duties among Council of State members. The Auditor's core constitutional function is independent review of our state government's fiscal and operational affairs. At the time the office was created, the people who ratified our Constitution would never have

thought that the Auditor's role included administering elections. In fact, administering elections impedes the Auditor's responsibility to independently review the State Board and County Boards' finances and operations. Moreover, the General Assembly's view that it may reassign responsibility for administering elections to any Council of State member at any time effectively allows the legislature, not the executive branch, to control enforcement of the election laws. The Separation of Powers Clause forbids that result.

1. The Auditor's assigned duties and powers must be limited to independent review of fiscal affairs and government operations

Appellants argue that the General Assembly's broad authority to assign functions, powers, and duties to statutory agencies, N.C. CONST. art. III, § 5(10), and to set the statutory duties of Council of State members like the Auditor, *id.* art. III, § 7(2), means that Senate Bill 382 must be a constitutional exercise of legislative authority. *See* Leg. Def. Br. 14-17; Auditor Br. 12-16, 19. As explained above, the General Assembly's power to assign duties and functions is not unlimited. Here, Senate Bill 382 exceeds the General Assembly's authority to reallocate responsibilities among the Council of State.

To determine what powers the General Assembly may assign to the State Auditor, the Court should start with the people's understanding of the office when it was first created in the 1868 Constitution. 1868 N.C. CONST. art. III, § 1; *see Sneed v. Greensboro City Bd. of Ed.*, 299 N.C. 609, 613 (1980) ("Inquiry

must be had into the history of the questioned provision and its antecedents, the conditions that existed prior to its enactment, and the purposes sought to be accomplished by its promulgation. The court should place itself as nearly as possible in the position of the men who framed the instrument." (internal quotation marks omitted)).

By the State Auditor's own account, the role of the State Auditor as established in 1868 was to "superintend the fiscal affairs of the State; examine and settle accounts of persons indebted to the State; liquidate claims by persons against the State; and to draw warrants on the State Treasurer for moneys to be paid out of the treasury." N.C. Office of the State Auditor, *History of the Office of State Auditor* (last accessed Oct. 8, 2025), https://www.auditor.nc.gov/about-us/history-office-state-auditor. One of the convention delegates similarly explained that "[u]pon the Auditor devolves the most important *financial interests* of the State," a responsibility that required "one acquainted with book-keeping, the various public funds and the tax laws of the State." Jos. W. Holden, Official Proceedings of the Convention, *The Daily Standard* (Jan. 28, 1868).[4] The 1869 legislation that implemented the 1868 Constitution provided that "It is the duty of the Auditor: (1) To superintend the fiscal concerns of the State." Pub. L. ch. 270 § 63(1) (1869). The legislation

[4] Digitized copies of the Daily Standard from this time period are available at DigitalNC, https://www.digitalnc.org/newspapers/the-daily-standard-raleigh-n-c/.

went on to assign a variety of additional fiscal duties to the Auditor, such as "[t]o keep and state all accounts in which the State is interested," and "[t]o examine and settle the accounts of all persons indebted to the State." *Id.* §§ 63(4), (5).

This understanding of the Auditor's primarily financial role is reflected in the General Statutes today. The "General Duty" assigned by the General Assembly to the State Auditor is "to provide for the auditing and investigation of State agencies by the impartial, independent State Auditor." N.C. Gen. Stat. § 147-64.6. To preserve the independence necessary to effectively audit state government activities, the General Assembly has generally sought to prevent the State Auditor from being involved in non-audit responsibilities. Specifically, a longstanding statute provides that "the Auditor and his employees" may not, unless otherwise expressly authorized by statute, "serve in any capacity on an administrative board, commission, or agency of government" and further provides that "[t]he Auditor shall not conduct an audit on a program or activity for which he ha[s] management responsibility." N.C. Gen. Stat. § 147-64.12.

This portfolio is consistent with the office's title. An auditor is "a person authorized to examine and verify accounts." Merriam-Webster Dictionary (2025); *see also* Black's Law Dictionary (12th ed. 2024) ("A person or firm, usu. an accountant or an accounting firm, that formally examines an individual's or

entity's financial records or status."); *id.* (defining "state auditor" as "The appointed or elected official responsible for overseeing state fiscal transactions and auditing state-agency accounts"). That is precisely how our Constitution's framers would have understood the role. *E.g.*, Noah Webster, *An American Dictionary of the English Language*, (1828 ed.) ("A person appointed an authorized to examine an account or accounts, compare the charges with the vouchers, examine the parties and witnesses, allow or reject charges, and state the balance."); John Bouvier, *A Law Dictionary adapted to the Constitution and Laws of the United State of America* (1860 ed.) ("An officer whose duty is to examine the accounts of officers who have received and disbursed public moneys by lawful authority."); Oxford University Press, Oxford English Dictionary (2025) (" An official whose duty it is to receive and examine accounts of money in the hands of others, who verifies them by reference to vouchers, and has power to disallow improper charges.").

Since the inception of the Office, the State Auditor has played an important role in ensuring that the State's funds are spent appropriately and efficiently. That is what the People understood in 1868 when they created the Office and what they understood in 2024 when electing a new State Auditor. The General Assembly's assignment of election administration to the Auditor shortly after completion of the 2024 General Election cannot be squared with this understanding, developed and maintained over more than 150 years.

2. Election administration is inconsistent with the Auditor's role

Until the General Assembly enacted Senate Bill 382 in 2024, undersigned counsel's legal and historical research has not shown that the State Auditor has played any role in election administration. To the contrary, the State Auditor has been responsible only for conducting various independent audits of the State Board of Elections, a function well within the Auditor's traditional, constitutional role. *See, e.g.*, Investigative Report, North Carolina State Board of Elections, Office of the State Auditor (Feb. 2011), *available at*: https://files.nc.gov/nc-auditor/documents/reports/investigative/INV-2011-0361.pdf?VersionId=7Kwfy.Ie.zMjHpbHifx4pi0.p189qeA8; Letter from State Auditor Leslie Merritt, Jr. to Larry Leake, Chairman, State Board of Elections (Apr. 17, 2008), *available at*: https://files.nc.gov/nc-auditor/documents/reports/investigative/INV-2008-0334.pdf?VersionId=u.rMm740Aa1_x8cVvNKfn7b1l0azVFvU.

While the Auditor argues that his role "has expanded to encompass a broader mandate," Auditor Br. 34, the purported expansion is statutory, not constitutional, and does not encompass elections. *Id.* 34-37. In the Auditor's own description, his role is to "review and examine all aspects of the operational and financial affairs of State government." Auditor Br. 36

(emphasis omitted). Notably, this role of review and examination is distinct from implementation of affirmative policy.

The State Board of Elections is responsible for a wide variety of activity in the administration of activities that far exceed the Auditor's financially focused role. For example, the State Board of Elections is responsible for "general supervision over the primaries and elections in the State." N.C. Gen. Stat. § 163-22(a). It has authority to issue rules, regulations and guidelines; appoint and remove county board members and advise them as to the "proper methods of conducting primaries and elections"; investigate the administration of election laws, prepare and print ballots, including determining their form and content; tabulate and certify election results; and exercise certain emergency powers. *See, e.g.*, *id.* §§ 163-22(a)–(k), (m)–(p), 163-22.2, 163-24, 163-27.1, 163-82.12, 163-82.24, 163-91, 163-104, 163-166.8, 163-182.12, 163-227.2. Likewise, the county boards of elections undertake many functions that have no relationship to auditing, such as administering elections on the county level, appointing and removing board employees and local elections officers, determining sites and hours for early voting, investigating administration of election laws, defining election precincts, preparing ballots, purchasing and maintaining voting equipment, preparing budgets, and issuing certificates of election. N.C. Gen. Stat. §§ 163-33, 163-166.35(a).

Senate Bill 382 represents a significant departure from historical practice by making the State Auditor responsible for administration of the State's election laws, as opposed to auditing the functions of the State Board of Elections or county boards of elections. Moreover, the legislation makes North Carolina unique in the nation by assigning the State Auditor complete authority to appoint, supervise, and remove members of the State Board and the chairs of all 100 county boards. And it upsets the settled expectations of North Carolina's voters, from whom "[a]ll political power is . . . derived," by completely reassigning the executive power over election administration just weeks after an election took place. N.C. CONST. art. I, § 2.

By contrast, the Governor's important role in the faithful execution of our state's election laws has been consistent: for more than one hundred years, the Governor has appointed the members of the State Board of Elections. *See* N.C. Gen. Stat. § 163-19(b) (2024); 1901 Session Law Ch. 89 at p. 244 § 5. While the State Board functioned independently, the Governor was able to supervise its actions and ensure faithful execution of the state's elections laws in his role as chief executive.[5]

[5] Until 2018, the State Board of Elections was responsible for appointing all members to three-member county boards of election. The Governor's direct participation in appointing the chair was established when the General Assembly established five-member county boards. *See* N.C. Sess. L. 2018-146 § 4.3.(a).

As all of North Carolina's living former Governors—three Democrats and two Republicans—wrote in an amicus brief to the Court of Appeals in this case a year ago, "[f]or nearly 125 years, our Board of Elections, with its members appointed and supervised by the Governor, has faithfully ensured time and time again that our elections are lawful and accurate." Amicus Brief of Governor James G. Martin et al., No. 24-406 (N.C. Ct. App. Oct. 29, 2024), at 8 (available on e-filing site). This has included countless examples in which the Governor's political allies—or even the Governor himself—lost closely contested races. *See generally id.* at 9-14.

There has never been any question that administration of the election laws is properly assigned to the Governor. In contrast, Senate Bill 382 violates the Constitution by assigning administration of our State's election laws to the Auditor, a person elected by the people to fill a position directed toward oversight and management of the state's fiscal affairs and operations, not the affirmative implementation of policy.

3. The Separation of Powers Clause does not permit the General Assembly to reassign executive duties at will.

If the scheme enacted in Senate Bill 382 is allowed to stand, executive power would no longer derive from the people and their Constitution but would be subject to arbitrary reassignment at the whim of the General Assembly. The General Assembly could make the Insurance Commissioner,

Superintendent of Public Instruction, or any other Council of State member responsible for the administration of the election laws or any other executive function. The duty and power to perform independent, impartial audits of state agencies could be assigned to the Commissioner of Agriculture. The state's agricultural policy could be managed by a commission appointed by the Attorney General. The Department of Adult Correction could be supervised by a board appointed by the Labor Commissioner.

This is not hyperbole. The Auditor contends that there is not "any text in our Constitution that actually places substantive limits on the General Assembly's authority to assign Council of State members' duties." Auditor Br. 30.

The People did not adopt this nonsensical approach for the organization of our executive branch. The Governor is mentioned 78 separate times in the Constitution, but the State Auditor is mentioned just once, in the clause that creates his office. *Compare* N.C. CONST. art. III, § 7(1) *with, e.g.*, N.C. CONST. art. I, § 37, art. II, § 22, art. III, art. IV, § 19, art. IX § 4. art. XII, § 1. In our Constitution, the People made the Governor the State's chief executive and established other, specific executive offices in the executive branch to fulfill specific functions, not to serve as alternative Governors fungible with the one elected by the People. As a bipartisan group of all the state's living, former Governors explained in an amicus brief in an appeal currently pending before

this Court, "[T]he nine members of the Council of State are neither the Governor nor proxies for the Governor. There is but one Governor. And it is not the Commissioner of Agriculture. Nor is it the Commissioner of Insurance. Only the Governor can be the Governor." Amicus Brief of Gov. James G. Martin et al., No. 24-440, at 4 (N.C. Ct. App. Oct. 8, 2024) (available on e-filing site).

Appellants' view of the Constitution would shatter our constitutional balance and subvert the will of the people who elect their executive officials based on their qualifications to fulfill their assigned responsibilities. If the General Assembly can simply assign any executive function to any executive official any time it wants, it can effectively control the execution of the law by continuing to transfer executive authority among executive officials until it achieves its desired outcome. "The separation of powers clause plainly and clearly does not allow the General Assembly to take this much control over the execution of the laws from the Governor and lodge it with itself." *McCrory*, 368 N.C. at 647. Indeed, the rule that the General Assembly seeks "would nullify the separation of powers clause, at least as it pertained to the General Assembly's ability to control the executive branch." *Id.*

The people of North Carolina elected the Governor—and only the Governor—to be the State's chief executive. And they elected the State Auditor to conduct independent audits of government agencies, not to manage those

agencies. If Legislative Defendants prevail in this appeal, the General Assembly would be empowered to assign any duty to any preferred executive official at any time, thereby controlling the law's execution. "[T]he General Assembly could countermand the will of the voters in electing their chosen Governor by simply transferring the Governor's executive power to a member of the Council of State whose politics or policy choices the General Assembly might prefer." Amicus Brief of Gov. James G. Martin et al., *supra*, at 14.

The General Assembly violates the Constitution and separation of powers when it improperly controls the execution of the law by assigning powers, duties, and functions to an executive branch official that far exceeds the role of his office. To resolve this case, the Court need only determine whether our Constitution permits the State Auditor to be solely responsible for execution of the State's election laws. Constitutional text, history, and precedent establish that it does not.

IV. This case is justiciable.

Late in their briefs, Appellants claim this case raises a political question, which would mean this Court lacks subject matter jurisdiction over the appeal. Leg. Def. Br. 31-33 (arguing art. III, § 7(2)); Auditor's Br. pp 38-45 (arguing art. III, § 5(10) and plenary legislative power). This argument is foreclosed by controlling precedent. *See Cooper I*, 370 N.C. at 409-11.

In *Cooper I*, the Court held that the Governor's constitutional challenge to the General Assembly's statute governing appointment to the State Board of Elections was justiciable because the Governor was not "challenging the General Assembly's decision to 'prescribe the functions, powers, and duties of the administrative departments and agencies of the State,'" but rather was "challenging the extent . . . to which the statutory provisions governing the manner in which the [State Board of Elections] is constituted and required to operate . . . impermissibly encroach upon his constitutionally established executive authority to see that the laws are faithfully executed." *Id.* at 409-10. The same is true here, where the Governor contends that the General Assembly has impermissibly exceeded a defined, textual limit on the power that may be assigned to the State Auditor and encroached on the Governor's executive authority.

The same holds true for Legislative Defendants' argument that the General Assembly's authority to assign duties and powers to the Council of State renders the Governor's challenge non-justiciable. The Governor argues that the General Assembly has violated a variety of specific, constitutional provisions that constrain the power conferred in art. III, § 7(2).

Indeed, Legislative Defendants concede that the justiciability of this case is established in *Cooper I*, but halfheartedly attempt to elevate the Supreme Court's *Berger* order to controlling precedent overruling *Cooper I*. *See* Leg. Def.

Br. 31-32 n. 10. *Berger* has no such effect. *See supra*, Section II, pp. 9-11. Because *Cooper I* remains the law, this case is justiciable.

CONCLUSION

For all of the foregoing reasons, this Court should uphold the North Carolina Constitution, affirm the ruling of the trial court finding the challenged provisions of Senate Bill 382 unconstitutional, and dissolve this Court's stay of the trial court's permanent injunction.

Respectfully submitted this the 8th day of October, 2025.

Electronically Submitted
Daniel F. E. Smith
N.C. State Bar No. 41601
dsmith@brookspierce.com
BROOKS, PIERCE, MCLENDON,
HUMPHREY & LEONARD, L.L.P.
Suite 2000 Renaissance Plaza
230 North Elm Street (27401)
Post Office Box 26000
Greensboro, NC 27420-6000
Telephone: 336/373-8850
Facsimile: 336/378-1001

N.C. R. App. P. 33(b) Certification: I certify that all of the attorneys listed below have authorized me to list their names on this document as if they had personally signed it.

Jim W. Phillips, Jr.
N.C. State Bar No. 12516
jphillips@brookspierce.com
Eric F. Fletcher
N.C. State Bar No. 54105
efletcher@brookspierce.com

W. Swain Wood
N.C. State. Bar. No. 32037
swain.wood@wilmerhale.com
WILMER CUTLER PICKERING
HALE & DORR LLP
2100 Pennsylvania Avenue, N.A.
Washington, DC 20037

Attorneys for Plaintiff-Appellee Joshua H. Stein, Governor of the State of North Carolina

CERTIFICATION OF WORD COUNT

Pursuant to Rule 28(j) of the North Carolina Rules of Appellate Procedure, the undersigned counsel certifies that this brief contains fewer than 8,750 words, excluding covers, captions, indexes, tables of authorities, certificates of service, certificates of compliance with this rule, counsel's signature block, and appendixes.

This the 8th day of October, 2025.

Electronically Submitted
Daniel F. E. Smith

CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that a copy of the foregoing document was served upon the parties by email addressed as follows:

Matthew Tilley
Matthew.Tilley@wbd-us.com
Mike Ingersoll
Mike.Ingersoll@wbd-us.com
Emmett Whelan
Emmett.Whelan@wbd-us.com
Noah H. Huffstetler, III
noah.huffstetler@nelsonmullins.com
D. Martin Warf
martin.warf@nelsonmullins.com
Aaron Harding
aaron.harding@nelsonmullins.com

Attorneys for Legislative Defendants

Alex C. Dale
acd@wardandsmith.com
Mark S. Wigley
mswigley@wardandsmith.com
docket@wardandsmith.com

Attorneys for Dave Boliek, in his Official Capacity as N.C. State Auditor

This the 8th day of October, 2025.

Electronically Submitted
Daniel F. E. Smith