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. DESTIN C. HALL, in his official capacity as SPEAKER OF THE NORTH CAROLINA HOUSE OF REPRESENTATIVES; and PHILIP E. BERGER, in his official capacity as PRESIDENT PRO TEMPORE OF THE NORTH CAROLINA SENATE. Defendants.	**MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

INTRODUCTION

Weeks after the 2024 elections were completed in November, the General Assembly enacted Senate Bill 382 (Session Law 2024-57) over the Governor's veto. Among its many provisions, Senate Bill 382 contained the General Assembly's sixth attempt in nine years to divest the Governor of authority to supervise the administration of North Carolina election law. For the first time in the State's history, and in an approach unique among all fifty States, the General Assembly assigned complete authority to appoint, supervise, and remove members of the State Board of Elections and the chairs of all 100 county boards of election to the State Auditor, an official whose authority is dependent on the General Assembly and who has no constitutionally assigned duty to faithfully execute the laws.

This Court—in this very case—already held unconstitutional the General Assembly's effort to strip the previous Governor of authority over the administration of election laws by assigning to itself the power to appoint, supervise, and remove members of the State Board and county boards. The same result is required here. Our Supreme Court has repeatedly held that the separation of powers is violated "when the actions of one branch prevent another branch from performing its constitutional duties." *State ex rel. McCrory v. Berger*, 368 N.C. 633, 645 (2016). Senate Bill 382 fails that test. If the General Assembly is allowed to transfer authority over the execution of election laws to the State Auditor, the General Assembly can prevent the Governor from exercising the supreme executive powers vested in him by the North Carolina Constitution and fulfilling his constitutional duty to "take care that the laws be faithfully executed." N.C. CONST. art. III, §§ 1, 5(4). That outcome cannot be squared with the separation of powers.

Senate Bill 382's constitutional defects, moreover, extend beyond the fact that the legislation would frustrate the take care authority of our State's chief executive. Fundamentally, the General Assembly here claims a power to—on its whim—transfer any executive duty or power from the Governor to any other executive official that it favors more. The Constitution, however, does not allow the legislature to exert that "degree of control . . . over the execution of the laws." *McCrory*, 368 N.C. at 645.

If the General Assembly has free rein to reassign enforcement of a particular set of laws to its preferred executive-branch official at any time, the legislature can, in effect, control how the law is enforced. That is paradigmatic executive-branch

power. This time, it is the administration of election laws assigned to the Auditor, but next time it could be election laws to the Treasurer, agricultural laws to the State Superintendent of Public Instruction, or transportation laws to the Commissioner of Labor. The separation of powers mandated by our Constitution forbids such legislative interference.

The General Assembly's flexibility to assign duties to the Council of State is not absolute. The General Assembly cannot ignore the powers and duties expressly vested in the Governor alone. Nor can it disregard entirely the State Auditor's historical role and responsibilities or the settled expectations of the voters who elected the State Auditor based on his qualifications to execute certain functions. For these reasons, the General Assembly can assign the State Auditor duties and powers to conduct independent reviews of state agencies, including the State Board and county boards of elections. But it cannot grant the State Auditor final executive authority over implementation of the election laws.

The people of North Carolina through our Constitution have assigned the supreme executive power and duty of faithful execution to the Governor alone, and that is an assignment that the General Assembly cannot alter. Because Senate Bill 382 contravenes the plain text of the Constitution, constitutional history and context, and binding Supreme Court precedent by assigning to the State Auditor the sole power to supervise the administration of our state's election laws, it violates the separation of powers and must be enjoined.

PROCEDURAL HISTORY

On October 17, 2023, the Governor filed his Verified Complaint in this action and moved for a preliminary injunction. By order entered November 8, 2023, and on Plaintiff's motion, Wake County Superior Court Judge Vince M. Rozier, Jr. transferred this matter to a three-judge panel, which Chief Justice Newby duly appointed.

The Governor moved for a preliminary injunction, which a three-judge panel granted. On November 17, 2023, the State answered the Complaint. Legislative Defendants answered on January 17, 2024.

The Governor then moved for summary judgment, while Legislative Defendants moved to dismiss and for judgment on the pleadings. The panel ruled in favor of the Governor, permanently enjoining the changes to the State Board from taking effect and denying Legislative Defendants' motions.

Shortly thereafter, Legislative Defendants appealed. Following passage of Senate Bill 382, however, Legislative Defendants moved to dismiss their appeal. The Court of Appeals granted the motion on December 23, 2024.

That same day, the Governor moved for leave to file a supplemental complaint. After a hearing on a joint motion by all parties, Wake County Superior Court Judge Paul Ridgeway entered an order that vacated the prior summary judgment and preliminary injunction orders, permitted the supplemental complaint, set a summary judgment schedule, and confirmed that the claims in the supplemental complaint should be heard by a three-judge panel.

STATEMENT OF UNDISPUTED FACTS

A. In recent years, the General Assembly has repeatedly sought to strip the Governor's authority over the State Board of Elections.

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

The passage of Senate Bill 382 marks the sixth time in the last decade that the General Assembly has sought to change this structure to take from the Governor effective control over the execution of election laws by the State Board of Elections. Each of the five prior attempts has been rejected by either the courts—including the North Carolina Supreme Court and this Court earlier in this case—or by the people.

First attempt. In December 2016, the General Assembly enacted legislation that sought to abolish the existing State Board of Elections and create a new Bipartisan State Board of Elections and Ethics Enforcement. *Cooper I*, 370 N.C. at 395; *see also* Session Laws 2016-125, 2016-126. The new board would have consisted of four members appointed by the Governor and four members appointed by the General Assembly. Session Law 2016-125 § 2.(c). That legislation was struck down by a three-judge panel of the Wake County Superior Court. *Cooper I*, 370 N.C. at 395.

Second attempt. The General Assembly then enacted Session Law 2017-6, which, among other unconstitutional provisions, would have required the Governor to appoint eight members of a new version of the elections board, selecting four members each from two lists supplied by the chairs of the Republican and Democratic

parties. *Cooper I*, 370 N.C. at 396. The legislation was struck down by the North Carolina Supreme Court. *Cooper I*, 370 N.C. at 414-15.

Third attempt. After *Cooper I*, the General Assembly enacted legislation in 2018 that 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. *See* Session Law 2018-2, Part VII; Session Law 2017-6. The 2018 legislation would also have created evenly split county boards of election appointed by the State Board, with 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 rejected this third effort. *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 a constitutional amendment to create a new State Board of Ethics and Elections Enforcement, which echoed the board structure declared unconstitutional in *Cooper I*—*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. The voters rejected that amendment resoundingly 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.[1]

Fifth attempt. In October 2023, the General Assembly overrode the Governor's veto to enact Senate Bill 749 (Session Law 2023-139). That legislation gave rise to the original complaint in this action. In short, Senate Bill 749 would have replaced the five-member State Board of Elections appointed by the Governor with an eight-member State Board appointed entirely by the legislature. Session Law 2023-139 § 2.1. In addition, it would have created county boards with four members that would also have been appointed entirely by the legislature. *Id.* §§ 2.3, 4.1. Legislative leaders would also have retained authority to designate the chair of the State Board, as well as its executive director, in certain circumstances. *Id.* §§ 2.1, 2.5.

This Court granted summary judgment to the Governor, concluding that the General Assembly's "actions [were] the most stark and blatant removal of appointment power from the Governor since *McCrory* and *Cooper I*." Because "*Cooper I* and *McCrory* control," the Court said, "the Session Law must be permanently enjoined." Summary Judg. Order at 6.[2]

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[1] The Court may take judicial notice of the results of the election. *State v. Swink*, 151 N.C. 726 (1909) (taking judicial notice of holding of election and resulting referendum vote in favor of new law); *see also In re Peoples*, 296 N.C. 109, 142 (1978) (taking judicial notice of records of the North Carolina State Board of Elections); *see also* N.C. R. Evid. 201(b).

[2] This Order was vacated with consent of the parties, *see supra* p. 4, and is not controlling precedent.

B. The General Assembly tries for a sixth time and passes Senate Bill 382.

Senate Bill 382 marks the General Assembly's sixth attempt to transfer elections authority away from the Governor. Before Senate Bill 382, the Governor appointed the members of the State Board from a list of four nominees submitted by the state party chairman of each of the two largest political parties in the State. N.C. Gen. Stat. § 163-19(b) (2024). The Governor similarly filled vacancies based on a list of nominees from the chair of the political party of the departing member. *Id.* § 163-19(c). The Governor was also empowered to summarily remove any member who failed to attend meetings of the State Board. *Id.* § 163-20(d).

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

Senate Bill 382 adopts much the same approach with respect to county boards of elections. Before Senate Bill 382, county boards were composed of five members. The State Board itself appointed four members, two each from lists of three nominees

provided by the two political parties receiving the most votes in the previous election. N.C. Gen. Stat. § 163-30(a), (c) (2024). The Governor appointed the chair of each county board. *Id.* § 163-30(a). The State Board could remove any county board member for cause and fill the vacancy created by that removal, selecting from a list of two nominees provided by the political party of the departing member. *Id.* §§ 163-22(c), 163-30(d).

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

ARGUMENT

I. Standard of Review

Laws enacted by the General Assembly are presumed constitutional and will not be declared invalid unless it is determined that they are unconstitutional beyond a reasonable doubt. *Cooper I*, 370 N.C. at 413. "In order to determine whether the violation is plain and clear, we 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." *Id.* (citation and internal quotation marks omitted).[3]

"Although there is a strong presumption that acts of the General Assembly are constitutional, it is nevertheless the duty of this Court, in some instances, to declare such acts unconstitutional." *Stephenson v. Bartlett*, 355 N.C. 354, 362 (2002) (citing *Marbury v. Madison*, 5 U.S. 137 (1803)). If a statute can be interpreted to ***allow*** the legislature—in any circumstance—to violate separation of powers, it is facially invalid. *See Cooper I*, 370 N.C. at 416 n.12; *see also McCrory*, 368 N.C. at 645–47.

II. The Governor is the State's chief executive.

The North Carolina Constitution vests executive power in a single constitutional officer: the Governor. N.C. CONST. art. III, § 1 ("The executive power of the State shall be vested in the Governor."); *see also* 1868 N.C. CONST. art. III, § 1 ("The Executive Department shall consist of a Governor (*in whom shall be vested the Supreme executive power of the State*) a Lieutenant Governor, a Secretary of State, an Auditor, a Treasurer, a Superintendent of Public Works, a Superintendent of Public Instruction, and an Attorney General. . . ." (emphasis added)). Though the Constitution names several other "elective officers" within the executive branch, N.C. CONST. art. III, § 7, it contains no provision vesting those officers with executive power. Nor does the Constitution assign those officers any role in the execution of state law. To the contrary, our Constitution gives to the Governor alone the

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

obligation to "take care that the laws be faithfully executed." N.C. CONST. art. III, § 5(4); 1868 N.C. CONST. art. III, § 7.

This constitutional language is bolstered by both history and precedent from the State's courts. Over the last 250 years, the Governor's role as chief executive has been fortified through constitutional revisions and amendments. Our courts, moreover, have repeatedly struck down legislative efforts that would have impeded the Governor's ability to fulfill his role as chief executive.

Together, our Constitution's text, our State's history, and our courts' precedents confirm one key truth: the Governor's supreme authority to take care that the laws are faithfully executed is unique among executive branch officials. Efforts to undermine that authority—no matter how craftily designed—violate the Constitution.

A. The Constitution affords executive power to the Governor alone.

Our Constitution exclusively vests "[t]he executive power of the State" in the Governor. N.C. CONST. art. III, § 1.[4] And it assigns exclusively to the Governor the obligation to "take care that the laws be faithfully executed." *Id.* art. III, § 5(4). Thus, as a constitutional matter, it is up to the Governor alone to ensure "that our laws are properly enforced." *Cooper v. Berger (Cooper Confirmation)*, 371 N.C. 799, 799 (2018);

[4] With only slightly different wording, so too did the 1868 Constitution. N.C. Const. of 1868, art. III, § 1 (providing for a Governor "in whom shall be vested the Supreme executive power of the State"); *see also McKinney v. Goins*, No. 109PA22-2, 2025 WL 350090, at *7 n.5 (N.C. Jan. 31, 2025) ("Our precedents have repeatedly cited the [1968 constitutional drafting] Commission's characterization of its edits as non-substantive.").

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."). Consistent with our Constitution's text, the General Assembly has recognized that the Governor supervises "the official conduct of *all* executive and ministerial officers," without excluding elected Council of State members. N.C. Gen. Stat. § 147-12(a)(1) (emphasis added).

The decision to vest the supreme executive power in the Governor and to assign the Governor alone the duty to take care that the laws be faithfully executed is a marked contrast from the assignment of the legislative and judicial power to multi-member bodies. N.C. CONST. art. II, § 1, art. IV, §§ 1, 2, 5-7, 9-10. The legislative power to enact the laws is vested in two multi-member legislative bodies: the Senate and the House of Representatives. N.C. CONST. art. II, § 1. And the judicial power to interpret the laws is, with limited exceptions not relevant here, vested in a General Court of Justice, which consists of multiple members in an Appellate Division, Superior Court Division, and District Court Division. N.C. CONST. art. IV, §§ 1, 2, 5-7, 9-10.

By contrast, our 1868 Constitution, in the same clause that first identified other independently elected executive offices, made clear that the *Governor* "shall be vested [with] the Supreme executive power of the State." 1868 N.C. CONST. art. III, § 1. Similarly, the duty to take care that the laws be faithfully executed was exclusively assigned to the Governor. 1868 N.C. CONST. art. III, § 7. The Governor

alone, moreover, was required to take an oath or affirmation to support the Constitution, laws of the United States and State, and "faithfully perform the duties appertaining to the Office of Governor." *Id.* § 7. These exclusive assignments of executive power and obligation were not changed in 1876, when thirty revisions to the Constitution were ratified by the people. *McCrory*, 368 N.C. at 431. And they remain in the Constitution today. N.C. CONST. art. III, §§ 1, 4, 5(4). In 1868 or any time in the century-and-a-half thereafter, the executive power could expressly have been vested in the multi-member Council of State, just as the legislative and judicial power are expressly vested in multi-member bodies. But the people of North Carolina have made a different choice.

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

This clause constrains the legislature's relationship to executive authority. Although the "clearest violation" of this constitutional provision occurs when "one branch exercises power that the constitution vests exclusively in another branch," the clause equally forbids one branch from "prevent[ing] another branch from performing

its constitutional duties." *McCrory*, 368 N.C. at 645. In other words, it matters little whether the legislature attempts directly to wield executive power or whether it instead merely interferes with the exercise of executive power. In either case, the legislative act runs afoul of our State's clear constitutional mandate to keep the powers afforded the three coordinate branches "forever separate and distinct," and it unlawfully encroaches upon the Governor's constitutional role. N.C. CONST. art. I, § 6; *see also McCrory*, 368 N.C. at 645.

B. The people of North Carolina have bolstered the Governor's executive power over time.

Since 1776, our State has repeatedly changed how power is allocated among the three branches of government. *McCrory*, 368 N.C. at 645. Across the last 250 years, that reallocation has increasingly empowered the Governor. The people of North Carolina, by adopting constitutional amendments, have shifted power away from the General Assembly while enhancing and reinforcing executive power. *See, e.g.*, John L. Sanders, *Our Constitutions: A Historical Perspective* (hereinafter "Sanders"), *in* NORTH CAROLINA MANUAL 2011-2012 at 73, 73-91, *available at*: https://digital.ncdcr.gov/Documents/Detail/north-carolina-manual-2011-2012/4384827.

As originally conceived, the Governor was a short-term, legislatively appointed official almost entirely beholden to the General Assembly. North Carolina's 1776 Constitution provided for the Governor to be selected jointly by the House and the Senate to a one-year term. 1776 CONST. art. XV. The people amended the Constitution in 1835 to provide for direct election of the Governor to a two-year term,

but the Governor's powers remained relatively circumscribed. Orth & Newby, THE NORTH CAROLINA STATE CONSTITUTION 15 (2d ed. 2013) (noting that after this amendment "little changed in reality").

The 1868 Constitution established a much more independent Governor as the State's chief executive. Specifically, it provided that the Governor was to be popularly elected by the people to a four-year term, vested with "the Supreme executive power of the State," and responsible for the faithful execution of the laws. 1868 N.C. CONST. art. III §§ 1, 7; *see also Report of the North Carolina State Constitution Study Commission* 142 (1968) (hereinafter "*1968 Report*").[5]

One hundred years later, the drafters of the 1971 Constitution explained the Governor's supreme executive authority:

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

1968 Report at 109 (emphasis added). Unsurprisingly, then, the 1971 Constitution carried forward the modern gubernatorial office that had been established in 1868.[6]

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[5] Our Supreme Court has relied upon the *1968 Report* numerous times. *See, e.g.*, *McCrory*, 368 N.C. at 643.

[6] The 1971 Constitution used different language than the prior iteration, but maintained the Governor's role as chief executive with the supreme executive power. *See* N.C. CONST. art. III, § 1. The 1971 Constitution resulted from a "general editorial revision of the [1868] constitution . . . none [of which was] calculated . . . to bring about any fundamental change in the power of state and local government or the distribution of that power." *1968 Report* at 10; *see also* Orth & Newby, THE NORTH

Since the 1971 Constitution was adopted, the people have elected to further strengthen the Governor's footing, adopting a 1977 amendment to allow the Governor to serve two successive terms. *See* Sanders at 87-88; N.C. CONST. art. III, § 2. And in 1996, the voters, by a 3-to-1 majority, gave the Governor veto power. *See* Sanders at 89.

As recently as November 2018, the people resoundingly reaffirmed their preference for continuing to vest executive authority exclusively in the Governor's Office and against legislative efforts to encroach on that authority. Specifically, the General Assembly proposed a constitutional amendment to create a new State Board of Ethics and Elections Enforcement composed entirely of legislative appointees—the same structure declared unconstitutional in *Cooper I*. Session Law 2018-133. The voters decisively 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.

Thus, from 1776 to the present, the Governor has shifted from an individual selected by the General Assembly for a one-year term to "the people's elected executive" with "express constitutional powers," *Bacon v. Lee*, 353 N.C. 696, 711 (2001), empowered to seek multiple terms of office, veto legislation, administer the

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CAROLINA STATE CONSTITUTION 32-33 (2d ed. 2013) ("[The 1971 Constitution was] a good-government measure . . . designed to consolidate and conserve the best features of the past, not break with it. . . . The text of the new frame of government was that of the 1868 constitution as amended, subjected to rigorous editorial revision."); *McKinney*, 2025 WL 350090, at *7 n.5.

budget, and faithfully execute the laws. N.C. CONST. art. II, § 22; art. III, §§ 1, 2, 5, 10; *McCrory*, 368 N.C. at 646.

C. Supreme Court precedent confirms the Governor's executive supremacy.

The North Carolina Supreme Court has also repeatedly confirmed the exclusive nature of the Governor's executive authority.

On several occasions, the Court has reaffirmed the Governor's supreme authority to faithfully execute the laws when rejecting legislative attempts to arrogate that authority for itself. In *State ex rel. Wallace v. Bone*, 304 N.C. 591 (1982), for example, our Supreme Court recognized that the Governor alone must control executive branch instrumentalities when it rejected the legislature's attempt to put four members of the General Assembly on the Environmental Management Commission. *Bone*, 304 N.C. at 607. And in *McCrory v. Berger*, the Court explained that the reason the Governor must control executive branch commissions was that the executive branch's "distinctive purpose" is to "faithfully execute[], or give[] effect to" laws enacted by the General Assembly, and the "Governor leads" that branch. 368 N.C. at 636. There, the Court sided with then-Governor McCrory in his challenge to "legislation that authorize[d] the General Assembly to appoint a majority of the voting members of three administrative commissions." *Id.* at 636. That structure, our Supreme Court held, left the "Governor with little control over the views and priorities" of those commissions. *Id.* at 647.

The Court has also held that the Governor's exclusive duty to take care that the laws be faithfully executed dictates not only that the legislature cannot take

executive power for itself, but also that the legislature cannot "unreasonably disrupt[]" the Governor's control over the executive branch. *Id.* at 645 (quoting *Bacon*, 353 N.C. at 717). The Governor's "control" over executive boards and commissions derives from three mechanisms: 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.

Thus, in *Cooper v. Berger (Cooper I)*, 370 N.C. 392 (2018), the Court held that a statute requiring the Governor to select half the members of the State Board from a list provided by leadership of the opposing political party violated separation of powers. *Cooper I*, 370 N.C. at 422. That conclusion turned on the Governor's obligation to faithfully execute laws, which the Court explained requires that the Governor retain the ability, "within a reasonable period of time" to have "the final say on how to execute the laws." *Id.* at 418. The General Assembly impermissibly interfered with the Governor's authority when it adopted a structure for the State Board that restricted the Governor's ability to select appointees of his choosing and also gave him "limited supervisory control over the agency and circumscribed removal authority over commission members." *Id.*

Finally, the Court has emphasized the Governor's supreme executive power even when it has rejected separation of powers challenges to the General Assembly's enactments. For example, in *Cooper v. Berger (Cooper Confirmation)*, 371 N.C. 799 (2018), the Court explained that "[t]he Governor is our state's chief executive" and "[h]e or she bears the *ultimate responsibility* of ensuring that our laws are properly

enforced." *Cooper Confirmation*, 371 N.C. at 799 (emphasis added). Although the Court noted that members of the Council of State were also executive branch officers, it likened them to "the advisory councils of the English monarchs." *Id.* at 800 n.1. In other words, Council of State members aid the Governor in executing the laws, but the Governor alone wields the ultimate executive authority and bears the ultimate duty of faithful execution.

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At bottom, the Supreme Court has recognized what the people made clear in our Constitution: the Governor—and the Governor alone—has the constitutional duty to ensure the State's laws are faithfully executed.

III. Senate Bill 382 violates the separation of powers because it prevents the Governor from ensuring faithful execution of the law, as the Constitution requires.

Senate Bill 382 cannot be reconciled with the Governor's role under North Carolina law. By stripping the Governor of control over the State Board and county boards, the General Assembly has interfered with his constitutional obligation to take care that the State's elections laws are faithfully executed. This interference runs counter to the Constitution, the evolution of the Governor's role over time, and binding precedent.

That the General Assembly effectuated its interference in Senate Bill 382 by assigning execution of the State's elections law to a different member of the executive branch, the State Auditor, does not change that conclusion. Indeed, by transferring elections authority to a Council of State member whose role bears no relation to

elections, the General Assembly has merely confirmed its real objective: to dictate the faithful execution of the laws, in violation of the separation of powers.

Because Senate Bill 382—like the five efforts before it—unreasonably disturbs the Governor's authority to take care that the laws are faithfully executed, the law must be enjoined.

A. Senate Bill 382 contravenes the Governor's role as chief executive.

Senate Bill 382's reworking of the State Board is simple, though unconstitutional: the law would take ***all*** the authority previously exercised by the Governor with respect to the State Board and transfer that executive authority to the State Auditor. More specifically, the challenged provisions would:

- End the terms of all gubernatorially appointed members on the existing State Board of Elections. Session Law 2024-57 § 3A.3.(c) (amending N.C. Gen. Stat. § 163-19(b)).
- Empower the State Auditor to appoint all members of the newly constituted State Board of Elections. *Id.*
- Empower the State Auditor to fill all vacancies on the State Board of Elections. *Id.*
- Empower the State Auditor to appoint the chair of all 100 county boards of elections. *Id.* at § 3A.3.(f) (amending N.C. Gen. Stat. § 163-30(a)).
- Assign to the Auditor the statutory power of removal. *Id.* at § 3A.3.(d) (amending § 163-20(d)); *see also* N.C. Gen. Stat. § 143B-2 (Executive Organization Act of 1973, which contains default gubernatorial removal powers, is not expressly applicable to State Board).

These changes cannot be reconciled with the Governor's unique role under our Constitution, especially when compared to the limited, specific role contemplated for the Auditor. While the Governor is mentioned 78 separate times in the Constitution, the Auditor is mentioned just once. *Compare* N.C. CONST. art. III, § 7(1) *with, e.g.*, N.C. CONST. art. I, § 37, art. II, § 22, art. III, art. IV, § 19, art. IX § 4. art. XII, § 1. The Governor—not the Auditor—is our State's chief executive. The Governor—not the Auditor—is tasked with the constitutional obligation to faithfully execute the law. Consequently, Senate Bill 382 has the same constitutional infirmities as the General Assembly's prior attempts to take from the Governor power to supervise the executive officials who administer the State's elections.

North Carolina case law is plain and clear: the North Carolina Constitution requires the Governor to have sufficient control over administrative bodies that have final executive authority to ensure that the laws can be faithfully executed. *McCrory*, 368 N.C. at 646; *Cooper I*, 370 N.C. at 418. To assess the Governor's claims, precedent directs this Court to first consider whether the State Board possesses executive authority, such that the Governor is entitled to control it. *See Wallace*, 304 N.C. at 606–07 (first considering whether the "duties of the EMC are administrative or executive in character"). Next, the Court must consider whether the General Assembly has unconstitutionally encroached on the Governor's control of the State Board. *McCrory*, 368 N.C. at 646; *Cooper I*, 370 N.C. at 418. Here, the answer to both questions is unequivocally yes. Senate Bill 382 is therefore unconstitutional.

First, just six years ago, our Supreme Court concluded that the State Board is primarily administrative or executive in character. *Cooper I*, 370 N.C. at 415. Similarly, this Court held that both the State Board and county boards were executive agencies at summary judgment when assessing the Governor's challenge to Senate Bill 749. Summary Judgment Order at 5-6 (¶¶11-12). Nothing has changed in the duties or functions of the State Board or county boards that would warrant a different conclusion.

Specifically, the State Board of Elections remains responsible for "general supervision over the primaries and elections in the State," including 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.Likewise, the county boards of elections undertake executive functions, such as administering elections on the county level, appointing and removing board employees, preparing ballots, preparing budgets, and issuing certificates of election. N.C. Gen. Stat. § 163-33(6)–(11). Because these functions are "primarily administrative or executive in character," the State Board and county boards of election are executive agencies. *McCrory*, 368 N.C. at 645–46.

The Court must therefore move to the next step and ask whether Senate Bill 382 affords the Governor sufficient control to "perform his express constitutional duty

to take care that the laws are faithfully executed." *Id.*; *Cooper I*, 370 N.C. at 414. It does not.

Again, as our Supreme Court has explained, "the relevant issue in a separation-of-powers dispute is whether, based upon a case-by-case analysis of the extent to which the Governor is entitled to appoint, supervise, and remove the relevant executive officials, the challenged legislation impermissibly interferes with the Governor's ability to execute the laws in any manner." *Cooper BOE*, 370 N.C. at 417. To survive judicial scrutiny, the Governor must retain "'enough control over' the executive officers 'to perform his constitutional duty' under the take care clause." *Cooper Confirmation*, 371 N.C. at 806 (quoting *McCrory*, 368 N.C. at 646).

Here, where Senate Bill 382 would completely remove the Governor from supervising the executive branch officials charged with administering the State's election laws, the constitutional violation is plain. As explained above, under Senate Bill 382, the Auditor, not the Governor, would have authority to appoint, supervise, and remove the members of the State Board and the chairs of all 100 county boards of elections. *See Cooper Confirmation*, 371 N.C. at 806; *McCrory*, 368 N.C. at 646. Such an approach would functionally deprive the Governor of any role in the administration of the state's election laws, divest him of the executive power vested in him by the Constitution, and prevent him from ensuring that the election laws are faithfully executed. Legislation of that kind cannot be reconciled with the text of the Constitution, the evolving role of the Governor over the last two centuries, or our Supreme Court's precedents.

B. Senate Bill 382 is not saved by the State Auditor's location in the executive branch.

Senate Bill 382 concededly adopts a somewhat different strategy than the General Assembly's five prior attempts to strip the Governor of control of the State Board in the past decade. For the first time, the General Assembly has sought to transfer authority over the enforcement of the State's election laws from the Governor to another official within the executive branch. But this strategy is no more constitutional than the last five. Because, under Senate Bill 382, the General Assembly claims the power to reassign execution of the election laws to its preferred executive official any time it is dissatisfied with enforcement, the legislature has effectively sought to dictate how the law is enforced. That kind of legislative aggrandizement violates the separation of powers.

1. The Constitution does not allow the General Assembly to indiscriminately reassign executive authority.

As the Supreme Court has repeatedly held, the Governor's right to control executive boards and commissions derives from the duty of faithful execution—not from the fact that he is an elected member of the executive branch. *Cooper I*, 370 N.C. at 418 ("The General Assembly cannot, however, *consistent with the textual command contained in Article III, Section 5(4) of the North Carolina Constitution*, structure an executive branch commission in such a manner that *the Governor* is unable, within a reasonable period of time, to 'take care that the laws be faithfully executed' . . . ." (emphases added)); *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.'*" (emphasis added)). For that reason, the General

Assembly cannot simply transfer the Governor's authority over certain executive or administrative agencies to other executive officials in the Council of State. Because they are not assigned the duty to take care that the laws are faithfully executed, the other Council of State members are not fungible with the Governor.

Precedent from the North Carolina Supreme Court confirms the point. In *North Carolina State Board of Education*, the Court considered legislation that assigned new duties to the State Superintendent of Public Instruction. 371 N.C. 170, 171 (2018). The Court recited the Superior Court's common-sense statement of the law: "[W]hen [the] constitution expressly confers certain powers and duties on an entity, those powers and duties cannot be transferred to someone else without a constitutional amendment." *Id.* at 72 (internal quotation marks omitted); *see also* Thomas M. Cooley, *A Treatise on the Constitutional Limitations Which Rest upon the Legislative Power of the States of the American Union* 114-115 (2d ed. 1871) ("[S]uch powers as are specially conferred by the constitution upon the governor, or upon any other specified officer, the legislature cannot authorize to be performed by any other officer or authority; and from those duties which the constitution requires of him he cannot be excused by law."). The Court then upheld the legislation against a challenge brought by the State Board of Education, a constitutionally created body, because the new duties assigned to the State Superintendent (also a constitutionally created office) "*d[id] not interfere* with the Board's constitutional authority to generally supervise and administer the public school system . . . ." *Id.* at 185 (emphasis added). This was because the "statutory changes . . . do not, at least on

their face, invade the Board's constitutional authority under Article IX, Section 5 . . . [because of] numerous statutory provisions *subjecting the Superintendent's authority* to appropriate rules and regulations adopted by the Board." *Id.* at 187 (emphasis added); *see also Martin v. Thornburg*, 320 N.C. 533, 545-46 (1987) (finding no constitutional conflict between the authority of the Governor and Attorney General with regard to representation in legal proceedings because statutory responsibilities of the Attorney General were "*not in derogation of or inconsistent with the executive power* vested by the constitution in the Governor" (emphasis added)).

As another example, our Supreme Court has held that a Superior Court judge may not order a District Attorney to request that the Attorney General prosecute a case. This is so because the North Carolina Constitution and related statutes "give the District Attorneys of the State the *exclusive discretion and authority* to determine whether to request—and thus permit—the prosecution of any individual case by the Special Prosecution Division [of the Office of the Attorney General]." *See State v. Camacho*, 329 N.C. 589, 594 (1991) (emphasis added). That power cannot be fulfilled—or even interfered with—by another constitutional officer. *See id.*

State Board of Education and *Camacho* illustrate that diffusing the Governor's exclusive, constitutional duty of faithful execution among other executive branch officers not subject to the Governor's authority violates the plain language of the North Carolina Constitution and thus cannot be constitutional. The executive power vested in the Governor and his constitutionally assigned duty to take care that the

laws be faithfully executed cannot be transferred to the State Auditor or any other member of the Council of State at the whim of the General Assembly.

Any other approach would afford the General Assembly an easy end-run around the separation of powers. If the General Assembly can simply assign any executive function to any executive official any time it wants, it can effectively control the execution of the law by continuing to transfer executive authority among executive officials until it achieves its desired outcome. "The separation of powers clause plainly and clearly does not allow the General Assembly to take this much control over the execution of the laws from the Governor and lodge it with itself." *McCrory*, 368 N.C. at 647. Indeed, the rule that the General Assembly seeks "would nullify the separation of powers clause, at least as it pertained to the General Assembly's ability to control the executive branch." *Id.*

If the scheme enacted in Senate Bill 382 is allowed to stand executive power would no longer derive from the people and their Constitution but would be subject to arbitrary reassignment at the whim of the General Assembly. The General Assembly could make the Insurance Commissioner, Attorney General, or any other Council of State member responsible for the administration of the election laws or any other executive function. The duty and power to perform independent, impartial audits of state agencies could be assigned to the Commissioner of Agriculture. The state's agricultural policy could be managed by a commission appointed by the Superintendent of Public Instruction. The Department of Adult Correction could be supervised by a board appointed by the Labor Commissioner.

That approach would shatter our constitutional balance and subvert the will of the people, who elect their executive officials based on their qualifications to fulfill their assigned responsibilities. The people of North Carolina elected the Governor—and only the Governor—to be the State's chief executive. And they elected the State Auditor to conduct independent audits of government agencies, not to manage those agencies.

2. The General Assembly cannot constitutionally transfer authority over elections to the State Auditor.

To resolve this case, the Court need only determine whether our Constitution permits the State Auditor to be solely responsible for execution of the State's election laws. Constitutional text, history, and precedent establish that it does not.

While the Constitution permits the legislature to "prescribe[] by law" the "respective duties" of the "[o]ther elective officers" in the Council of State, N.C. Const. art III, § 7(2), in assigning those duties it cannot unreasonably disturb the Governor's supreme executive authority and his obligation to take care that the laws are faithfully executed. *Cooper Confirmation*, 371 N.C. at 806 ("The separation of powers clause requires that the Governor have enough control over executive officers to perform his constitutional duty under the take care clause." (cleaned up)). Moreover, the General Assembly's power to prescribe duties to the Council of State is constrained by the people's understanding of the purpose of those offices when they were created. *See Sneed v. Greensboro City Bd. of Ed.*, 299 N.C. 609, 613 (1980) ("Inquiry must be had into the history of the questioned provision and its antecedents, the conditions that existed prior to its enactment, and the purposes sought to be

accomplished by its promulgation. The court should place itself as nearly as possible in the position of the men who framed the instrument." (internal quotation marks omitted)). If the people intended § 7(2) to function as plenary authority for the General Assembly to assign *any* duty to *any* Council of State member at *any* time, then they would have assigned the executive authority and the take care obligation to the entire Council of State. They did not.

The elected, constitutional position of State Auditor was first established in the 1868 Constitution. 1868 N.C. CONST. art. III, § 1. By the State Auditor's own account, the role of the State Auditor as established in 1868 was to "superintend the fiscal affairs of the State; examine and settle accounts of persons indebted to the State; liquidate claims by persons against the State; and to draw warrants on the State Treasurer for moneys to be paid out of the Treasury." N.C. Office of the State Auditor, *History of the Office of State Auditor* (last accessed Feb. 24, 2025), https://www.auditor.nc.gov/about-us/history-office-state-auditor (attached as Exhibit A). The 1869 legislation that implemented the 1868 Constitution provided that "It is the duty of the Auditor: (1) To superintend the fiscal concerns of the State." Pub. L. ch. 270 § 63(1) (1869). The legislation went on to assign a variety of additional fiscal duties to the Auditor, such as "[t]o keep and state all accounts in which the State is interested," and "[t]o examine and settle the accounts of all persons indebted to the State." *Id.* §§ 63(4), (5).

This understanding of the Auditor's role is also reflected in the General Statutes today. The "General Duty" assigned by the General Assembly to the State

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

This portfolio is consistent with the office's title. An auditor is "a person authorized to examine and verify accounts." Merriam-Webster Dictionary (2025); *see also* Black's Law Dictionary (12th ed. 2024) ("A person or firm, usu. an accountant or an accounting firm, that formally examines an individual's or entity's financial records or status."); *id.* (defining "state auditor" as "The appointed or elected official responsible for overseeing state fiscal transactions and auditing state-agency accounts"). That is precisely how our Constitution's framers would have understood the role. *E.g.*, Noah Webster, *An American Dictionary of the English Language*, (1828 ed.) ("A person appointed an authorized to examine an account or accounts, compare the charges with the vouchers, examine the parties and witnesses, allow or reject charges, and state the balance."); John Bouvier, *A Law Dictionary adapted to the Constitution and Laws of the United State of America* (1860 ed.) ("An officer whose

duty is to examine the accounts of officers who have received and disbursed public moneys by lawful authority."); Oxford University Press, Oxford English Dictionary (2025) (" An official whose duty it is to receive and examine accounts of money in the hands of others, who verifies them by reference to vouchers, and has power to disallow improper charges.").

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

Senate Bill 382 would therefore represent a significant departure from historical practice by making the State Auditor responsible for administration of the state's election laws, as opposed to auditing the functions of the State Board of Elections or county boards of elections. Moreover, the legislation would make North Carolina unique in the nation by assigning the State Auditor complete authority to

appoint, supervise, and remove members of the State Board and the chairs of all 100 county boards. And it would upset the settled expectations of North Carolina's voters, from whom "[a]ll political power is . . . derived," by completely changing the executive power over elections just weeks after an election took place. N.C. CONST. art. I, § 2.

By contrast, the Governor's important role in the faithful execution of our state's election laws has been consistent: for more than one hundred years, the Governor has appointed the members of the State Board of Elections. *See* N.C. Gen. Stat. § 163-19(b) (2024); 1901 Session Law Ch. 89 at p.244 § 5. While the State Board functioned independently, the Governor was able to supervise its actions and ensure faithful execution of the state's elections laws in his role as chief executive.[7]

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

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

The Constitution limits the General Assembly's authority to transfer executive authority away from the Governor. Otherwise, the vesting of supreme executive authority in the Governor and the Governor's take care authority are rendered meaningless, and the General Assembly can effectively wield the ultimate executive power of the State. Because Senate Bill 382 plainly runs afoul of any reasonable constitutional limit, its provisions transferring elections authority to the State Auditor are unlawful.

CONCLUSION

For the foregoing reasons, Plaintiff Governor Josh Stein respectfully requests that this Court grant his Motion for Summary Judgment and permanently enjoin Sections 3A.3.(b), (c), (d), (f), (g), and (h) of Session Law 2024-57 (Senate Bill 382).

This the 25th day of February, 2025.

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