No. COA 24-406 TENTH DISTRICT

NORTH CAROLINA COURT OF APPEALS

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

Roy A. Cooper, III in his capacity as Governor of the State of North Carolina, Plaintiff, v. Philip E. Berger, in his official capacity as President Pro Tempore of the North Carolina Senate; Timothy K. Moore, in his official capacity as Speaker of the North Carolina House of Representatives and The State of North Carolina, Defendants.	)	From Wake County

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

LEGISLATIVE DEFENDANT-APPELLANTS' REPLY BRIEF

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

INDEX

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

No. COA 24-406 TENTH DISTRICT

NORTH CAROLINA COURT OF APPEALS
* * * * * * * * * * * * * * * * * * *

Roy A. Cooper, III in his capacity as Governor of the State of North Carolina, Plaintiff, v. Philip E. Berger, in his official capacity as President Pro Tempore of the North Carolina Senate; Timothy K. Moore, in his official capacity as Speaker of the North Carolina House of Representatives and The State of North Carolina, Defendants.	)	From Wake County

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

LEGISLATIVE DEFENDANT-APPELLANTS' REPLY BRIEF

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

INTRODUCTION

The Governor and the Attorney General urge this Court to follow them right off a jurisprudential cliff. They argue that *Cooper v. Berger*, 370 N.C. 392, 410, 809 S.E.2d 98, 109 (2018) ("*Cooper I*"), and its alternative test for determining a justiciable question, is not undone by a restoration of key principles in *Harper v. Hall*, 384 N.C. 292, 325, 886 S.E.2d 393, 415 (2023); however, that argument risks this Court collapsing the political question in on itself—the very thing warned of by the dissent in *Cooper I* and course corrected in *Harper*. The judicial restraint articulated through the political question doctrine reflects the separation of powers. The power

of judicial review, for instance, is not appropriate for executive clemency decisions. *Bacon v. Lee*, 353 N.C. 696, 716, 549 S.E.2d 840, 854 (2001). But Appellees argue that because the Court here is called upon to interpret a constitutional provision, it should exercise judicial review in favor of the Governor. Not true. Following *Harper* allows this Court to reverse the error the trial court made by following Appellees and *Cooper I* off the cliff into nonjusticiable waters.

Even if justiciable though, Appellees argue that the protections afforded to the Governor's obligation to faithfully execute the laws in Article III, Section 5(4) is a check on however broad the plenary and, importantly, textually expressed power of organizing state government given to the General Assembly (and the Governor) in Article III, Section 5(10). But as with any separation of powers question, it is important to know what power is at issue. Senate Bill 749 gives neither any legislator nor the legislative branch any more ability to *execute* the laws than the Governor exercises the power of judicial review by appointing judges to vacancies. This case is about how the ones who execute are chosen—and that power of appointment has long been held not to be solely a core executive power. Here, the Governor has no appointment power—Senate Bill 749 was not designed to do that. Nonetheless, Appellees argue that Article III, Section 5(4) does not permit the General Assembly to design an executive agency that the Governor cannot sufficiently control through appointment, supervision, and removal of its leadership. Synthesizing Appellees' authority however only yields situations of shared responsibility for appointment or constraints on the Governor's ability to appoint executive officials. Where *no*

appointment power is designed, however, these cases do not measure up. Appellees are twisting *McCrory's* proviso that the General Assembly "may [not] appoint [statutory officers] in every instance and under all circumstances," *State ex rel. McCrory v. Berger*, 368 N.C. 633, 648, 781 S.E.2d 248, 258 (2016) ("*McCrory*") to mean that the Governor must constitutionally be able to appoint statutory officers even where no appointments are provided to him by law. That unmooring of our separation of powers jurisprudence goes too far and the trial court erred in determining as much.

I. APPELLEES UNDERSTATE THE EXTENT TO WHICH *COOPER I* IS AN ABERRATION FROM THE LONGSTANDING POLITICAL QUESTION DOCTRINE AS RECAPITULATED IN *HARPER*.

Appellees contend that *Cooper I* "forecloses" the application of the political question doctrine here and that appellants "cannot invoke *Harper* and [thereby] render the constitutional guarantee of separation of powers unenforceable." (Gov.'s Br. p 29); (*see also* AG's Br. p 24). Yet, as Defendants contend in their initial brief, *Cooper I* represents an analytical departure from the well-established political question doctrine as articulated by the North Carolina Supreme Court in *Harper*. Appellees attempt to soften the implications of political question doctrine here by squeezing *Cooper I*'s political question analysis into a shoe that simply does not fit.

In *Harper*, the Court noted as a threshold matter that "[w]hen we cannot locate an *express, textual limitation on the legislature*, the issue at hand may involve a political question that is better suited for resolution by the policymaking branch." *Id.* at 325, 886 S.E.2d at 415 (emphasis added). The Court's observation regarding the

political question doctrine was a corollary to its "plainly stated" standard of review for a merits analysis of a constitutional challenge to an act of the General Assembly, namely, whether an act of the General Assembly which is presumed to be constitutional, "violates[s] an *express provision* of the constitution *beyond a reasonable doubt*." *Id.* at 343, 886 S.E.2d at 427 (emphasis added). The Court's twofold emphasis on locating "express provisions" limiting the legislature in the text of the Constitution are mirror image articulations of the separation of powers principles expressed in Article I, Section 6 of the North Carolina State Constitution. *See id.* at 325, 886 S.E.2d at 415 ("As 'essentially a function of the separation of powers,' the political question doctrine operates to check the judiciary and prevent its encroaching on the other branches' authority.") (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)). That is why the Court in *Harper* ultimately declared in unqualified terms that under the political question doctrine, "*courts must refuse to review political questions*, that is, issues that are better suited for the political branches. *Such issues are considered nonjusticiable*." *Id.* (emphasis added).

After establishing that the political question doctrine is firmly situated in the constitutional principle of the separation of powers, the *Harper* Court laid out three distinct factors which demand that "a court must refrain from adjudicating a claim": "(1) a textually demonstrable commitment of the matter to another branch; (2) a lack of judicial discoverable and manageable standards; or (3) the impossibility of deciding a case without making a policy determination of a kind clearly suited for nonjudicial discretion." *Id.* at 325, 886 S.E.2d at 415-16. What is more, it is important to bear in

mind that the *Harper* court laid out these factors full stop. There is no qualifying language or theorizing about ways that plaintiffs could formulate their claims, or ways court might construe a plaintiff's claim in order to avoid the separation of powers principle—as applied to the judiciary—that "a court *must refrain* from adjudicating a claim when *any one* of the [factors] is present." *Id.* (emphasis added).

Appellees maintain that "*Harper* did not overrule, abrogate, or otherwise affect [*Cooper I*'s] political question holding." (Gov.'s Br. p 30) (AG's Br. p 24). They point out that "[i]n fact, none of the *Harper* opinions (majority or dissent) cite or mention—let alone discuss, analyze, or *cast doubt upon*—[*Cooper I*]." (*Id.*) (emphasis added). But Appellees cannot explain how to square *Cooper I* with *Harper*.

In *Cooper I*, as in *Harper*, the Court acknowledged that the "political question doctrine controls, essentially, when a question becomes not justiciable . . . because of the separation of powers provided by the Constitution." *Cooper I* at 407, 809 S.E.2d at 107 (quoting *Bacon v. Lee*, 353 N.C. 696, 717 (2001)) (cleaned up). The *Cooper I* Court went on to recognize the principle that the political question "excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the legislative or executive branches of government." *Id.* at 408, 809 S.E.2d at 107 (quoting *Bacon*, 353 N.C. at 717) (cleaned up). Again, this is consistent with the first factor articulated in *Harper*. *See Harper*, 384 N.C. at 325, 886 S.E.2d at 415–16.

Yet, rather than limit the analysis to the well-established principles it harkened back to, the *Cooper I* court tacked on an alternative analytical step nowhere before articulated in case law:

> [In] order to resolve the justiciability issue, we must decide whether [one branch of government] is seeking to have the judicial branch interfere with an issue committed to the sole discretion [of another branch] or whether [one branch] is seeking to have the Court undertake the usual role performed by a judicial body, which is to ascertain the meaning of an applicable legal principle.

Cooper I, 370 N.C. at 409, 809 S.E.2d at 108. The Court concluded that this additional caveat was justified by a spurious distinction it drew between "cases that do and do not involve political questions." *Id.* at 408, 809 S.E.2d at 107. According to the Court, the difference between cases that are justiciable and those that are not lies in whether a case requires the court to "construe[ ] and appl[y] . . . provisions of the Constitution of North Carolina." *Id.* at 412, 809 S.E.2d at 110. The court distinguished the case before it from that of *Bacon v. Lee* by stating that "unlike *Bacon*, this case involves a conflict between two competing constitutional provisions." *Id.*

As an initial matter, *Cooper I* does not fit into the traditional political question jurisprudence because the foundation for its distinction between cases that do and do not involve political questions is fundamentally flawed. The Court in *Bacon v. Lee* explicitly characterized the plaintiffs' state law claims as a constitutional challenge under Article I, Section 19 of the State constitution to the Governor's clemency authority under Article III, Section 5(6). *Bacon*, 353 N.C. at 720–21, 549 S.E.2d at

856. The *Cooper I* Court created a distinction without a difference in *Bacon* and it undermines the contention that its ultimate holding comports with *Harper*.

What is more, *Cooper I*'s distinction leads to unworkable results in light of basic political question principles. The *Cooper I* Court quotes *Baker v. Carr*, 369 U.S. 186 (1962) for the foundational jurisprudential consideration that "[d]eciding whether a matter has in any measure been committed by the Constitution to another branch of government . . . is in itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution." *Cooper I*, 370 N.C. at 407, 809 S.E.2d at 107 (quoting *Baker*, 369 U.S. at 211). If all it takes to decide that a matter is justiciable is a conclusion that the Court is simply performing its usual role of "ascertain[ing] the meaning of an applicable legal principle," *id.* at 409, 809 S.E.2d at 108, then the political question analysis entirely collapses on itself. At the very least, *Harper* "casts doubt" on the holding of *Cooper I* as *Harper* maintains that the "delicate exercise in constitutional interpretation," *Cooper I*, 370 N.C. at 408, 809 S.E.2d at 107, into whether a matter is committed to another branch does not resolve the justiciability issue in the manner articulated in *Cooper I*.

Finally, *Cooper I*'s analysis of Article III, Section 5(10) is not dispositive such that appellants' political question argument is somehow foreclosed by it. Appellees accuse Appellants of "vastly overstating the effect of Article III, Section 5(10) in their attempt to find constitutional authority to justify their attempt to exercise the Governor's constitutional authority." (Gov.'s Br. p 31) (AG's Br. p 26-28). Yet, it is

Appellees' position that is overstated. An act of the General Assembly does not need to be pursuant to an expressed provision of the Constitution to be constitutional. *Harper*, 384 N.C. at 322, 886 S.E.2d at 413–14 ("Accordingly, the General Assembly possesses plenary power as well as the responsibilities explicitly recognized in the text of the state constitution."); *see also State ex rel. Martin v. Preston*, 325 N.C. 438, 448–49, 385 S.E.2d 473, 478 (1989); *McIntyre v. Clarkson*, 254 N.C. 510, 515, 119 S.E.2d 888, 891–92 (1961). But where there is an express delegation of authority, a review of the exercise of that expressed power may be a political question. *Harper*, 384 N.C. at 325, 886 S.E.2d at 415. The *Cooper I* court was uncertain about determining that Article III, Section 5(10) did not include the legislative ability to organize how a board or commission would be chosen, noting that "even if one does not accept this understanding of the scope of the General Assembly's authority under Article III, Section 5(10), we continue to have the authority to decide this case because the General Assembly's authority pursuant to Article III, Section 5(10) is necessarily constrained by the limits placed upon that authority by other constitutional provisions." *Cooper I*, 370 N.C. at 410, 809 S.E.2d at 109. But that alternative pathway around the political question—or more specifically the question of what is expressed by Article III, Section 5(10)—is specifically what *Harper* recognizes does not manufacture a justiciable question. That is plainly the case because the *overruled* opinion in *Harper* harkened back to *Cooper I*'s alternative political question analysis in justifying that the partisan redistricting question was initially justiciable. *See Harper v. Hall*, 380 N.C. 317, 364, 868 S.E.2d 499, 535 (2022) ("Rather, this case asks

how constitutional limitations in our Declaration of Rights limit the General Assembly's power to apportion districts under article II. It is thus analogous to *Cooper v. Berger*, 370 N.C. 392, 809 S.E.2d 98 (2018), in that it 'involves a conflict between two competing constitutional provisions,' and it 'involves an issue of constitutional interpretation, which this Court has a duty to decide.' *Id.* at 412, 809 S.E.2d 98."), *overruled in later appeal*, 384 N.C. 292, 886 S.E.2d 393 (2023)). *Cooper I*'s discussion of the scope of Article III, Section 5(10) was supported by a since-overruled pillar.

Cooper I's unsupported pronouncement that Article III, Section 5(10) refers to "what the agencies in question are supposed to do, rather than the extent to which the Governor has sufficient control over those departments and agencies," *id. at* 410, 809 S.E.2d at 109, does little to move the analysis forward and cannot carry the argument as far appellees contend that it does. The Framers of the Constitution viewed "functions, powers, and duties" as encompassing the authority of the General Assembly to exercise "authority over the structure and organization of state government. It retains the power to make changes on its own initiative . . . and it can alter any reorganization plan which it has allowed to take effect and then finds to be working unsatisfactorily." N.C. State Constitution Study Comm'n, *Report of the North Carolina State Constitution Study Commission* 131–32 (1968). Appellees contend that the "[a]ssignment of 'functions, powers, and duties' to administrative boards and commissions is distinct from the execution—once assigned—of those functions, powers, and duties." (Gov.'s Br. p 31) (AG's Br. p 26-28). Appellants agree, and simply point out that once it is conceded that said assignment is textually, demonstrably

committed to the General Assembly, the manner in which those appointments are carried out is a nonjusticiable political question under longstanding jurisprudence as articulated in *Harper v. Hall.*

II. SENATE BILL 749 IS NOT UNCONSTITUTIONAL BEYOND A REASONABLE DOUBT BECAUSE SEPARATION OF POWERS PRECEDENT FALLS SHORT OF SUPPORTING GOVERNOR'S THEORY THAT HE MUST HAVE APPOINTMENTS.

Appellants argue that the North Carolina Constitution prohibits legislation that deprives the Governor of sufficient control of agencies to carry out his constitutional mandate to ensure that the laws are faithfully executed. (Gov.'s Br. p 18) (AG's Br. p 22-23. They point to three cases in support of the proposition that address "'[t]he nature of the Governor's executive authority—and the concomitant prohibition on the General Assembly granting itself (or its leadership) executive powers or interfering with the Governor's executive power." *Id.* In *Wallace v. Bone*, 304 N.C. 591, 286 S.E.2d 79 (1982) the Court held that a violation of the separation of powers clause occurs when the legislature "create[s] a special instrumentality of government to implement specific legislation and then retain[s] some control over the process of implementation by appointing legislators to the governing body of the instrumentality." *Id.* at 608, 286 S.E.2d at 88. In *McCrory*, 368 N.C. 633, 781 S.E.2d 248, the court held that a separation of powers violation occurred when the General Assembly created commissions on which it retained the power to appoint a majority of the commission's voting members and gave the Governor only two or three appointees because said configurations failed to give the Governor sufficient control

over the commission to carry out his duty to ensure that the laws are faithfully executed. *Id.* at 644-48, 781 S.E.2d at 256–58. In *Cooper v. Berger*, 370 N.C. 392 (2018), the Court held that a separation of powers violation occurred when the General Assembly reorganized a board and gave the Governor authority to appoint half of the members from his own party because that amounted to a lack of "sufficient control" by "limiting the extent to which individuals supportive of the Governor's policy preferences have the ability to supervise the activities of the [board]." *Id.* at 416, 809 S.E.2d at 112. Despite appellees' insistence to the contrary, none of those opinions can be dispositive for the case at hand as none of them present an analysis of constitutionality of an executive agency, commission, or board on which the General Assembly has reserved statutory appointments for itself.

According to appellees, *Wallace*, *McCrory*, and *Cooper I* stand for the proposition that the General Assembly's decision to structure the board in such a way renders the law unconstitutional on its face because it "purports to eliminate the Governor's ability to appoint, supervise and remove a majority of members of boards and commissioners exercising final executive authority." (Gov.'s Br. p 23) (AG's Br. p 10, 21-23). Yet, as explained at length in the opening briefs, Senate Bill 749 restructures a new State Board of Elections such that, among other changes, the General Assembly appoints *all eight members of the board*. N.C. Session Law 2023-139 § 2.1. Thus, the inquiry that appellees rely upon is inapposite for the case at hand because the Governor has no authority for statutory appointments to this board.

Perhaps realizing the limited nature of the holdings in those cases, in the very next paragraph appellees rephrase the summary rule from *McCrory* and *Cooper I* as a much more sweeping grant of authority, namely, that the Governor must "*have sufficient power over administrative bodies that have final executive authority* like the State Board and county boards." (Gov.'s Br. p 23) (emphasis added) (AG's Br. p 15). According to appellees, a court is constitutionally required to protect this broad conception of gubernatorial power by first considering whether an entity is "primarily administrative or executive in character." (*Id.*) (citing *Cooper I*, 370 N.C. at 415, 809 S.E.2d at 112). If a court concludes that the first step is met because a commission or board is "executive in character", according to appellees, a court must then conclude whether the Governor has "sufficient control" through the ability to appoint, supervise, and remove enough members such that he can carry out his constitutional duty to take care that the laws are faithfully executed." (*Id.* at 26.)

Interestingly, both *McCrory* and *Cooper I* rely on similar unsupported assumptions about what is entailed by the duty to take care that the laws are faithfully executed. According to the *McCrory* Court, the real underlying problem with the board structure chosen by the General Assembly was the fact that the Governor was left with "little control over the views and priorities of the officers that the General Assembly appoints." 368 N.C. at 647, 781 S.E.2d at 257. Similarly, the Court in *Cooper I*, expressed that it viewed the problem to be "limiting the extent to which individuals supportive of the Governor's policy preferences have the ability to supervise the activities of [the board]." 370 N.C. at 416, 809 S.E.2d at 112-13. In both

of those cases, which involved board structures granting the Governor authority over some portion of the statutory appointments, the Courts elided the Governor's *duty* to faithfully execute the laws with his *ability* to ensure that his policy preferences would be adequately implemented. *See, e.g., Cooper I*, 370 N.C. at 418, 809 S.E.2d at 114 (concluding that the General Assembly precludes the Governor from ensuring that the laws are faithfully executed by structuring a board consisting of individuals half of whom "are, in all likelihood, not supportive, if not openly opposed to [the Governor's] *policy preferences*" (emphasis added)). In sum, appellees' argument from the caselaw they cite seeks to *constitutionalize* the Governor's power to implement his policy preferences and further expand that power beyond the confines of boards where he has been granted at least some authority to make statutory appointments.

As appellants argue in their initial brief, this court should reject appellees' invitation to abandon any limiting principle to their interpretation of precedent and squeeze unwarranted, sweeping executive control of any administrative agency through the mousehole of Article III, Section 5(4) of the North Carolina Constitution. The precedents cited by appellees and the legal principle that appellees derive from them cannot apply beyond those cases without calling into question the degree of authority of other executive officers explicitly granted in the Constitution such as the Secretary of State, Auditor, Treasurer, Superintendent of Public Instruction, Attorney General, Commissioner of Agriculture, Commissioner of Labor, and Commissioner of Insurance. *See* N.C. CONST. art III, § 7(1).

Each of those administrative departments headed by those constitutional officers would surely satisfy appellees' first test in that they are "administrative or executive" in character. If appellees' conception of Article III, Section 5(4) were to be applied to those administrative departments, then each one would be structured unconstitutionally to the extent that the Governor was unable to ensure that individuals supportive of his policy positions were in positions of sufficient power. Yet, the fact that the Constitution establishes that each of the officers who lead those agencies are to be elected by the people of North Carolina casts serious doubt on appellees' proposition that the Governor's duty to faithfully execute the laws entails appointment power to any agency that is "administrative or executive in character." The Constitution itself contemplates entire administrative departments lead by officers elected by the people wholly separate from any input from the Governor.

Appellees protest that appellants "distort the Governor's position and invent arguments that the Governor has not made-for example, that the Constitution requires the Governor alone to exercise *all* executive power." (Gov.'s Br. p 3). Appellants simply point out what they consider to be the legal ramifications—whether contemplated by appellees or not—of allowing Article III, Section 5(4) to be a trojan horse for declaring the structure of any department that is "administrative or executive in character" unconstitutional when the Governor is unable to secure the participation of individuals who support his or her policy preferences.

CONCLUSION

For the foregoing reasons, this court should conclude that this matter is nonjusticiable under the political question doctrine, or in the alternative, that Senate Bill 749 does not inhibit the Governor's duty to faithfully execute the laws under Article III, Section 5(4) of the North Carolina Constitution.

Respectfully submitted, this the 18th day of November, 2024.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: /s/ Electronically Submitted

D. Martin Warf
N.C. State Bar No. 32982
301 Hillsborough Street, Suite 1400
Raleigh, NC 27603
Telephone: (919) 877-3800
Facsimile: (919) 877-3799
martin.warf@nelsonmullins.com

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.

Noah H. Huffstetler, III
N.C. State Bar No. 7170
301 Hillsborough Street, Suite 1400
Raleigh, NC 27603
Telephone: (919) 877-3800
Facsimile: (919) 877-3799
noah.huffstetler@nelsonmullins.com

Counsel for Defendant-Appellants Philip E. Berger, in his official capacity as President Pro Tempore of the North Carolina Senate, and Timothy K. Moore, in his official capacity as Speaker of the North Carolina House of Representatives

CERTIFICATE OF WORD COURT

Pursuant to Rule 28(j) of the North Carolina Rules of Appellate Procedure, counsel for Defendants certifies that the foregoing brief, which was prepared using a 12-point proportionally spaced font with serifs, is less than 3,750 words (excluding covers, captions, indexes, tables of authorities, counsel's signature block, certificates of service, this certificate of compliance, and appendixes) as reported by the word-processing software.

This, the 18th day of November, 2024.

By: /s/ Electronically Submitted

D. Martin Warf
N.C. State Bar No. 32982
NELSON MULLINS RILEY & SCARBOROUGH, LLP
301 Hillsborough Street, Suite 1400
Raleigh, NC 27603
Telephone: (919) 877-3800
Facsimile: (919) 877-3799
martin.warf@nelsonmullins.com

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing LEGISLATIVE DEFENDANT-APPELLANTS' BRIEF via email to the address identified below:

Jim W. Phillips, Jr.
BROOKS, PIERCE, MCLENDON, HUMPHREY
& LEONARD, L.L.P.
jphillips@brookspierce.com

Eric M. David
BROOKS, PIERCE, MCLENDON, HUMPHREY
& LEONARD, L.L.P.
edavid@brookspierce.com

Daniel F. E. Smith
BROOKS, PIERCE, MCLENDON, HUMPHREY
& LEONARD, L.L.P.
dsmith@brookspierce.com

Amanda S. Hawkins
BROOKS, PIERCE, MCLENDON, HUMPHREY
& LEONARD, L.L.P.
ahawkins@brookspierce.com

Amar Majmundar
Senior Deputy Attorney General
NC DEPARTMENT OF JUSTICE
amujmundar@ncdoj.gov

Stephanie Brennan
Senior Deputy Attorney General
NC DEPARTMENT OF JUSTICE
Sbrennan@ncdoj.gov

By: /s/ Electronically Submitted
D. Martin Warf
N.C. State Bar No. 32982
NELSON MULLINS RILEY &
SCARBOROUGH, LLP
301 Hillsborough Street, Suite 1400
Raleigh, NC 27603
Telephone: (919) 877-3800

Facsimile: (919) 877-3799
martin.warf@nelsonmullins.com