NO. 24-406 TENTH DISTRICT

NORTH CAROLINA COURT OF APPEALS

****

ROY A. COOPER, III, in his official capacity as GOVERNOR OF THE STATE OF NORTH CAROLINA,

Plaintiff–Appellee,

v.

PHILIP E. BERGER, in his official capacity as PRESIDENT PRO TEMPORE OF THE NORTH CAROLINA SENATE; and TIMOTHY K. MOORE, in his official capacity as SPEAKER OF THE NORTH CAROLINA HOUSE OF REPRESENTATIVES;

Defendant–Appellants,

and the STATE OF NORTH CAROLINA

Defendant–Appellee.

From Wake County
23CV029308-910

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GOVERNOR'S APPELLEE BRIEF

****

ISSUE PRESENTED

I. Did the trial court correctly hold that Senate Bill 749 is facially unconstitutional where the North Carolina Supreme Court has previously invalidated a materially identical statute on separation-of-powers grounds and the people rejected a materially identical constitutional amendment?

INTRODUCTION

The North Carolina Constitution emphatically declares that "[t]he legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other." N.C. CONST. art. I, § 6. "Separating the powers of the government preserves individual liberty by safeguarding against the tyranny that may arise from the accumulation of power in one person or one body." *Cooper v. Berger ("Cooper Confirmation")*, 371 N.C. 799, 804 (2018) (citing Montesquieu, *The Spirit of the Laws* 151–52 (Thomas Nugent trans., Hafner Press 1949)).

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Ignoring our Constitution and controlling precedent, Senate Bill 749 (Session Law 2023-139) eliminates the Governor's power over the State Board of Elections and the county boards of elections, the executive agencies charged with enforcing election laws. Senate Bill 749 thus violates the constitutional guarantee of separation of powers by preventing the Governor from exercising the executive powers vested in him by the North Carolina Constitution, art. III, § 1, and fulfilling his constitutional duty to "take care that the laws be faithfully executed." N.C. CONST. art. III, § 5(4). In place of the Governor, Senate Bill 749 empowers the General Assembly as a whole—and, in certain instances, the House Speaker or Senate President Pro Tempore, acting individually—to exercise that executive power.

This case is not novel or complex, which is why the three-judge panel below unanimously enjoined Senate Bill 749 from taking effect and unanimously granted

summary judgment and a permanent injunction in favor of the Governor. (R pp 100-101, 123-129).

Nonetheless, in an attempt to evade the result mandated by our Constitution's plain language and controlling, settled precedent, Legislative Defendants 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. *See* Leg. Def. Br. pp 29-30 (citing nothing). Resolution of this case, however, only requires application of a basic understanding of civics and constitutional structure: while the legislature enacts substantive election laws, it may not empower itself to enforce those laws.

McCrory provides the analytical framework for assessing when legislation unconstitutionally interferes with gubernatorial power. *State ex rel. McCrory v. Berger*, 368 N.C. 633 (2016). A reviewing court examines the Governor's "control" over executive boards and commissions, which derives from his "ability [1] to appoint the commissioners, [2] to supervise their day-to-day activities, and [3] to remove them from office." *Id.* at 646. "[T]he Governor must have enough control" over agencies exercising "final executive authority" to "perform his constitutional duty" to faithfully execute the laws. *Id.*

It is noteworthy that Senate Bill 749 does not amend any of the substantive election laws found in the hundreds of statute pages that make up Chapter 163 of the General Statutes. Instead, Senate Bill 749 simply replaces the five-member State Board of Elections appointed by the Governor with an eight-member Board of

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Elections appointed entirely by the General Assembly. *See* Session Law 2023-139, § 2.1 (amending N.C. Gen. Stat. § 163-19). And it replaces the five-member county boards of elections appointed by the State Board (four members) and the Governor (one member, who serves as chair) with four-member county boards of elections appointed entirely by the General Assembly. *See id.* § 4.1 (amending § 163-30).

Since 2016, the General Assembly has tried four times to restructure the State Board of Elections in order to control both: (1) the substantive content of our elections law through its lawmaking power; and (2) any decisions made by the Board concerning the execution of that substantive law. These restructuring attempts were decisively rejected by the Supreme Court of North Carolina, three-judge panels of the Superior Court, and—most importantly—the people, who rejected (by a vote of 62% against/38% for) a proposed constitutional amendment restructuring the Board in November 2018. Following each failed attempt, North Carolina has resumed use of the five-member structure that has fairly and efficiently overseen North Carolina's elections since 1901. *See* 1901 Session Law Ch. 89 at p. 244 § 5.

In their Petition for Discretionary Review Prior to Determination by the Court of Appeals, Legislative Defendants recognized that this Court lacks the authority to give them what they really want—reversal of controlling precedent. As Legislative Defendants argued at the time, they are asking "questions only [the Supreme] Court can answer." Pet. p 4. More specifically, Legislative Defendants acknowledged that they could only prevail if binding Supreme Court precedent is "reexamined," "revisit[ed]," or "reevaluate[d]." Pet. pp 4-5, 14. After being rebuffed by the Supreme

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Court, Legislative Defendants quickly changed their tune, now insisting that the Supreme Court *has already done* what they asked. The Court should reject this attempt at a jurisprudential sleight of hand. *See Jacobs v. Physicians Weight Loss Ctr. of Am., Inc.*, 173 N.C. App. 663, 678 (2005) ("[A litigant] will not be permitted to switch horses on his appeal. Nor may he ride two horses going different routes to the same destination." (quoting *Graham v. Wall*, 220 N.C. 84, 94 (1941))).

As a result of previous decisions addressing separation of powers disputes, the applicable constitutional standard is well defined. *See State ex rel. Wallace v. Bone*, 304 N.C. 591 (1982); *McCrory*, 368 N.C. 633 (2016); *Cooper v. Berger ("Cooper BOE")*, 370 N.C. 392 (2018); *Cooper Confirmation*, 371 N.C. at 806-07. Application of that standard, along with this Court's duty to follow binding Supreme Court precedent, *e.g.*, *Dunn v. Pate*, 334 N.C. 115, 118 (1993), necessitates the conclusion that Senate Bill 749 violates the Constitution, and, accordingly, the trial court's judgment must be affirmed.

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STATEMENT OF FACTS

On 10 October 2023, the General Assembly enacted Session Law 2023-139 ("Senate Bill 749"). Both Legislative Defendants and the State admitted in their Answers that the challenged legislation, applicable constitutional provisions, and legal precedent all speak for themselves or that the Governor's allegations state legal conclusions that do not require a response. R pp 75-95 (State's Answer ¶¶ 17–56); R pp 105-111 (Legislative Defendant's Answer ¶¶ 17–38, 44–45, 47–48, 52).

Senate Bill 749 alters the structure of both the State Board of Elections and county boards of elections, completely eliminating the Governor's direct and indirect powers of appointment, supervision, and removal over these boards and giving the General Assembly, or its leadership, the authority to do all of those things. *See* Session Law 2023-139 §§ 2.1, 2.2 (eliminating Governor's power of summary removal), 2.3, 4.1, 4.2. The proposed changes to the State Board are nearly identical to those embodied in a constitutional amendment that was submitted to the people in November 2018 and overwhelmingly rejected. *See* Session Law 2018-133.

I. State Board of Elections

A. Existing Law

Since 1901, the State Board of Elections has consisted of five members, no more than three of whom could be members of the same political party. *See* N.C. Gen. Stat. § 163-19(b) (2022); 1901 Session Law Ch. 89 at p. 244 § 5. The Governor appoints all five members from two lists of four nominees each, submitted, respectively, by the state chairs of each of the two largest political parties in the State. *See* N.C. Gen. Stat. § 163-19(b). The Governor also fills vacancies using a list of nominees provided by the departing member's party's state chair. *Id.* § 163-19(c). The Governor is empowered to summarily remove any member who fails to attend meetings of the State Board. *Id.* § 163-20(d).

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B. Changes Enacted by Senate Bill 749

If allowed to take effect, Senate Bill 749 would change the Governor's ability to ensure faithful execution of the State's election laws through the State Board of Elections in six ways.

First, Senate Bill 749 completely eliminates the Governor's power to appoint Board members and transfers it to the General Assembly. Session Law 2023-139 § 2.1 (amending § 163-19). All eight members are "appointed by an act of the General Assembly," with those appointments being split between the legislature's majority and minority parties. Session Law 2023-139 § 2.1 (amending § 163-19). The President Pro Tempore and Speaker of the House each recommend two appointments, and the minority leader of the Senate and minority leader of the House of Representatives each recommend two appointments. *Id.*

Second, the bill increases the total membership of the State Board of Elections from five to eight, as was the case with the board proposed in the unsuccessful 2018 constitutional amendments. *See* Session Law 2023-139 § 2.1 (amending N.C. Gen. Stat. § 163-19(b)); Session Law 2018-133 (rejected amendments). Changing the Board to consist of an even number of members divided equally between the two largest political parties increases the likelihood that the Board will be deadlocked and unable to execute the laws. *See Cooper BOE*, 370 N.C. at 420–21 (recognizing that creation of board whose membership was evenly split between two parties created "deadlocked structures").

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Third, Senate Bill 749 eliminates the Governor's ability to fill vacancies on the State Board. Instead, it provides that the General Assembly will fill each vacancy. *Id.* (amending § 163-19(c)).

Fourth, Senate Bill 749 eliminates the Governor's power to remove any member of the State Board who fails to attend its meetings. *Id.* § 2.2 (amending § 163-20(d)). Senate Bill 749 is silent about whether members of the State Board can be removed and, if so, who is empowered to remove them.

Indeed, with the elimination of gubernatorial removal for lack of attendance, Senate Bill 749 further increases the risk that the State Board will be unable to function given that Senate Bill 749 requires a supermajority of six members to override a decision by the chair not to hold a meeting. *Id.* (amending § 163-20(a)).

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Fifth, Senate Bill 749 empowers the General Assembly, for all practical purposes, to appoint the chair and Executive Director of the State Board. If for any reason (including deadlock) the State Board cannot elect a chair or Executive Director for 30 days or more, either the President Pro Tempore or the Speaker (depending on the calendar year) is empowered to select:

- The chair of the State Board. *See id.* § 2.1 (amending § 163-19(e)).
- The Executive Director of the State Board. *See id.* § 2.5 (amending § 163-27(b)).

Finally, if the State Board wishes to employ private legal counsel, the General Assembly, rather than the Governor, must approve that decision. *Id.* § 2.4 (amending § 163-25(c)).

II. County Boards of Elections

If allowed to take effect, Senate Bill 749 also would impact the Governor's ability to ensure that county boards of elections faithfully execute the law.

A. Existing Law

County boards are composed of five members (one appointed by the Governor and four appointed by the State Board), with the State Board required to appoint two members each from two lists of three nominees provided by each political party with the highest and second highest number of registered affiliates (i.e., the Democratic and Republican parties). N.C. Gen. Stat. §§ 163-22(c); 163-30(a), (c). The Governor appoints the chair of each county board. *Id.* § 163-30(a). The State Board can remove any county board member for cause and fill the resulting vacancy. *Id.* § 163-22(c).

B. Changes Enacted by Senate Bill 749

Senate Bill 749 would have reduced the size of county boards of election to four members. *Id.* § 4.1 (amending N.C. Gen. Stat. § 163-30(a)).

Under Senate Bill 749, the Governor has no authority to appoint or remove any member of a county board of elections. *See id.* § 2.3 (amending § 163-22(c)). Instead, members of the General Assembly appoint all county board members, with the President Pro Tempore of the Senate, the Speaker of the House of Representatives, the minority leader of the Senate, and the minority leader of the House of Representatives each recommending one member. *Id.* § 2.3 (amending § 163-22(c)); *id.* § 4.1 (amending § 163-30(a)). Like the restructured State Board, these changes increase the risk that county boards will deadlock.

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The State Board—which, as detailed above, has all its members appointed by the General Assembly—is empowered to remove county board members for cause. *See id.* §§ 2.1, 2.3.

For 2024, new county board members would have been appointed on or after January 1, 2024 to serve—instead of the standard two-year term—a three-and-a-half-year term "until the last Tuesday in June of 2027." *Id.* § 4.4.

Starting in 2027, new county boards would be seated on the last Tuesday in June. *See id.* (amending § 163-30(a)). The county board must select a chair no later than 15 days after the first county board meeting in July. *Id.* (enacting § 163-30(c1)). If a county board deadlocks and is unable to select its chair "within 15 days after the first meeting in July," either the President Pro Tempore or the Speaker (depending on the calendar year) makes the selection. *See id.* (enacting § 163-30(c1)). And if a county board deadlocks and is unable to select a county director of elections, the Executive Director of the State Board makes the selection. *Id.* § 4.2 (amending § 163-35(b1)).

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If in session, the General Assembly also fills any vacancies on county boards. *Id.* § 4.1 (amending § 163-30(d)). If the General Assembly "has adjourned for more than 10 days," the individual legislator with appointing authority over the seat fills the vacancy "via a letter." *Id.*

III. The General Assembly has made four unsuccessful attempts to empower itself by restructuring the State Board of Elections.

Senate Bill 749 is the General Assembly's fifth attempt to take control of the State Board of Elections in less than a decade. Each prior attempt was rejected by either the courts or the people.

First attempt. "On 16 December, 2016, the General Assembly enacted Senate Bill 4 and House Bill 17 [Session Laws 2016-125 and 2016-126]." *Cooper BOE*, 370 N.C. at 395. Had they taken effect, these laws would have abolished the existing State Board of Elections and created a new "Bipartisan State Board of Elections and Ethics Enforcement." *Id.* The new board would have consisted of four members appointed by the Governor, two members appointed by the General Assembly upon the recommendation of the Speaker, and two members appointed by the General Assembly upon recommendation of the President Pro Tempore. Session Law 2016-125 § 2.(c). The Governor, Speaker, and President Pro Tempore were each required to make their appointments from a list of nominees provided by the State chairs of the two largest political parties, and were required to divide their appointments equally between the two parties. *Id.* As a result, the new board's membership would have been equally divided between the two largest parties, each of whom would have had four members. That legislation was struck down by a three-judge panel of the Superior Court, Wake County. *Cooper BOE*, 370 N.C. at 395.

Second attempt. The General Assembly then enacted Session Law 2017-6, which, among other things, required the Governor to appoint eight members to a new version of the state elections board by selecting four members each from lists supplied

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by the chairs of the Republican and Democratic parties. *Cooper BOE*, 370 N.C. at 396. Thus, although the Governor had the nominal authority to appoint all eight members of the board, the legislation ensured that the Governor could not appoint a majority of members who shared the Governor's views and priorities.

The Supreme Court found the restructured elections board unconstitutional because it

> le[ft] the Governor with little control over the views and priorities of the Bipartisan State Board, by requiring that a sufficient number of its members to block the implementation of the Governor's policy preferences be selected from a list of nominees chosen by the leader of the political party other than the one to which the Governor belongs, limiting the extent to which individuals supportive of the Governor's policy preferences have the ability to supervise the activities of the Bipartisan State Board, and significantly constraining the Governor's ability to remove members of the Bipartisan State Board.

370 N.C. at 416 (cleaned up). The Court reiterated the analytical framework from *McCrory*, explaining that the Governor's ability to ensure faithful execution of the laws by executive agencies like the State Board depended on his or her ability to appoint the commissioners, supervise their day-to-day activities, and remove them from office. *See id* at 414-16.

Third attempt. After *Cooper BOE*, the General Assembly enacted the "2018 Legislation" (i.e., Part VII of Session Law 2018-2 and the portions of Session Law 2017-6 that were not struck down in *Cooper BOE*), which sought to establish a nine-member State Board with all members appointed by the Governor: four from a list of six nominees supplied by the State Democratic party chair; four from a list of six nominees supplied by the State Republican party chair; and one from a list of two

nominees (not registered as a Democrat or Republican) made by the other eight members. The 2018 Legislation also created evenly split county boards of election appointed by the State Board, containing two members from each major party, and mandated that the chair of each county board be a Republican in every year that Presidential, gubernatorial, and Council of State elections are held.

A three-judge trial court panel held that, "when analyzed collectively and in their entirety, all of the foregoing provisions combine to strip the Governor of the requisite control mandated by *Cooper* and *McCrory*, and that the Acts thus prevent the Governor from fulfilling his core duty of taking care that the State's election laws are faithfully executed." *See* Order ¶ 79, *Cooper v. Berger*, 18 CVS 3348 (N.C. Super. Ct. Wake County, Oct. 16, 2018).

Fourth Attempt. In the summer of 2018, the General Assembly proposed constitutional amendments. *See* Session Law 2018-117. Among other things, the amendments would have created an eight-member State Board with four members appointed upon the recommendation of the President Pro Tempore from nominees submitted by the majority and minority leaders of the Senate, and four upon the recommendation of the Speaker from nominees submitted by the majority and minority leaders of the House of Representatives. *See id.* § 1. The President Pro Tempore and Speaker were limited to two nominations each, meaning that the State Board would have had four members from one party and four members from the other.

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In a parallel amendment, the General Assembly proposed to amend the separation of powers clause to expressly grant itself control of "the powers, duties, responsibilities, appointments, and terms of office of any board or commission prescribed by general law." *See id.* § 2.

Finally, the General Assembly proposed to amend the Governor's faithful execution and appointment powers set forth in Section 5 of Article III of the North Carolina Constitution to subject them to legislative control. *See id.* § 4. The General Assembly carefully omitted any description of the proposed amendments' destruction of executive power from the ballot language that voters would have seen. The Governor (among other parties) challenged that deceptive ballot language, which a three-judge panel enjoined from use at the November 2018 election. *See Cooper v. Berger*, Wake County 18 CVS 9805, Order on Injunctive Relief (Aug. 21, 2018).

After issuance of the injunction, the General Assembly simply withdrew the misleading ballot language and proposed amendments. *See Cooper v. Berger*, Wake County 17 CVS 6465, Notice of Withdrawal of Constitutional Amendments Providing Basis for Legislative Defendants' Motion to Stay (filed Aug. 29, 2018). Instead, the General Assembly submitted a constitutional amendment creating a new State Board echoing the board structure invalidated in *Cooper BOE*—i.e., an eight-member board with the Governor appointing four members recommended by the Democratic and Republican Senate leaders and four members recommended by the Democratic and Republican House leaders. Session Law 2018-133.

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The voters rejected that amendment by a vote of 2,199,787 against (62%) and 1,371,446 for (38%). *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.

ARGUMENT

I. STANDARD OF REVIEW

Summary judgment is reviewed *de novo*. *See N.C. Farm Bureau Mut. Ins. Co., Inc. v. Herring*, 385 N.C. 419, 422, (2023). For constitutional disputes, courts "look to the text of the constitution, the historical context in which the people of North Carolina adopted the applicable constitutional provision, and our precedents." *McCrory*, 368 N.C. at 639.

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Legislative acts are presumed constitutional and will not be declared unconstitutional unless the violation is "plain and clear." *E.g., id.* "The presumption of constitutionality is not, however, and should not be, conclusive." *Moore v. Knightdale Bd. of Elections*, 331 N.C. 1, 4 (1992). And the presumption *does not* mean that the legislation can violate the North Carolina Constitution "only a little bit" and retain its validity. Legislation that *authorizes* a constitutional violation is unconstitutional, *even if that authority is not exercised*. *See Lang v. Carolina Land & Development Co.*, 169 N.C. 662 (1915).

For this reason, *McCrory* focused on how the challenged legislation allocated power between the General Assembly and the Governor. *See* 368 N.C. at 645–47.

McCrory made clear that the reviewing court "must examine the degree of control that the challenged legislation *allows* the General Assembly to exert" rather than whether the General Assembly actually exerted that control. *Id.* at 647 (emphasis added). *Cooper BOE* similarly examined "the manner in which the membership" of the executive board "is structured and operates" under the challenged legislation. 370 N.C. at 418.

Thus, to analyze whether a legislative act violates separation of powers, the reviewing court must examine the governmental structures created by the legislation and how they impact the powers and duties of the affected branches. *See McCrory*, 368 N.C. at 645–47; *cf. Carr v. Coke*, 116 N.C. 223, 234–35 (1895) ("It is the province and duty of the Court to construe and interpret legislative acts, and see if they disregard or violate any provision of the Constitution, and if so found, to declare them invalid, and *this is done upon the face of the act itself*." (emphasis added)).

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This Court is, of course, bound by the holdings of the Supreme Court. *Dunn*, 334 N.C. at 118. If this matter reaches the Supreme Court, the Governor will argue that the legislature is not entitled to a presumption of constitutionality in separation-of-powers cases, especially where, as here, it knowingly enacted an unconstitutional statute.

II. SENATE BILL 749 IS FACIALLY UNCONSTITUTIONAL.

Remarkably, in an opening brief that purports to direct this Court to focus on the text of the Constitution, Legislative Defendants fail to cite or quote the guarantee of separation of powers that sits at the heart of this case. Ignoring the plain text of

our Constitution does not change what it says: "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.

In analyzing whether board and commission structures violate separation of powers, the starting point is the plain text of the North Carolina Constitution, which obligates and empowers the Governor to ensure "that our laws are properly enforced." *Cooper Confirmation*, 371 N.C. at 799-800 (citing N.C. Const. art. III, § 5(4)). Our Constitution expressly vests "[t]he executive power of the State" in the Governor, and only the Governor. N.C. CONST. art. III, § 1. And only "[t]he Governor shall take care that the laws be faithfully executed." *Id.* art. III, § 5(4). The duty of faithful execution is "a core power of the executive" that separation of powers protects from disruption. *McCrory*, 368 N.C. at 645.

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Legislative Defendants acknowledge that the "clear [constitutional] text" invalidating Senate Bill 749 "is Article III, § 5(4)—that the Elections Board composition violates [gubernatorial] power to take care that laws are faithfully executed," though they sidestep that constitutional language and disregard the precedent enforcing it. Leg. Def. Br. p 26.

But, as Chief Justice Martin wrote for a unanimous Supreme Court, "[t]he Governor is our state's chief executive. He or she bears the ultimate responsibility of ensuring that our laws are properly enforced." *Cooper Confirmation*, 371 N.C. at 799. And as this Court has summarized, the Governor "is a constitutional officer elected by the qualified voters of the state. N.C. CONST. art. III, § 2. The executive power of

the state is vested in him. N.C. CONST. art. III, § 1. And he has the duty to supervise the official conduct of all executive officers." *Tice v. Dep't of Transp.*, 67 N.C. App. 48, 49 (1984) (also citing N.C. Gen. Stat. § 147-12(1)).

Under our constitutional structure, the Governor must have sufficient authority over executive agencies like the State and county boards of elections to ensure that the substantive laws passed by the legislature are faithfully executed. Contrary to Legislative Defendants' audacious argument that the General Assembly may delegate the faithful execution of the laws to someone other than the Governor, Leg. Def. Br. pp 30-31, or "devise[]" the "way to execute and administer the laws for North Carolina," *id.* p 15, our Constitution is clear. *See* N.C. CONST. art. III, §§ 1, 5(4). Ensuring the faithful execution of the laws is the "distinctive purpose" of the executive branch and the core of the Governor's authority. *See McCrory*, 368 N.C. at 635; *see also, e.g., State v. English*, 5 N.C. 435, 435 (1810) ("The Governor represents the supreme executive power of the State, and according to the theory of our Constitution, is bound to attend to the due enforcement and execution of the laws.").

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A. The North Carolina Constitution prohibits legislation that deprives the Governor of control sufficient to ensure the faithful execution of the laws by executive agencies.

The 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—has been the subject of three North Carolina Supreme Court opinions since the early 1980s.

1. *Wallace v. Bone*

State ex rel. Wallace v. Bone, 304 N.C. 591 (1982), addressed whether "legislation providing for four members of our General Assembly to serve on the" Environmental Management Commission complied with separation of powers. *Id.* at 607. After examining the history of separation of powers and considering its application in other states, the Supreme Court unanimously held "that the legislature cannot constitutionally create a special instrumentality of government to implement specific legislation and then retain some control over the process of implementation by appointing legislators to the governing body of the instrumentality." *Id.* at 608. "In other words," when serving as members of the Environmental Management Commission, "legislators were wielding executive power, which violated the per se rule prohibiting one branch of government from exercising powers vested exclusively in another branch." *Cooper Confirmation*, 371 N.C. at 805 (discussing *Wallace*).

2. *McCrory v. Berger*

After *Wallace*, both the General Assembly and Governor appeared to understand that the North Carolina Constitution protected executive power from legislative encroachment. It was not until the 2010s that another separation of powers dispute ripened into litigation, when Governor McCrory "challenge[d] legislation that authorize[d] the General Assembly to appoint a majority of the voting members of three administrative commissions." *McCrory*, 368 N.C. at 636. Our Supreme Court found that the General Assembly's appointment of the majority of members of the three commissions, each of which exercised final executive authority,

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left the "Governor with little control over the views and priorities" of those commissions. *Id.* at 647.

Writing for six justices (three Democratic and three Republican), Chief Justice Martin explained, "The clearest violation of the separation of powers clause occurs when one branch exercises power that the Constitution vests exclusively in another branch. Other violations are more nuanced, such as when the actions of one branch prevent another branch from performing its constitutional duties." *Id.* at 645 (citations omitted). "When we assess a separation of powers challenge that implicates the Governor's constitutional authority, we must determine whether the actions of a coordinate branch 'unreasonably disrupt a core power of the executive.'" *Id.* (quoting *Bacon v. Lee*, 353 N.C. 696, 717 (2001)). With respect to executive boards and commissions, the "core power" at issue is the heart of executive authority—the Governor's exclusive right to ensure faithful execution of the laws. *Id.* The Governor's constitutional responsibilities were implicated in *McCrory* because the boards and commissions at issue there had "final authority over executive branch decisions," including classifications and closure plans for coal ash impoundments, mining permit decisions, and oil and gas-related penalties. *Id.* at 645–46. "In light of the final executive authority that these three commissions possess, the Governor must have enough control over them to perform his constitutional duty." *Id.* at 646.

The *McCrory* framework for assessing the Governor's "control" over executive boards and commissions focuses on the Governor's "ability to appoint the commissioners, to supervise their day-to-day activities, and to remove them from

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office." *Id.* at 646. *McCrory* laid down a black letter principle of law guiding the application of that framework: "the Governor must have enough control" over an agency exercising "final executive authority" so as to "perform his constitutional duty" to faithfully execute the laws. *Id.*

Chief Justice Martin explained the core holding of the Court:

> When the General Assembly appoints executive officers that the Governor has little power to remove, it can appoint them essentially without the Governor's influence. That leaves the Governor with little control over the views and priorities of the officers that the General Assembly appoints. *When those officers form a majority on a commission that has the final say on how to execute the laws, the General Assembly, not the Governor, can exert most of the control over the executive policy that is implemented in any area of the law that the commission regulates.* As a result, the Governor cannot take care that the laws are faithfully executed in that area. 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. *See Bacon*, 353 N.C. at 717–18, 549 S.E.2d at 854; *Wallace*, 304 N.C. at 608, 286 S.E.2d at 88; *see also* N.C. CONST. art. III, § 5(4).

Id. at 647 (emphasis added). In referencing executive policy, Chief Justice Martin recognized, like the General Assembly, the Governor's responsibility to "formulat[e] and administer[] the policies of the executive branch of the State government." N.C. Gen. Stat. § 143B-4. In short, the North Carolina Constitution prohibits the General Assembly from exercising "most of the control over executive policy" created by boards and commissions like the State Board of Elections. 368 N.C. at 647.

3. *Cooper v. Berger (Cooper BOE)*

Despite the clear holding of *McCrory*, the General Assembly continued to attack separation of powers after Governor Cooper was elected.

In *Cooper BOE*, the Supreme Court rejected, on separation of powers grounds, a restructuring of the State Board of Elections nearly identical to the one at issue here. First, the Court reaffirmed *McCrory's* analytical framework, explaining that the Governor's ability to ensure faithful execution of the laws by executive agencies like the State Board depended on his or her "ability to appoint the commissioners, to supervise their day-to-day activities and to remove them from office." 370 N.C. at 414 (internal quotation marks omitted).

Next, the Court described the exact nature of the executive power that our Constitution reserves to the Governor, as it relates to boards and commissions exercising final executive authority. The duty of faithful execution "contemplates that the Governor will have the ability to affirmatively implement the policy decisions that executive branch agencies subject to his or her control are allowed, through delegation from the General Assembly, to make[.]" *Id.* 414–15.

The Court concluded that the General Assembly's restructuring of the State Board left "the Governor with little control over the views and priorities of" board members by depriving the Governor of the ability to appoint a majority of members who shared his views, "limiting the extent to which individuals supportive of the Governor's policy preferences have the ability to supervise the [Board's] activities," and "significantly constraining the Governor's ability to remove members." *Id.* at 416. The Court affirmed that the Governor's duty of faithful execution, protected by separation of powers, prevents the General Assembly from "structur[ing] an executive branch commission in such a manner that the Governor is unable, within

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a reasonable period of time, to 'take care that the laws be faithfully executed[.]'" *Id.* at 418.

* * * * *

After *Wallace*, *McCrory*, and *Cooper BOE*, there can be no doubt that the North Carolina Constitution renders unconstitutional statutory enactments that purport to eliminate the Governor's ability to appoint, supervise, and remove a majority of members of boards and commissions exercising final executive authority.

B. Senate Bill 749 deprives the Governor of constitutionally sufficient control over the executive agencies that enforce election laws.

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In order to fulfill the Governor's constitutional duties and conform with separation-of-powers principles, the Governor must have sufficient power over administrative bodies that have final executive authority like the State Board and county boards. *McCrory*, 368 N.C. at 646; *Cooper BOE*, 370 N.C. at 418. Because the challenged provisions of Senate Bill 749 violate these principles, they were properly invalidated by the trial court.

Senate Bill 749 is even more invasive of gubernatorial authority than the legislation at issue in *McCrory* and *Cooper BOE*. Senate Bill 749 directly empowers the General Assembly or its leadership to select *all* members of the State Board and county boards, creates deadlocked structures likely to empower the legislative leadership to select the State Board chair and Executive Director, eliminates the Governor's power to remove members of the State Board for failing to attend

meetings, obliterates the Governor's power to select county board chairs, and eviscerates the Governor's ability to fill vacancies. *See* Session Law 2023-139.

This Court's task is straightforward. It is long- and well-settled that "lower courts" must "respect and observe the decisions of th[e] [North Carolina Supreme C]ourt until they are overruled or reversed." *Hill v. Atl. & N.C.R. Co.*, 143 N.C. 539, 588 (1906). This Court "has no authority to overrule decisions of the Supreme Court and has the responsibility to follow those decisions until otherwise ordered by the Supreme Court." *Dunn v. Pate*, 334 N.C. 115, 118 (1993) (internal quotation marks and brackets omitted) (quoting *Cannon v. Miller*, 313 N.C. 324 (1985) (per curiam)).[1] Even the Supreme Court does not overrule itself lightly. As Chief Justice Newby has explained, "The principle of stare decisis directs this Court to adhere to its long-established precedent to provide consistency and uniformity in the law." *West v. Hoyle's Tire & Axle, LLC*, 2022-NCSC-144, ¶ 18, 383 N.C. 654, 659.

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In assessing this appeal, the Court first considers whether the State Board and county boards possess executive authority such that the Governor is entitled to control them. *See Wallace*, 304 N.C. at 606–07 (first considering whether the "duties

[1] Because existing Supreme Court precedent controls, Legislative Defendants suggestion that "Article III, Section 5(4) is not [an] express textual limitation of the Legislature's ability to organize and appoint administrative offices" necessarily fails. *Compare* Leg. Def. Br. p 6, *with, e.g., McCrory*, 368 N.C. at 645 ("In the current constitution, Article III, Section 5(4) gives the Governor the duty to 'take care that the laws be faithfully executed.' The challenged legislation implicates this constitutional duty . . .") *and Cooper BOE*, 370 N.C. at 411 ("[T]he authority granted to the General Assembly pursuant to Article III, Section 5(10) is subject to other constitutional limitations, including the explicit textual limitation contained in Article III, Section 5(4)." (footnotes omitted)) (rejecting Legislative Defendants' political question argument).

of the EMC are administrative or executive in character"). Next, the Court considers whether the General Assembly has unconstitutionally encroached on the Governor's authority over the State Board and county boards. *McCrory*, 368 N.C. at 646; *Cooper BOE*, 370 N.C. at 418. The answer to both questions is unequivocally yes.

1. The State Board of Elections and county boards of elections are executive agencies.

Our Supreme Court has concluded that the State Board is primarily administrative or executive in character. *Cooper BOE*, 370 N.C. at 415. Given that neither Senate Bill 749 nor any other statute has altered the nature of the State Board's functions, powers, and duties, it remains so today. For example, the State Board of Elections has "general supervision over the primaries and elections in the State," including the 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"; prepare and print ballots, including determining their form and content; certify election results; and exercise certain emergency powers. *See, e.g.*, N.C. Gen. Stat. §§ 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; *Cooper BOE*, 370 N.C. at 415 ("The Bipartisan State Board established by Session Law 2017-6, which has responsibility for the enforcement of laws governing elections, campaign finance, lobbying, and ethics, clearly performs primarily executive, rather than legislative or judicial, functions.").

Likewise, the county boards of elections undertake executive functions, such as administering elections on the county level, appointing and removing board

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employees, preparing ballots, developing budgets, and issuing certificates of election. N.C. Gen. Stat. § 163-33(6)–(11).

Accordingly, the State Board and county boards of election are executive agencies because their functions are "primarily administrative or executive in character" and they have "final authority over executive branch decisions." *McCrory*, 368 N.C. at 645–46. Because the State Board and county boards are executive agencies with final executive authority, the Governor must be able to appoint, supervise, and remove a majority of the State Board and county boards in order to "perform his express constitutional duty to take care that the laws are faithfully executed." *Id.*; *Cooper BOE*, 370 N.C. at 414.

2. Senate Bill 749 violates separation of powers by usurping the Governor's authority over executive agencies.

Senate Bill 749 directly violates the Constitution by empowering the General Assembly (as a whole) and the Speaker or President Pro Tempore (acting individually) to exercise ***all*** the authority to appoint, supervise, and remove members of the State and county boards of elections. *See Cooper BOE*, 370 N.C. at 414; *McCrory*, 368 N.C. at 645. Senate Bill 749 effectively transfers the constitutional duty of ensuring faithful execution from the Governor to the General Assembly and its leadership.

If it were ever allowed to take effect, Senate Bill 749 would prevent the Governor from fulfilling his constitutional duties as the head of the State's executive branch by, *inter alia*:

- Abolishing and disbanding the existing State Board of Elections. Session Law 2023-139 § 2.1 (amending N.C. Gen. Stat. § 163-19(b)); *id.* § 2.6.
- Legislatively appointing *all* eight members of the newly constituted State Board of Elections. *Id.*
- Legislatively appointing all members of county boards of elections. *Id.* § 4.1 (amending § 163-30(a)).
- Authorizing the General Assembly or, in certain circumstances, individual legislators, to fill vacancies. *Id.* § 2.1 (amending § 163-19(c), (e)).
- Eliminating the Governor's statutory power of removal. *Id.* § 2.2 (amending § 163-20(d)); *see also* N.C. Gen. Stat. § 143B-2 (Executive Organization Act of 1973 is not expressly applicable to State Board).
- Authorizing either the Speaker or the President Pro Tempore to effectively appoint the State Board chair and select its Executive Director if such positions are not quickly filled by the Board itself. Session Law 2023-139 § 2.1 (amending § 163-19(e)); § 2.5 (amending § 163-27(b)).
- Authorizing either the Speaker or the President Pro Tempore to effectively appoint the chair of each county board if a chair is not selected by the county board itself. *Id.* § 4.1 (enacting § 163-30(c1)).

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- Empowering the Executive Director (who is likely appointed by the legislature) to select each county's director of elections if the county board of elections deadlocks. *Id.* § 4.2 (enacting § 163-35(b1)).
- Evenly dividing both the State Board and county boards so as to increase the chances of deadlock and inaction, including in the selection of the chairs and Executive Director. *Id.* §§ 2.1, 4.1
- Requiring legislative—not gubernatorial—approval to hire outside legal counsel. *Id.* § 2.4 (amending § 163-25(c)).

The above-detailed constitutional harms are not speculative or theoretical; they *will* exist the moment that Senate Bill 749 takes effect. If that ever happens, the General Assembly will have both enacted the election laws and assumed control over their execution, in plain violation of separation of powers. *See Cooper Confirmation*, 371 N.C. at 804–05; *Cooper BOE*, 370 N.C. at 414; *McCrory*, 368 N.C. at 645.

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Senate Bill 749 goes even further than the legislation held unconstitutional in *Cooper BOE* by *entirely* eliminating the Governor's appointment, supervision, and removal authority for the State Board and the county boards of elections. Thus, Senate Bill 749 violates our Constitution by preventing the Governor from fulfilling his core constitutional duty to ensure faithful execution of the election laws. *See* N.C. CONST. art. I, § 6; *id.* art. III, §§ 1, 5(4); *Cooper Confirmation*, 371 N.C. at 804–05; *Cooper BOE*, 370 N.C. at 414, 418; *McCrory*, 368 N.C. at 645-46.

III. *COOPER BOE* FORECLOSES LEGISLATIVE DEFENDANTS' POLITICAL QUESTION ARGUMENT.

Legislative Defendants primarily argue that *Harper v. Hall*, 384 N.C. 292 (2023), renders Senate Bill 749's constitutionality an unreviewable political question. *See* Leg. Def. Br. pp 5-23. *Harper* found that "partisan gerrymandering claims present a political question that is nonjusticiable under the North Carolina Constitution." *Harper*, 384 N.C. at 300. After considering *Harper* and noting that it did not announce a new standard for determining "whether an issue is a nonjusticiable political question," the trial court panel, in a short, plain statement, analyzed the political question issue and found the claims regarding Senate Bill 749 "justiciable as a matter of law." (R p 127 ¶¶ 8-10).[2]

Even assuming the existence of a principled basis to distinguish the justiciability of this case from their appeal in *Cooper v. Berger*, COA 24-440, Legislative Defendants still cannot invoke *Harper* and render the constitutional guarantee of separation of powers unenforceable, for three main reasons.

First, *Harper* did not change the political question doctrine because it acknowledges that where there is "an express, textual limitation on the legislature," the matter can be adjudicated. 384 N.C. at 325. Such a limitation is clearly present here. Article I, Section 6's guarantee of separation of powers and Article III, Section

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[2] Despite the many pages of briefing they devote to it, Legislative Defendants appear to concede their political question argument lacks merit. In their 1 October 2024 appellants' brief in the related appeal (*Cooper v. Berger et al.*, COA 24-440), Legislative Defendants have not argued that similar separation-of-powers issues involve a nonjusticiable political question.

1 and Section 5(4)'s assignment to the Governor—alone—of the supreme executive power and duty to "take care that the laws be faithfully executed" constitute an "express, textual limitation on the legislature," suitable for judicial interpretation. *McCrory* recognized and enforced such a limitation. *See, e.g.*, 368 N.C. at 645-646 ("In the current constitution, Article III, Section 5(4) gives the Governor the duty to 'take care that the laws be faithfully executed.' The challenged legislation implicates this constitutional duty . . . . In light of the final executive authority that these . . . commissions possess, the Governor must have enough control over them to perform his constitutional duty.").

Second, *Cooper BOE* did not "ignore[] the political question." Leg. Def. Br. p 11. To the contrary, the Supreme Court squarely addressed and rejected Legislative Defendants' argument, holding, "the [separation of powers] claim asserted in the Governor's complaint does not raise a nonjusticiable political question. . . ." *Cooper BOE*, 370 N.C. at 422. Nothing in *Harper* nullified fifty years of constitutional jurisprudence and empowered the legislature to ignore separation of powers. *Harper* did not overrule, abrogate, or otherwise affect *Cooper BOE*'s political question holding. In fact, none of the *Harper* opinions (majority or dissent) cite or mention—let alone discuss, analyze, or cast doubt upon—*Cooper BOE*. *See Harper*, 384 N.C. 292. As *Wallace*, *McCrory*, *Cooper BOE*, *Cooper Confirmation*, and the litigation over block grants shows, *Cooper v. Berger* ("*Cooper Block Grants*"), 376 N.C. 22 (2020), seventeen justices of the North Carolina Supreme Court, elected from both sides of the aisle, have found separation-of-power disputes to be justiciable.

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Finally, the General Assembly's power to enact the laws, including those that delegate limited authority to executive agencies, is well-settled. *See, e.g.*, N.C. Const art. II, § 1; art. III, § 5(10); *Adams v. N. Carolina Dep't of Nat. & Econ. Res.*, 295 N.C. 683, 696-97 (1978). Despite Legislative Defendants' attempts to muddy the waters, nothing in the present action challenges the legislature's authority to prescribe the functions and duties of executive agencies and even, within constitutional bounds, create and dissolve them.

Nonetheless, Legislative Defendants conflate the legislative power to organize state agencies with the power to manage those agencies once created, 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. The plain text of Section 5(10) recognizes the General Assembly's authority to determine the "functions, powers, and duties" of executive agencies. N.C. CONST. art III, § 5(10). But it does *not* refer to, or apply to, "the General Assembly's ability to . . . *manage* agencies." *See* Leg. Def. Br. p 14 (emphasis added).

Assignment of "functions, powers, and duties" to administrative boards and commissions is distinct from the execution—once assigned—of those functions, powers, and duties. And such assignment is distinct from the question of whether the Governor, as a constitutional matter, has sufficient authority to appoint, supervise, and remove executive officials. *See McCrory*, 368 N.C. at 646. As our Supreme Court has explained, "functions, powers, and duties" relate to what

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executive agencies "are supposed to do, rather than the extent to which the Governor has sufficient control . . . to ensure 'that the laws be faithfully executed.'" *Cooper BOE*, 370 N.C. at 410.

Indeed, Section 5(10) was added to our Constitution through a 1971 amendment "to authorize *the Governor* to reorganize the administrative departments subject to legislative approval." *See* Session Law 1969-932 (emphasis added). Thus, when Legislative Defendants argue that Article III, Section 5(10) is a "textual commitment" to the legislature that closes the courthouse door on heretofore cognizable separation-of-powers claims, they ignore the plain constitutional text and the history of its adoption, which gave power to the Governor, not the General Assembly.

In any event, *nothing* in Senate Bill 749's plain language changes the functions, powers, and duties of the agencies that implement elections in North Carolina. *See supra* pp 25-26. And county boards of elections retain their executive duties to administer elections, appoint and remove board employees, prepare ballots, budget, and issue certificates of election. *E.g.*, N.C. Gen. Stat. § 163-33(6)–(11).

Accordingly, Legislative Defendants' invocation of Article III, Section 5(10) and the political question doctrine is nothing more than a distraction from the actual constitutional issues presented in this case. The political question doctrine does not preclude judicial scrutiny of legislative attempts, like Senate Bill 749, to control both the *enactment and execution* of the law. Legislative Defendants' political question argument fails.

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IV. LEGISLATIVE DEFENDANTS' OTHER ARGUMENTS IGNORE CONTROLLING PRECEDENT AND, IN ANY EVENT, ARE ENTIRELY MERITLESS.

Aside from arguing the political question doctrine and halfheartedly asserting that Senate Bill 749 complies with separation of powers, Legislative Defendants' brief makes a handful of arguments apparently aimed at persuading judges of this Court to act as politicians, rather than as independent constitutional officers sworn to uphold the North Carolina Constitution. *See* N.C. CONST. art. VI, § 7. None of these arguments have merit.

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First, Legislative Defendants assert that their appeal requires this Court to "weigh[] which agency structure is best." Leg. Def. Br. p 6. Acceptance of this argument would put the Court in the place of legislating, rather than interpreting and applying our Constitution and precedent. The Court's authority, however, is limited to determining the constitutionality of Senate Bill 749.

Second, in an attempt to ignore the actual law, Legislative Defendants rely upon dissenting opinions and overruled, non-precedential, and distinguished decisions. *See* Leg. Def. Br. pp. 8, 19 (citing dissents); 17-18 (citing non-precedential opinions in *Melott* and *Goldston*); 16-17, 31 n. 4 (relying on *Cunningham* and *Salisbury*). At the risk of belaboring the obvious, dissents are an expression of disagreement with, rather than a statement of, controlling law.

Legislative Defendants' reliance on *State ex rel. Salisbury v. Croom*, 167 N.C. 223 (1914) and *Cunningham v. Sprinkle*, 124 N.C. 638 (1899), fares no better. According to Legislative Defendants, these decisions show that "[g]ubernatorial

appointment power, much less exclusive control of agency authority, is not historically found in the obligation of the Governor to take care that the laws are executed faithfully" and that Article III, Section 5(4) does not create "an explicit limitation on the General Assembly's authority to organize and structure state agencies." Leg. Def. Br. pp 17, 18. Legislative Defendants' arguments run headlong into *McCrory*, which explained:

> Under the rule that defendants advance, the General Assembly could appoint every statutory officer to every administrative body, even those with final executive authority, and could prohibit the Governor from having any power to remove those officers. This rule would nullify the separation of powers clause, at least as it pertained to the General Assembly's ability to control the executive branch.
>
> *Our appointment cases do not embrace defendants' proposed rule. Many do not even involve separation of powers challenges. See, e.g., Salisbury*, 167 N.C. at 227, 83 S.E. at 355 . . .
>
> Those appointment cases that do involve separation of powers challenges do not establish the proposed rule either. . . . Notably, *Cunningham* and *McIver* both conclude that appointing statutory officers is not an exclusively executive prerogative. *See Cunningham*, 124 N.C. at 643, 33 S.E. at 139; *McIver*, 72 N.C. at 85. *We agree, and do not deny that the General Assembly may generally appoint statutory officers to administrative commissions. We merely deny that it may appoint them in every instance and under all circumstances.*

Id. at 648 (footnote omitted) (emphases added).

Finally, Legislative Defendants denigrate *Cooper BOE*, noting that the precise phrase "interstitial policy decisions" does not appear in other separation of powers decisions. Leg. Def. Br. p 27. Legislative Defendants neglect the wealth of case law recognizing that executive officials make "interstitial" decisions to fill the gaps in

statutes enacted by the legislature. *See, e.g., State ex rel. Com'r of Ins. v. N. Carolina Rate Bureau*, 300 N.C. 381, 411 (1980) ("Legislative rules are those established by an agency as a result of a delegation of legislative power to the agency [and] '. . . fill the interstices of statutes.'" (quoting Daye, *North Carolina's New Administrative Procedure Act: An Interpretive Analysis*, 53 N.C. L. REV. 833, 852-53 (1975)), *abrogated on other grounds by Matter of Redmond*, 369 N.C. 490 (2017); *Dillingham v. N. Carolina Dep't of Human Res.*, 132 N.C. App. 704, 710 (1999) (determining executive agency policy statement was "rule" because it filled the "interstices of the statutes").

That interstitial authority—which exists whether or not the Governor and legislative majority belong to the same political party—does not authorize executive policymaking outside the guardrails set by legislation or the Constitution. Rather it contemplates and acknowledges that when the General Assembly enacts legislation appropriately delegating authority to executive branch agencies to adopt rules and act to implement that legislation, executive branch officials decide how to do that, so long as those decisions comply with the underlying statute. Ultimately, however, that interstitial authority seems to be what Legislative Defendants sought to control by enacting Senate Bill 749. Avoiding such legislative tyranny, of course, is the exact reason our Constitution guarantees separation of powers. *Cooper Confirmation*, 371 N.C. at 804.

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CONCLUSION

This Court should apply controlling precedent and affirm the judgment of the trial court.

Respectfully submitted this the 28th day of October, 2024.

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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.

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CERTIFICATE OF COMPLIANCE

Pursuant to N.C. R. App. P. 28(j), counsel for Plaintiff-Appellee Governor certifies that the foregoing brief, which is prepared using a proportionally spaced font with serifs, contains no more than 8,750 words (excluding cover, captions, indexes, tables of authorities, certificates of service, this certificate of compliance, counsel's signature block, and appendixes) as reported by the word-processing software used to prepare this brief.

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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:

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