

NORTH CAROLINA COURT OF APPEALS

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ROY A. COOPER, III,  
in his official capacity,

Plaintiff-Appellee,

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-Appellants.

From Wake County

\*\*\*\*\*

**AMICUS BRIEF OF  
GOVERNOR JAMES G. MARTIN,  
GOVERNOR JAMES B. HUNT, JR.,  
GOVERNOR MICHAEL F. EASLEY,  
GOVERNOR BEVERLY E. PERDUE, AND  
GOVERNOR PATRICK L. MCCRORY  
IN SUPPORT OF GOVERNOR ROY A. COOPER, III**

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**INDEX**

TABLE OF AUTHORITIES ..... ii

INTRODUCTION ..... 1

NATURE OF AMICI'S INTEREST ..... 5

ARGUMENT ..... 6

I. With no legitimate justification for its enactment, Senate Bill 749 reveals itself as the General Assembly's latest attempt to seize the Governor's constitutionally conferred executive power. .... 6

    A. There is no legitimate justification—nor has the General Assembly identified one—for eliminating the Governor's power to appoint and supervise the Board of Elections. .... 6

    B. For nearly 125 years, the Board of Elections has faithfully ensured that our elections are lawful and accurate. .... 9

CONCLUSION..... 15

CERTIFICATE OF COMPLIANCE..... 18

CERTIFICATE OF SERVICE..... 19

APPENDIX

**TABLE OF AUTHORITIES**

<b>Cases</b>	<b>Page(s)</b>
<i>Cooper v. Berger</i> , 370 N.C. 392, 809 S.E.2d 98 (2018) .....	1, 3, 9
<i>Leandro v. State</i> , 346 N.C. 336, 488 S.E.2d 249 (1997) .....	4
<b>Constitutional Provisions</b>	
N.C. Const. art. III, § 1 .....	5
<b>Session Laws</b>	
N.C. Pub. L. No. 89-1901, § 5 .....	6
N.C. Sess. Law 1971-864, § 4(5) .....	9
N.C. Sess. Law 1973-1409 .....	9
N.C. Sess. Law 2018-133 .....	1
N.C. Sess. Law 2023-139 .....	7
<b>Rules</b>	
N.C. R. App. P. 28.1(b)(3)(c) .....	1
<b>Official Reports and Documents</b>	
11/06/2018 Official General Election Results – Statewide, Bipartisan Board of Ethics & Elections, <i>Historical Election Results Data</i> , State Board of Elections, <a href="https://er.ncsbe.gov/contest_details.html?election_dt=11/06/2018&amp;county_id=0&amp;contest_id=1422">https://er.ncsbe.gov/contest_details.html?election_dt=11/06/2018&amp;county_id=0&amp;contest_id=1422</a> .....	2
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Chief Justice Paul Newby, Facebook (Dec. 12, 2020), <https://www.facebook.com/JusticePaulNewby/posts/pfbid035W8E9Stom1yQ6mAP1DQ8FiHBFVK8sfdxQ5DTsLcuoWztfGt8Jjpt7NqGUSAYsFpGl> ..... 11

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Statement on 2016 Election Results*, YouTube  
(Dec. 5, 2016),  
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IN SUPPORT OF GOVERNOR ROY A. COOPER, III**

\*\*\*\*\*

## INTRODUCTION<sup>1</sup>

Shortly after Governor Cooper was elected in 2016, the General Assembly enacted legislation taking away the Governor's executive power to appoint and supervise the state and county boards of elections. Governor Cooper challenged the legislation and the Supreme Court struck it down as unconstitutional. *See Cooper v. Berger*, 370 N.C. 392, 395–400, 422, 809 S.E.2d 98, 100–02, 116 (2018).

Undeterred, but recognizing that taking away the Governor's executive power would require a constitutional amendment, the General Assembly proposed one to the voters seven months later. *See* N.C. Sess. Law 2018-133 (App. 9–10). Like the legislation that the Supreme Court struck down, the proposed constitutional amendment would have taken away the Governor's executive power to supervise the state and county boards of elections.

In the Fall of 2018, with the proposed constitutional amendment on the ballot, the five living former Governors joined together to speak in opposition to the proposed amendment. The former Governors took their message directly to the people of North Carolina through public appearances,

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<sup>1</sup> No one other than the former Governors and the undersigned counsel wrote any part of this brief or contributed any money to support the preparation of this brief, which was prepared pro bono. *See* N.C. R. App. P. 28.1(b)(3)(c).

television programs, and print media, sharing why it was so critically important that the people reject the attempt to ratify the proposed amendment as a part of their Constitution.

The former Governors were well-positioned to offer their insights on the matter. Their unique, shared experience as our State's Chief Executive gave them a deep understanding of how North Carolina's longstanding separation-of-powers guarantee works in the real world. As that experience showed, the General Assembly's proposed amendment would not only have eroded the Constitution's separation-of-powers guarantee, but it would also have impeded the proper functioning of good government where the people of North Carolina perhaps need it the most: in the executive-branch agency charged with ensuring that our elections are lawful and accurate.

The people of North Carolina agreed. At the ballot box in November 2018, they overwhelmingly rejected the General Assembly's proposed constitutional amendment by a vote of 62% to 38%, voting "NO" in 88 out of 100 counties.<sup>2</sup>

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<sup>2</sup> 11/06/2018 Official General Election Results – Statewide, Bipartisan Board of Ethics & Elections, *Historical Election Results Data*, State Board of Elections, [https://er.ncsbe.gov/contest\\_details.html?election\\_dt=11/06/2018&county\\_id=0&contest\\_id=1422](https://er.ncsbe.gov/contest_details.html?election_dt=11/06/2018&county_id=0&contest_id=1422).



Despite all this, the General Assembly has now tried again. This time, even after acknowledging that they would need a constitutional amendment like the one the people overwhelmingly rejected in 2018, the General Assembly in Senate Bill 749 has tried to achieve that result through mere legislation (yet again). *See Cooper*, 370 N.C. at 418, 809 S.E.2d at 114. And so again, the former Governors have united, this time to urge the Court to preserve North Carolina's separation-of-powers guarantee and affirm the three-judge panel's unanimous decision striking down the law.

To be clear, the former Governors strongly agree with Governor Cooper that the three-judge panel in this case got it exactly right. The Supreme Court has already held that this legislation did not present a "political question" insulated from judicial review and, furthermore, that it violated the Constitution "impermissibly, facially, and beyond a reasonable doubt." *Id.* at 418–22, 809 S.E.2d at 114–16. Thus, the only two questions before the Court in this case were definitively answered by controlling precedent from a mere six years ago. Against that backdrop, the General Assembly's passage of Senate Bill 749 is about as "stark" and "blatant" an attempt to violate the Constitution as North Carolina has seen in some time. (R p 128).

Likewise, the arguments that the General Assembly is attempting to make in this case are similarly extreme. The General Assembly's lead argument is that the political-question doctrine can nullify an express

constitutional limitation on the General Assembly (the Constitution's separation-of-powers mandate) that has been in place since the founding of our State. That kind of extreme suggestion has no place in our State's jurisprudence. *See, e.g., Leandro v. State*, 346 N.C. 336, 345, 488 S.E.2d 249, 253 (1997) ("It has long been understood that it is the duty of the courts to determine the meaning of the requirements of our Constitution.").

But beyond the damage that Senate Bill 749 would do to our Constitution, it suffers from a more basic flaw: Not only is it unconstitutional, but it also lacks any legitimate justification for its enactment—a "solution without a problem" that reveals its true motive. As described below, there is no legitimate justification—nor has the General Assembly identified one—for eliminating the Governor's executive power to appoint and supervise the Board of Elections. In short, there is no problem in need of a solution here. Rather, for nearly 125 years, the Board of Elections has faithfully ensured that our elections are lawful and accurate.

Moreover, and ironically, the General Assembly's "solution" to the non-existent problem actually creates a significant problem. Under Senate Bill 749, the state and county boards of elections would have an even number of members, virtually guaranteeing deadlocked votes, including on whether to certify election results—a situation where North Carolinians' long-awaited

end to each November election could unnecessarily extend into the holidays and beyond.

With these practical realities in mind, this brief focuses on the fact that Senate Bill 749 was not driven by any actual need to solve a real-world problem. Instead, it was driven by the General Assembly's continued campaign to seize the Governor's constitutional powers. In focusing on that issue, the former Governors seek to show the Court that Senate Bill 749 should be viewed as what it really is: the General Assembly's latest unconstitutional power grab.

### **NATURE OF AMICUS INTEREST**

The five living former Governors of North Carolina have a strong interest in this case: their interest in preserving the executive power, status, and dignity that the Constitution confers on the Office of the Governor.

Other than Governor Cooper, they are the only five living individuals who have been entrusted with the State's executive power. *See* N.C. Const. art. III, § 1. That unique, shared experience has given the former Governors a deep understanding of how the Constitution's separation-of-powers guarantee works in the real world. Based on that experience, the former Governors seek to share their perspective that not only is Senate Bill 749 unconstitutional, but it also lacks any legitimate justification.

Although the former Governors' affiliation is bipartisan (two Republican and three Democratic former Governors), their interest is nonpartisan. This case, after all, is not about partisan politics. It is about the separation of powers—a bedrock constitutional principle as old as the State of North Carolina itself. That foundational principle transcends politics.

Embracing that foundational principle, the former Governors ask the Court to affirm the three-judge panel's unanimous decision invalidating Senate Bill 749.

### **ARGUMENT**

**I. With no legitimate justification for its enactment, Senate Bill 749 reveals itself as the General Assembly's latest attempt to seize the Governor's constitutionally conferred executive power.**

**A. There is no legitimate justification—nor has the General Assembly identified one—for eliminating the Governor's power to appoint and supervise the Board of Elections.**

For nearly 125 years, the Governor has appointed the members of the State Board of Elections. Beginning in 1901, the Board was constituted as a five-member entity, with no more than three members from the same political party and any vacancies to be filled by the Governor. *See* N.C. Pub. L. No. 89-1901, § 5 (App. 1–4). That structure has remained to this day—at

least until Senate Bill 749 attempted to take away the Governor's executive power of appointment and supervision.

Had it not been enjoined by the three-judge panel, Senate Bill 749 would have eliminated the Governor's executive power to appoint and supervise the State Board of Elections and the 100 county boards of elections, and it would have transferred that executive power to the General Assembly—in some cases, to the Speaker of the House or Senate President Pro Tempore individually. *See* N.C. Sess. Law 2023-139 (App. 11–27). It would also have created gridlock by design: a State Board of Elections and county boards of elections with an even number of members, virtually guaranteeing deadlocked votes. *See id.*

As justification for such a radical restructuring, one might think that if the Board of Elections had actually failed to administer lawful and accurate elections in North Carolina over the course of almost 125 years, the General Assembly would be quick to cite to those instances. But that is not the case.

Even with a 125-year retrospective, the General Assembly is apparently unable to identify a single instance where the Board failed to administer a lawful and accurate election. In its submissions before the Superior Court and its brief to this Court, nowhere has the General Assembly pointed to a shred of evidence suggesting that the Board of Elections has failed to perform its duties, much less that the Governor's exercise of

executive power to appoint and supervise the Board warrants the gridlock-by-design “solution” proposed in Senate Bill 749.

In its brief, the General Assembly says that it is entitled “to question and try different solutions.” Leg. Defs.’ Br. p. 22. But conspicuously missing from that statement about “solutions” is an identification of a legitimate *problem*.<sup>3</sup> And the absence of any legitimate problem only proves the point: Senate Bill 749 is not legislation that is designed to solve a real problem. Instead, it is the General Assembly’s latest attempt at a power grab.

The reality, as described below, is that not only is the State Board of Elections not in need of a “solution” for a nonexistent problem, but the opposite is true. For 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.<sup>4</sup>

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<sup>3</sup> The closest the General Assembly gets is talking in generalities—“minimiz[ing] political heavy handedness,” “insulat[ing] the elections boards from political influence, [and] promot[ing] compromise rather than polarity”—but without citing to a single, actual example of where any of this actually occurred. See Leg. Defs.’ Br. pp. 4–5.

<sup>4</sup> The same is true for North Carolina’s county boards of elections. Those five-member boards are appointed by the Governor, who appoints the chair, and by the State Board of Elections, which appoints the other four members (two from each party).

**B. For nearly 125 years, the Board of Elections has faithfully ensured that our elections are lawful and accurate.**

Since the Board's creation in 1901, twenty-five Governors have appointed and supervised its members.<sup>5</sup> Over the course of these nearly 125 years, the Board of Elections has faithfully ensured lawful and accurate elections for North Carolina's voters, even when the election outcome might not have been what the Governor desired.

North Carolina's history is replete with these examples, and many of them are recent enough to remember quite well. Many of them are also those that the former Governors experienced firsthand.

Perhaps most notably, in 2016 the Board of Elections (appointed and supervised by Governor McCrory) administered the closest gubernatorial election in state history.<sup>6</sup> Demonstrating the Board's ability to function in even the most heightened of political atmospheres, the Board concluded that

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<sup>5</sup> The Board was briefly placed under the Department of the Secretary of State in 1971, but that legislation was repealed in 1973. *See* N.C. Sess. Law 1971-864, § 4(5) (repealed 1973) (App. 5–7); N.C. Sess. Law 1973-1409 (App. 8). The General Assembly also enacted legislation altering the Board in late 2016 and early 2017 that was struck down as unconstitutional. *See Cooper*, 370 N.C. at 395, 422, 809 S.E.2d at 100, 116.

<sup>6</sup> Jonah Kaplan & Heather Waliga, *State Board Orders Recount of 94,000 Durham County Votes*, ABC News 11 (Dec. 1, 2016, 8:33 AM), <https://web.archive.org/web/20161201201500/http://abc11.com/politics/state-board-orders-recount-of-94000-durham-county-votes/1631935/>.

although ordering a recount could “ease concerns among the population,” it would “very likely not change the result” that Governor Cooper had won.<sup>7</sup> Five days later, Governor McCrory conceded the election, urging North Carolinians to “celebrate our democratic process” and “respect what [he saw] to be the ultimate outcome”—a result certified by a Board of Elections that Governor McCrory appointed and supervised.<sup>8</sup>

Likewise, the Board’s successful administration of elections involving political party transitions in the Governor’s Office has been characteristic of the Board throughout the last several decades. In 1984, the Board of Elections (appointed and supervised by Governor Hunt) administered the election and certified Governor Martin’s victory that year. In 1992, the Board of Elections (appointed and supervised by Governor Martin) administered the election and certified Governor Hunt’s victory that year. And in 2012, the Board of Elections (appointed and supervised by Governor Perdue, who had

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<sup>7</sup> Official Meeting Minutes, State Board of Elections (Nov. 30, 2016), [https://s3.amazonaws.com/dl.ncsbe.gov/State\\_Board\\_Meeting\\_Docs/2016-11-30/sbe\\_minutes\\_2016-11-30.pdf](https://s3.amazonaws.com/dl.ncsbe.gov/State_Board_Meeting_Docs/2016-11-30/sbe_minutes_2016-11-30.pdf).

<sup>8</sup> Office of Governor Pat McCrory, Governor McCrory Statement on 2016 Election Results, YouTube (Dec. 5, 2016), [https://www.youtube.com/watch?v=cvNSmAZs\\_Hc](https://www.youtube.com/watch?v=cvNSmAZs_Hc); *see also* Danielle Battaglia, Former NC Gov. Pat McCrory Launches Group to Boost Confidence in Elections, *The News & Observer* (Oct. 14, 2024, 8:44 PM), <https://www.newsobserver.com/news/politics-government/election/article293963109.html>.



defeated Governor McCrory in 2008) administered the election and certified Governor McCrory's victory that year.

Even more recently, the Board of Elections showed itself once again to be adept at administering lawful and accurate elections regardless of whether the outcome might disappoint the Governor who appointed and supervised the Board at that time. In 2020, the Board of Elections (appointed and supervised by Governor Cooper) administered the election in which Chief Justice Paul Newby defeated then-Chief Justice Cheri Beasley—a race that was decided by approximately 400 votes.<sup>9</sup> Despite the heavily contested election, both candidates praised the work of the Board of Elections in administering the election lawfully and accurately. Chief Justice Newby specifically thanked the “county boards of elections for their tireless work” in “faithfully and diligently appl[ying] the direction they received through the election, the recount, and the second recount.”<sup>10</sup> Similarly, then-Chief Justice Beasley offered her “deepest thanks to the dedicated Board of Elections

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<sup>9</sup> Press Release, State Board of Elections, State Board Certifies Supreme Court Contest, Removes County Board Member During Final Meeting of 2020 (Dec. 18, 2020), <https://www.ncsbe.gov/news/press-releases/2020/12/18/state-board-certifies-supreme-court-contest-removes-county-board-member-during-final-meeting-2020>.

<sup>10</sup> Chief Justice Paul Newby, Facebook (Dec. 12, 2020), <https://www.facebook.com/JusticePaulNewby/posts/pfbid035W8E9Stom1yQ6mAP1DQ8FiHBFVK8sfdxQ5DTsLcuoWztfGt8Jjpt7NqGUSAYsFpGl>.

officials” who “worked tirelessly to protect and reaffirm the integrity of our most sacred democratic institution.”<sup>11</sup> As both Chief Justice Newby’s and then-Chief Justice Beasley’s public statements made clear, the system worked as it should.

As another example, in 1994 the Board of Elections (appointed and supervised by Governor Hunt) administered a closely contested State Senate election between now-Secretary of State Elaine Marshall and Senator Dan Page. The election did not result in a clear winner, and a recount appeared to have ended in a tie.<sup>12</sup> The Board of Elections then ordered a new election to be conducted in March 1995, which Senator Page won.<sup>13</sup> There as well, although Governor Hunt may have desired a different outcome, the system worked as it should, and this incredibly close election was administered lawfully and accurately.

Nor is there any suggestion that the current Board of Elections appointed and supervised by Governor Cooper has somehow departed from the Board’s exemplary 125-year track record. If anything, the events of the

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<sup>11</sup> @CheriBeasleyNC, Twitter (Dec. 12, 2020), <https://x.com/CheriBeasleyNC/status/1337778604822982657>.

<sup>12</sup> Senate Journal, 1995 Sess., at 11 (N.C. 1995) (App. 28–35).

<sup>13</sup> *Id.*, at 262–63.

past month have only further confirmed that the Board of Elections, with its members appointed and supervised by the Governor, continues to function as it should, effectively meeting even the greatest challenges to administering lawful and accurate elections.

As of the filing of this brief (one week before the 2024 election), the Board of Elections is working around the clock to ensure a lawful and accurate election in the wake of the devastation caused by Hurricane Helene in western North Carolina. Following Governor Cooper's declaration of a state of emergency, the Board of Elections unanimously authorized a series of critical emergency measures ahead of the 2024 election, including authorizing county boards to modify early voting hours, polling locations, and absentee voting procedures to protect the electoral process for voters affected by Hurricane Helene.<sup>14</sup>

The early results of these and other efforts are already a success: In the counties within the federal disaster area, 95% of early voting sites (76 out of

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<sup>14</sup> Michael Perchick, *NC Elections Board Pass Bipartisan Resolution to Support Voting Access in WNC*, ABC 11 News (Oct. 7, 2024, 5:53 PM), <https://abc11.com/post/2024-election-western-nc-voters-access-bipartisan-resolution-helene-recovery/15400078/>; see also Press Release, State Board of Elections, *Bipartisan State Board Unanimously Approves Measures to Help WNC Voters* (Oct. 7, 2024), <https://www.ncsbe.gov/news/press-releases/2024/10/07/bipartisan-state-board-unanimously-approves-measures-help-wnc-voters>.

80) planned before Hurricane Helene were open on the first day of early voting.<sup>15</sup>

These efforts have also drawn bipartisan recognition. The Republican Party Chair for the 11th Congressional District remarked that “[t]he State Board of Elections has done a great job,” and that “[e]very county [board] has done an incredible job.”<sup>16</sup> The Democratic Party Chair for the 11th Congressional District agreed, adding that “[t]he people at the Board of Election[s] . . . are working very hard to make this election go as smoothly as possible.”<sup>17</sup>

As this bipartisan recognition reflects, and as our history shows, our Board of Elections is hardly in need of a “solution,” least of all the unconstitutional, gridlock-by-design “solution” that Senate Bill 749 offers. Instead, for nearly 125 years, the Board of Elections, with its members appointed and supervised by the Governor, has faithfully ensured that our elections are lawful and accurate.

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<sup>15</sup> Press Release, State Board of Elections, Prepared Remarks of Karen Brinson Bell—Press Availability on Start of Early Voting in NC (Oct. 15, 2024), <https://www.ncsbe.gov/news/press-releases/2024/10/15/prepared-remarks-karen-brinson-bell-press-availability-start-early-voting-nc>.

<sup>16</sup> Perchick, *supra* note 14.

<sup>17</sup> *Id.*

\* \* \*

The examples above are just some of the myriad examples of the Board of Elections faithfully administering lawful and accurate elections over the course of nearly 125 years, including when the Governor who appointed and supervised the Board at the time might have desired for an election to come out a different way. Meanwhile, the General Assembly has yet to cite a single, concrete example of a problem that was the motivation for—let alone could justify—Senate Bill 749’s elimination of the Governor’s executive power.

Nor could it. The real motivation for Senate Bill 749 is the General Assembly’s desire to try, yet again, to seize the Governor’s executive power to appoint and supervise the Board of Elections—an attempt that comes after the Supreme Court rejected it the first time and the people of North Carolina overwhelmingly rejected it the second time.

The Court should recognize Senate Bill 749 for what it really is: the legislature’s most recent attempt at an unconstitutional power grab.

### **CONCLUSION**

The three-judge panel’s unanimous decision invalidating Senate Bill 749 should be affirmed.

Respectfully submitted the 29th day of October, 2024.

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This the 29th day of October, 2024.

/s/ Andrew H. Erteschik  
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This the 29th day of October, 2024.

/s/ Andrew H. Erteschik  
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