STATE OF NORTH CAROLINA

COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
23CV029308-910

JOSHUA H. STEIN, in his official 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; DESTIN C. HALL, in his official capacity as SPEAKER OF THE NORTH CAROLINA HOUSE OF REPRESENTATIVES; and THE STATE OF NORTH CAROLINA,

Defendants.

LEGISLATIVE DEFENDANTS' BRIEF IN OPPOSITION OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

The Governor's insistence that our Constitution requires that he hold all executive power runs directly contrary to our Constitutional text, history, and precedent. This remains true no matter how many times the Governor inserts the words "only," "exclusively," or "solely," into his brief. The drafters of our Constitution made a deliberate choice to check the accumulation of executive power by (i) establishing nine "other elective officers" within the executive branch and (ii) expressly reserving the power to assign their duties for the General Assembly under Article III, Section 7(2).

Senate Bill 382 is the natural outgrowth of that choice. After years of litigation by the current Governor and his predecessor blocking efforts to establish a bipartisan board of elections, the General Assembly has now chosen to (i) transfer the Board of Elections to the Department of the State Auditor, and (ii) assign the Auditor the duty to appoint the Board's members. In doing so, the General Assembly has made a policy decision the Constitution expressly authorizes it to make. Nothing about shifting appointments to the Auditor violates the separation of powers. Indeed, the power to appoint all of the Board of Elections' members remains with the executive branch.

The Governor's claims accordingly fail as a matter of law.

ARGUMENT

The Governor's argument rests on three premises. First, that our Constitution vests the Governor, and the "Governor alone," with *all* executive power. Second, that the Take Care Clause grants the Governor an "exclusive" duty to not only faithfully execute the law, but implement executive policy by insisting the actions of every

board and commission reflect his "views and priorities." And third, that the General Assembly cannot assign executive duties to any other officer. It is a simple argument. But it's wrong. Our Constitution diffuses executive power among a number of statewide elected officials, who together comprise the executive branch, and charges the General Assembly with assigning their duties.

The Court should reject the Governor's latest attempt to consolidate executive power into a single office.

I. THE GOVERNOR CANNOT EVADE THE STANDARD OF REVIEW.

The Governor begins his brief by attacking the standard of review. While he concedes that the Court must treat Senate Bill 382 as presumptively valid, he then suggests that he can disregard this bedrock constitutional principle with ease. He does this for good reason—he cannot overcome it.

First, the Governor claims that if a "statute can be interpreted to allow the legislature—in any circumstance—to violate separation of powers, it is facially invalid." (Gov. Br. at 9). But that flips the standard and suggests the Governor can rely on speculation. *See McKinney v. Goins*, No. 109PA22-2, 2025 N.C. LEXIS 65 (Jan. 31, 2025). False. The Governor "must establish that no set of circumstances exists under which the act would be valid." *Holmes v. Moore*, 384 N.C. 426, 436, 886 S.E.2d 120, 129 (2023) (quoting *State v. Bryant*, 359 N.C. 554, 564, 614 S.E.2d 479, 486 (2005)) (emphasis). Just because a statute might operate unconstitutionally "under some conceivable set of circumstances is insufficient to render it wholly invalid." *Cmty. Success Initiative v. Moore*, 384 N.C. 194, 213, 886 S.E.2d 16, 33 (2023)

(quoting *State v. Thompson*, 349 N.C. 483, 491, 508 S.E.2d 277, 282 (1998)). Simply put, the Governor must overcome a high bar.

The rigorous standard that applies to facial challenges is itself an outgrowth of the separation of powers. Article I, Section 2 declares that "[a]ll political power is vested in and derived from the people; all government of right originates from the people, is founded upon their will only, and is instituted solely for the good of the whole." N.C. Const. art. I, § 2. The People exercise their inherent political power through their elected representatives in the General Assembly. *State ex rel. Ewart v. Jones*, 116 N.C. 570, 570, 21 S.E. 787, 787 (1895). As the agent of the People, the General Assembly has "the presumptive[, plenary] power to act." *Harper v. Hall*, 384 N.C. 292, 323, 886 S.E.2d 393, 414 (2023) (quoting *State ex rel. Martin v. Preston*, 325 N.C. 438, 448, 385 S.E.2d 473, 478 (1989)).

Accordingly, courts must use the power of judicial review with "great reluctance," *Bayard v. Singleton*, 1 N.C. (Mart.) 5, 6-7 (1787), and resist any temptation to intrude into the General Assembly's policymaking role. *Holmes*, 384 N.C. at 439, 886 S.E.2d at 132 ("The power to invalidate legislative acts is one that must be exercised by this Court with the utmost restraint . . . ."). This is because "a restriction on the General Assembly is in fact a restriction on the people." *State v. Berger*, 368 N.C. 633, 651, 781 S.E.2d 248, 259 (2016) ("*McCrory*") (Newby, J., concurring in part and dissenting in part). When the judiciary strikes down a duly enacted law of the General Assembly, it creates a tension between the judiciary and the People. But the presumption of constitutionality eases this tension.

It is "a critical safeguard that preserves the delicate balance between this Court's role as the interpreter of our [c]onstitution and the legislature's role as the voice through which the people exercise their ultimate power." *Holmes*, 384 N.C. at 435, 886 S.E.2d at 129.

As a result, the Court must presume Senate Bill 382's changes to the Board of Elections are valid unless the Governor can show they are "prohibited by an express provision of the Constitution and demonstrate that the General Assembly has violated that provision beyond a reasonable doubt." *Harper*, 384 N.C. at 298, 886 S.E.2d at 399.

Realizing that he cannot meet his burden, the Governor forecasts that he will argue to the Supreme Court that the presumption of constitutionality should not apply in separation-of-powers cases. (Gov. Br. at 10 n. 3). But that presumption represents a "fundamental approach by which th[e] Court has decided questions for two centuries." *McKinney*, 2025 N.C. LEXIS 65, at *11. The Supreme Court has never suggested that it is prepared to take the radical step of abandoning the presumption in favor of a standard that would put the judiciary into the role of a super legislature—nor would the Constitution permit it to do so. This Court is certainly not permitted to take such a radical step. Instead, it is bound by precedent and must apply the same standard the Supreme Court has applied to all prior cases.

II. THE GOVERNOR'S INSISTENCE THAT HE HOLDS "EXCLUSIVE" EXECUTIVE AUTHORITY RUNS CONTRARY TO CONSTITUTIONAL TEXT, HISTORY, AND PRECEDENT.

Everytime the North Carolina Supreme Court has addressed the Governor's power under Article III, it has recognized that power is *shared*. Those decisions rest on the proposition—equally applicable here—that while the Governor is responsible for enforcing our laws, he "is not alone in this task." *Cooper v. Berger*, 371 N.C. 799, 799-800, 822 S.E.2d 286, 289-90 (2018) ("*Cooper Confirmation*"). That proposition is grounded in our Constitution's text, history, and precedent, and the Governor's arguments to the contrary are unavailing.

A. Our Constitution Establishes a Plural Executive Branch, and the General Assembly May Assign Its Officers' Duties.

The Governor's primary argument is that the North Carolina Constitution vests *all* executive power in him and him "alone." Put another way, the Governor claims he is a unitary executive. But our Constitution does not establish a unitary executive. And it never has.

North Carolina has always had a *plural* executive in the form of a multi-member executive branch. True, the Governor may serve as our "chief executive." *Cooper Confirmation*, 371 N.C. at 799-800, 822 S.E.2d at 289-90. And, in that role, he must use those powers granted to him to "take care that the laws be faithfully executed." N.C. Const. art. III, § 5(4). "But the Governor is not alone in this task." *Cooper Confirmation*, 371 N.C. at 799–800, 822 S.E.2d at 289–90 (tracing the Council of State to the founding of the State). Instead, our Constitution establishes nine other statewide elected officials in the executive branch. *Id.* These officers form the "Council

of State," which has certain prescribed duties under our Constitution, and also serve as independent constitutional officers with duties of their own.[1]

With that in mind, our Constitution reserves for the People—acting through their representatives in the General Assembly—the power to assign the duties of these "other elective officers." Article III, Section 7(2) grants the General Assembly this authority by providing that these officers' "respective duties shall be prescribed by law." N.C. Const. art. III, § 7(2).

As a result, the General Assembly regularly assigns executive duties to Council of State members. For example, the General Assembly has assigned the Commissioner of Insurance the duty to see "that all laws of this State that the Commissioner is responsible for administering . . . are faithfully executed." N.C. Gen. Stat. § 58-2-40 (1). Take the Commissioner of Labor: he is charged with the duty "to secure the enforcement of all laws relating to the inspection of factories, mercantile establishments, public eating places, and commercial institution in the State." N.C. Gen. Stat. § 95-4 (4) (further providing that the Commissioner of Labor shall have the power to "appoint inspectors and other assistants"). The Secretary of State is similarly charged with authority to issue charters, certificates of incorporation, and other corporate documents, "as may be required by the corporation laws of the State,"

[1] These executive officers are the Lieutenant Governor, Secretary of State, Auditor, Treasurer, Superintendent of Public Instruction, Attorney General, Commissioner of Agriculture, Commissioner of Labor, and Commissioner of Insurance. *See* N.C. Const. art. III, § 2 (establishing the Lieutenant Governor); *id.* §7 (establishing the "Other elective officers").

as well as to "administer the Securities Laws of the State." N.C. Gen. Stat. § 147-36(7) and (12).

In the same way, the State Auditor is charged with the duty to "independently examine and make findings" as to whether State agencies conduct programs and spend the public's money "in a faithful, efficient, and economical manner in compliance with and in furtherance of applicable laws of the State." N.C. Gen. Stat. § 147-64.6 (4). He is also charged with confirming that agencies are "serv[ing] the intent and purpose of the General Assembly." *Id.* at (5).

In short, laws that assign duties to the "other elective officers" within our plural executive system are nothing new. In fact, they are commonplace. And they are exactly what the drafters of our Constitution intended when they provided that these officers' "respective duties shall be prescribed by law." N.C. Const. art. III, § 7(2).

The Governor ignores these examples of the General Assembly's power under Article III, § 7(2). Instead, he zeroes in on the Vesting Clause[2] as if it were the only provision of our Constitution that addresses the allocation of executive authority. If one read only that clause in isolation, they might come to the (erroneous) conclusion that the Constitution requires that the Governor be vested with all executive power. But the Supreme Court has repeatedly admonished that a court must read all constitutional provisions in *pari materia*. *Stephenson v. Bartlett*, 355 N.C. 354, 378,

[2] N.C. Const. art. III, § 1 ("The executive power of the State shall be vested in the Governor.")

562 S.E.2d 377, 394 (2002) (citing *Leandro v. State*, 346 N.C. 336, 352, 488 S.E.2d 249, 258 (1997)). Doing so makes clear that the Governor in fact shares executive power with the other members of the executive branch. *See* Arch T. Allen III, A Study in Separation of Powers: Executive Power in North Carolina, 77 N.C. L. Rev. 2049 (1999) ("While subsequent amendments have permitted gubernatorial succession and veto, the governor *still shares* some executive power with the other elected Council of State members.") (emphasis added).

The Governor's reading simply cannot be squared with the rest of Article III. To start, that article provides for nine other elected executive officers. N.C. Const. art. III, §§ 7(1)-(2), and then grants the General Assembly authority to assign their duties, as described above. *Id.* The Constitution also provides the General Assembly the power to assign the functions, powers, and duties of the administrative departments and agencies of the State. *See McCrory*, 368 N.C. at 657; N.C. Const. art. III, § 5(10) ("The General Assembly shall prescribe the functions, powers, and duties of the administrative departments and agencies of the State and may alter them from time to time . . . ."); *id.* art. III, § 11 ("[A]ll administrative departments, agencies, and offices of the State and their respective functions, powers, and duties shall be allocated by law . . . .").

Accepting the Governor's singular reading of the generic Vesting Clause would render these other specific clauses meaningless.[3] If the Governor really has to hold

[3] Along with rending most of Article III meaningless, this reading would violate the traditional canon that "general terms should give way to the specifics." *See, e.g.*, *Trustees of Rowan Tech. College v. J. Hyatt Hammond Assocs.*, 313 N.C. 230, 238, 328

all executive power—which is the power to carry out the laws—what duties would be left to assign anyone else? How could the Treasurer have the power to administer the State Health Plan, the Secretary of State the power to administer corporate and securities laws, or the Commissioner of Insurance the State's Insurance regulations?

In all, the General Assembly's assignment of appointments and other duties related to elections to the Auditor cannot by itself violate the Constitution. *See Leandro v. State*, 346 N.C. 336, 352, 488 S.E.2d 249, 258 (1997) ("[A] constitution cannot violate itself.") To hold otherwise would render much of the rest of Article III meaningless. If the Vesting Clause was explicit enough to mean that only the Governor can hold executive power, there would be no room for the other constitutional officers the Constitution establishes within the executive branch, nor for the General Assembly to assign their duties.

B. <u>The Governor Misreads the Take Care Clause.</u>

Next, the Governor argues that the Take Care Clause represents a duty that belongs *exclusively* to the Governor. Then, misreading *McCrory* and *Cooper I*, he further contends that carrying out his duty to "take care that the laws be faithfully executed" requires that he also have the *power* to make policy and require that the

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S.E.2d 274, 279 (1985) ("[w]here one of two statutes might apply to the same situation, the statute which deals more directly and specifically with the situation controls over the statute of more general applicability."); *Wood-Hopkins Contracting Co. v. N.C. State Ports Auth.*, 284 N.C. 732, 738, 202 S.E.2d 473 (1974) ("general terms should give way to the specifics" in a contract.); *see also State ex rel. Martin v. Preston*, 325 N.C. 438, 449, 385 S.E.2d 473, 478 (1989) (quoting *Perry v. Stancil*, 237 N.C. 442, 444, 75 S.E.2d 512, 514 (1953)) ("Issues concerning the proper construction of the Constitution of North Carolina are in the main governed by the same general principles which control in ascertaining the meaning of all written instruments.").

makeup of boards and commissions reflect his "views and priorities." (Gov. Br. at 23). But that is wrong. Faithful execution requires that the Governor carry out those duties he has been assigned in a manner faithful, not to his own policy preferences, but to the laws enacted by the General Assembly. The clause does not direct the Governor "to thine own self be true." Indeed, reading it in such a way would violate the separation of powers, as it would permit the Governor to arrogate legislative power for himself.

First, the Take Care Clause is not a grant of power. Instead, it imposes a *duty* that *limits* the Governor's power and subordinates his actions to the laws enacted by the General Assembly. Unlike the General Assembly, the Governor historically has only those powers expressly granted by the Constitution. *See McKinney*, 2025 N.C. LEXIS 65, *12-13 ("The specific language used in Articles II, III, and IV confirms that the legislature, but not the executive or judicial branches, wields plenary power."); *Cooper I*, 370 N.C. at 430 (Martin, C.J., dissenting); *see also*, N.C. Const. art. III, § 5 (outlining the "Duties of Governor"). The text of the clause confirms this. By its terms, it binds and constrains his exercise of power: "The Governor shall take care that the laws be faithfully executed." In other words, the Governor must abide by the General Assembly's instructions and policies in its statutes, not the Governor's political interests.[4] Put differently, the clause imposes a *duty of fidelity*.

[4] As the Supreme Court recently explained: "Nowhere was it stated that the three powers or branches had to be equal. In fact, although the balance occasionally shifted, the preponderant power has always rested with the legislature." *McKinney*, 2025 N.C. LEXIS 65, *13; *Harper*, 384 N.C. at 322, 886 S.E.2d at 413 (quoting John V. Orth and Paul M. Newby, *The North Carolina State Constitution* 50 (2d ed. 2013)).

This duty of fidelity means the Governor has no power to make policy decisions regarding matters that are not delegated to him. Nor can he refuse to execute a law because he disagrees with it. *See Goldston v. State*, 199 N.C. App. 618, 629, 683 S.E.2d 237, 244 (2009) ("Article III, section 5(4) requires that the Governor take care that the laws be faithfully executed. The Governor as head of the executive department is charged with the duty of seeing that legislative acts are carried into effect."), *affirmed per curiam by divided panel*, 364 N.C. 416 (2010); *see also Winslow v. Morton*, 118 N.C. 486, 489-90 (1896) (observing that the Governor has a "duty of seeing that the statute is carried into effect"). The Take Care Clause says nothing about the Governor enforcing views and priorities that are out-of-sync with the policies reflected in the laws enacted by the General Assembly . *See also Cooper v. Berger*, 370 N.C. 392, 438, 809 S.E.2d 98, 127 (2018) ("*Cooper I*") (Newby, J, dissenting) ("Section 5(4) does not limit the power of the General Assembly in any manner; it simply requires the Governor to execute the laws as enacted by the General Assembly. Section 5(4) says nothing about the Governor's role in reorganization and clearly is not an 'explicit textual limitation' on the General Assembly's power."). And if a statute delegates decisions to other executive officials, the Governor has no obligation to personally execute it. He must only use those powers delegated to him in a manner faithful to the laws the General Assembly has enacted.

The Take Care Clause also does not establish a duty that vests exclusively in the Governor. Our Constitution imposes this duty the other Council of State

members—and indeed all public officers—as well. *See* N.C. Const. art. VI, § 7 (providing that before entering office, any person elected must swear that they "will support and maintain the Constitution and laws of the United States, and the Constitution and laws of North Carolina not inconsistent therewith, and that *I will faithfully discharge the duties of my office*" (emphasis added)).

Our Constitution no doubt expressly assigns some duties exclusively to the Governor. For instance, Article III Section 5(5) provides that the Governor "shall be the Commander in Chief of the military forces of the State." N.C. Const. art. III § 5(5). It also makes him administrator of the budget (as it is enacted by the General Assembly), N.C. Const. art. III, § 5(3), and grants him the exclusive power to grant reprieves, commutations, and pardons. N.C. Const. art. III, § 5(6).

But the general duty to "take care that the laws be faithfully executed" is not like the Governor's power as commander-in-chief. More than one official can "take care that the laws be faithfully executed" at the same time. There is nothing "exclusive" about an instruction to follow the law. All the Take Care Clause requires is that the Governor carry out those powers he has been delegated in a manner that is faithful to the laws the General Assembly enacts.

Although the Governor often quotes it out of context, the Court's opinion in *Cooper I* ostensibly recognizes this. There, the Court held only that the Governor's duties under the Take Care Clause carry with them "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*." *Cooper I*, 370

N.C. at 415, 809 S.E.2d at 112 (emphasis added). And even then, any such power is only "*interstitial*." 370 N.C. at 416 n.11, 809 S.E.2d at 113 n.11 (emphasis added). But that, of course, means the Governor has no power to make policy decisions contrary to those enacted by the General Assembly, nor to make such decisions regarding matters that have not been assigned to him.

The Supreme Court has confirmed this understanding of the Take Care Clause. In *Cooper Appropriations*, the Supreme Court rejected the Governor's claim that the Take Care Clause required that he be able to decide the distribution of federal block grants. *See Cooper v. Berger*, 376 N.C. 22, 852 S.E.2d 64 (2020) (Ervin, J.) ("*Cooper Appropriations*"). As the Court explained in that case, the Governor has no power to make "interstitial decisions" regarding questions the General Assembly has not delegated to him. *Id.* at 46, 852 S.E.2d at 64. Thus, the Court concluded that the General Assembly's decision to direct the distribution of federal block grants did not impermissibly interfere with the Take Care Clause because "the General Assembly has not delegated the authority to determine how the relevant federal block money should be spent." *Id.*

In short, the Take Care Clause does not establish a duty that belongs exclusively to the Governor. Nor does it grant him a right to carry out his "views and priorities" in a manner that conflicts with the express choices made by the General Assembly.

C. Our Constitutional History Confirms that the Governor Shares Executive Authority.

Unable to find support in the text, the Governor cherry-picks the constitutional history. To that end, he claims that, over time, the People have bolstered the Governor's executive power so that he now serves as the "People's elected executive." (Gov. Br. at 14-19). But he ignores that the People have never amended the Constitution to vest executive power exclusively in the Governor. Nor have they reversed the 1876 amendments that restored the General Assembly's authority to choose who appoints statutory officials. To the contrary, the People have consistently rejected attempts to eliminate or reduce the power of the "other elective officers" who comprise the Council of State, each time reaffirming their commitment to the plural executive model that has been part of this State's structure since its founding.

The Governor's claim that the 1868 Constitution's addition of the Vesting Clause and the Take Care Clause reflected a desire to create a unitary executive grossly misreads the history. Indeed, he ignores that the *same Constitution* provided that the "Executive Department" would include not just the Governor, but also "a Lieutenant Governor, a Secretary of State, an Auditor, a Treasurer, a Superintendent of Public Works, a Superintendent of Public Instruction, and an Attorney General." *See* N.C. Const. of 1868, art. III, § 1. And just as the Governor went from being appointed to being elected statewide, so too did the Council of State. Just as the duration of the Governor's term grew to four years, so too with the Council of State. *See* N.C. Const. of 1835, art. II, §§ 1-2; N.C. Const. of 1868, art. III, § 1. And, most importantly, while the 1868 Constitution vested the Governor with the "Supreme

executive power," it also provided for the first time that the duties of the other officers comprising the "Executive Department" "*shall be prescribed by law*." *See* N.C. Const. of 1868, art. III, § 13. This makes perfect sense. If the Governor has the "supreme executive power" there must be some other, *inferior* other executive power. Accordingly, the 1868 Constitution elevated the Council of State to "a body of directly elected officers, *with executive duties of their own*." John V. Orth & Paul Martin Newby, *The North Carolina State Constitution* 124-25 (2d ed. 2013) (emphasis added). Executive power may vest in the Governor by default, but the General Assembly can assign specific duties to other officers.[5]

The Governor seeks to ignore this (inconvenient) part of our Constitutional history. But the balance struck by the 1868 Constitution remains today. Our Constitution still vests the Governor with executive power as a general matter. *See* N.C. Const. art. III, § 1. It still provides that he shares that executive power with other executive officials. And the General Assembly stills assigns duties to these "Other elective officers" within the executive branch. *See* N.C. Const. art. III, § 7(2); *see also Report of the North Carolina State Constitution Study Commission 1968*, p. 10 (explaining that the 1971 Constitution reflected "general editorial revision[s] . . . none [of which were] calculated . . . to bring about any fundamental change in the power of state and local government or the distribution of that power"); *id.* at 131-32

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[5] In this way the Vesting Clause establishes a general, default rule: Duties not assigned to any other officer fall to the Governor by default. But that does not prohibit the General Assembly from assigning specific duties to specific officials.

("The General Assembly will not be deprived of any of its present authority over the structure and organization of state government.").

The Governor's rendition of history also fails to mention that the People have repeatedly rejected measures to shed our State's plural executive. The 1968 North Carolina State Constitution Study Commission proposed a series of amendments that would have moved members of the Council of State under the Governor. The Commission proposed having the Secretary of State and the Commissioners of Labor, Insurance, and Agriculture appointed by the Governor, and the Superintendent of Public Instruction appointed by the State Board of Education. Report of the North Carolina State Constitution Study Commission 1968, p. 117 (1968). But the People demurred. *See* Ferrel Guillory, *The Council of State and North Carolina's Long Ballot: A Tradition Hard to Change*, N.C. Insight, 40, 42-43 (1988). In the same way, in 1987, both Governor Martin and Lieutenant Governor Jordan supported amendments that would have made the Superintendent of Public Instruction appointive. *Id.* The People rejected those proposals as well, confirming a desire to maintain the plural executive that has been part of our State's constitutional structure from the start. *Id.*

And, as set forth above, the General Assembly has continued to assign duties to the other members of the Council of State, which they exercise independently of the Governor. In sum, our constitutional history contradicts the Governor's reading of the Vesting Clause and Take Care Clause. The People have chosen to diffuse executive power. And unless they change their mind, it must remain that way.

D. No Case Prohibits the General Assembly from Assigning the Auditor Power to Appoint the Board of Elections

The Governor's challenge to Senate Bill 382 finds no support in the case law either.

Although he floods his brief with cites to *McCrory*, *Cooper I*, and *Cooper Confirmation*, those cases do not control here. Indeed, each decision stressed that, "[a]s in *McCrory*, 'our opinion takes no position on how the separation of powers clause applies to those executive departments that are headed by independently elected members of the Council of State.'" *Cooper Confirmation*, 371 N.C. at 806 n.5, 822 S.E.2d at 292 n.4 (quoting *McCrory*, 368 N.C. at 646, n.5, 781 S.E.2d at 256 n. 5) (emphasis added); *Cooper I*, 370 N.C. at 407 n.4, 809 S.E.2d at 107 n.4 (same).

The Governor also claims that *State v. Camacho*, 329 N.C. 589, 594 (1991) and *N.C. State Bd. of Educ. v. State*, 371 N.C. 170, 814 S.E.2d 67 (2018) support his broad view of the Take Care clause. They do not. In fact, both *Camacho* and *State Board* support the Legislative Defendants, not the Governor. To start, the Vesting Clause and its scope were not at issue in *State Board of Education*. Rather, that case focused on a dispute between the Superintendent of Public Instruction and the State Board of Education. To resolve that dispute, the Court needed to interpret two constitutional provisions, Article IX, § 5 and Article IX, § 4(2), that are not at issue here. Those provisions explicitly provide the powers and duties of the State Board of Education and the Superintendent of Public Instruction. *Id.* Likewise, in *Camacho* the Court found that N.C. Const. art. IV, § 18 and N.C.G.S. § 114-11.6 gave district attorneys

the exclusive discretion to determine whether to request the prosecution of any individual case by the Special Prosecution Division. *Id.* at 594.

At bottom, *State Board* and *Camacho* hold only that when a constitutional statutory provision gives certain powers to an officer the General Assembly cannot reassign them. The problem for the Governor is that no provision gives him the exclusive power to administer elections, or to appoint the Board of Elections' members. Indeed, no provision of the Constitution requires that there be a Board of Elections at all. Instead, the Board is a statutorily created body. The General Assembly is thus free to assign the duty to appoint its members. *See McCrory*, 368 N.C. at 644, 781 S.E.2d at 255 (holding that the appointments clause "means the same thing it did in 1876" and thus only grants the Governor the exclusive right to appoint constitutional officers, not statutory officers"). And nothing in the Constitution prohibits it from assigning the duty to make those appointments to one of the "other elective officers" in the executive branch—indeed, the Constitution expressly allows it to do so. *See* N.C. Const. art. III, § 7(2).

Ultimately, the Governor's argument amounts to nothing more than an assertion that once the General Assembly assigns him some authority, it is stuck and can never assign it to any other executive officer. But this estoppel argument fails as a matter of basic logic. Senate Bill 382 does not "reassign" or "transfer away" any power that belongs exclusively to the Governor.

Indeed, Senate Bill 382 does not even implicate the separation of powers clause, which speaks only to the separation of powers *between the branches*. *See* N.C.

Const. art. I, § 6 ("The legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other.") Instead, the Auditor—an independently elected member of the executive branch—appoints all the State Board of Elections' members.

As a result, the Governor cannot show that Senate Bill 382 violates the separation of powers.

III. SENATE BILL 382 REPRESENTS A LEGITIMATE EXERCISE OF THE GENERAL ASSEMBLY'S AUTHORITY TO ORGANIZE AND STRUCTURE EXECUTIVE AGENCIES.

Finally, having established that our Constitution does not create a unitary executive and that the Take Care Clause is not a source of power, the Governor's final premise fails. The General Assembly has plenary power to assign the Auditor oversight authority over the State Board.

The Constitution expressly recognizes in Article III, Section 7(2) that the General Assembly has the power to allocate duties among the constitutional officers who comprise the executive branch. *See* N.C. Const. art III, § 7(2) (providing that "their respective duties shall be prescribed by law."); *see also* Report of the North Carolina State Constitution Study Commission 1968, p. 104 (1968) ("In North Carolina, most of the Governor's powers derive from statute, not the constitution.").[6] As a result, whether to create, eliminate, or move a board or commission to another

[6] The Constitution also recognizes that the General Assembly has ultimate authority to organize and reorganize executive agencies. *See* N.C. Const. art. III, § 5(10) ("The General Assembly shall prescribe the functions, powers, and duties of the administrative departments and agencies of the State" and has the authority to "alter them from time to time."); *see also Adams v. N. Carolina Dep't of Nat. & Econ. Res.*, 295 N.C. 683, 696-97, 249 S.E.2d 402, 410 (1978).

department is "a decision committed to the sole discretion of the General Assembly." *Cooper I*, 370 N.C. at 409, 809 S.E.2d at 108 (emphasis added); *see also McCrory*, 368 N.C. at 664 (noting "the General Assembly's significant express constitutional authority to assign executive duties to the constitutional officers and organize executive departments"); *Martin*, 320 N.C. at 524 (plurality) ("The citizens of this state have the right to distribute the governmental power among the various branches of the government.").

What is more, the General Assembly's ability to structure boards is one of the main ways it ensures that executive branch officials carry out their duties in a manner consistent with policy decisions reflected in the State's laws. It thus serves as an essential check on the exercise of executive power. *See, e.g.*, *Adams v. N. Carolina Dep't of Nat. & Econ. Res.*, 295 N.C. 683, 698, 249 S.E.2d 402, 411 (1978) ("Procedural safeguards tend to encourage adherence to legislative standards by the agency to which power has been delegated."); *State ex rel. Comm'r of Ins. v. N. Carolina Rate Bureau*, 300 N.C. 381, 409, 269 S.E.2d 547, 567 (1980) (noting that procedural controls "minimize the potential of unfairness in embodying" too much power "in one person or agency"); *see also Cooper Confirmation*, 371 N.C. at 809, 822 S.E.2d at 295 (upholding laws that require Senate confirmation of members of the Governor's cabinet).[7] Accordingly, the General Assembly can assign powers to the

[7] In seeking to avoid this straightforward conclusion, the Governor meets himself coming and going. After explaining to the Court that the other executive officers have no express or inherent power, but only those assigned by law, the Governor then argues that the Auditor cannot oversee elections because it is not in line with his "traditional role." (Gov. Br. at 29-33). But the Auditor cannot,

Board of Elections, decide that the board shall be housed under the Department of the State Auditor, and then assign him the duty of appointing its members. Such an arrangement, is, in fact, what the People intended when they chose to maintain a plural executive.

* * *

In the end, the Governor seeks to contravene the separation of powers by advocating a position that would (i) disregard the People's express decision to check the accumulation of executive power by authorizing the General Assembly to allocate duties among a multi-member executive branch, and (ii) use the courts to second-guess the propriety of the General Assembly's policy decisions under the guise of judicial review. The plain text of the Constitution establishes the Auditor as a member of the executive branch and authorizes the General Assembly to assign his duties. Thus, the decision to assign the duty of appointing the Board of Elections' members to the Auditor is one the General Assembly was expressly authorized to make. The analysis must end there.

CONCLUSION

For each of the reasons stated above, as well as those set forth in their opening brief, Legislative Defendants submit that the Court should enter summary judgment in their favor with respect to each of the claims asserted in the Governor's Complaint.

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simultaneously, (i) have no inherent powers *yet also* (ii) be constitutionally limited to carrying out only those duties that conform to his "traditional role." Both cannot be true.

This the 17th day of March, 2025.

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CERTIFICATE OF SERVICE

I hereby certify that on March 17, 2025, I caused a copy of the foregoing document to be served upon all parties via email as follows:

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