No. COA 24-406 TENTH DISTRICT

NORTH CAROLINA COURT OF APPEALS

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

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LEGISLATIVE DEFENDANT-APPELLANTS' BRIEF

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No. COA 24-406 TENTH DISTRICT

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

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LEGISLATIVE DEFENDANT-APPELLANTS' BRIEF
* * * * * * * * * * * * * * * * * * *

ISSUES PRESENTED

I. Whether the trial court erred in determining that it had subject matter jurisdiction by rejecting the application of the political question doctrine.

II. Whether trial court erred in determining that Session Law 2023-139 was unconstitutional beyond a reasonable doubt.

III. Whether, based on its determination of jurisdiction and unconstitutionality, the trial court erred in permanently enjoining Session Law 2023-139.

INTRODUCTION

The trial court erred by not recognizing the applicability of the political question doctrine in *Harper v. Hall*, 384 N.C. 292, 325, 886 S.E.2d 393, 415 (2023) and instead relying on *Cooper v. Berger*, 370 N.C. 392, 809 S.E.2d 98 (2018) (referred to herein as "*Cooper I*"), where the political question doctrine was practically extinguished, to find subject matter jurisdiction. The Court also incorrectly pigeonholed *Harper's* political question analysis to redistricting. These were material miscalculations by the trial court that lead it to incorrectly determine that it had subject matter jurisdiction.

The Court further erred when it wholly relied on *Cooper I* and rubber-stamped Senate Bill 749 as unconstitutional. *Cooper I* was not a mandate against iterations of the election boards in this state.

This Court should reverse the trial court's determination on subject matter jurisdiction. But failing that, the close review our Constitution demands in determining unconstitutionality beyond a reasonable doubt demonstrates that 2023 N.C. Sess. Laws 139 is a lawful exercise of legislative authority.

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STATEMENT OF THE CASE

On September 22, 2023, the General Assembly passed Senate Bill 749 and presented it to the Governor. The Governor vetoed that legislation, and the General Assembly overrode the Governor's veto on 10 October 2023, enacting Senate Bill 749 as 2023 N.C. Sess. Laws 139.

On 17 October 2023, the Governor, filed suit, asking that Senate Bill 749 be declared unconstitutional and seeking pretrial and permanent injunctive relief. The Governor also requested a three-judge superior court panel be appointed pursuant to N.C. Gen. Stat. § 1-267.1. On 8 November 2023 Chief Justice Newby appointed a three-judge panel consisting of the Honorables Edwin Wilson, Lori Hamilton, and Andrew Womble.

On 30 November 2023, that trial court panel entered a preliminary injunction halting the transition to the new structure for the state and county boards of election. Legislative Defendants filed a motion to dismiss for lack of subject matter jurisdiction, or alternatively, judgment on the pleadings, and the Governor filed a motion for summary judgment. Following a hearing on those motions, the trial court entered an 11 March 2024 Order determining that the court had subject matter jurisdiction and that Senate Bill 749 was unconstitutional.

Legislative Defendants filed notice of appeal on 12 March 2024. Legislative Defendants sought a petition for discretionary review with the Supreme Court of North Carolina prior to review by this Court. This Court graciously extended its briefing schedule while the Supreme Court weighed the bypass petition. On 21 August 2024, the Supreme Court denied the bypass petition and the matter is on for review with this Court.

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STATEMENT OF THE GROUNDS FOR APPELLATE REVIEW

The trial court determined that Senate Bill 749 was unconstitutional and, therefore, permanently enjoined it in a final judgment. Appeal lies to this Court pursuant to N.C. Gen. Stat. § 7A-27(b).

STATEMENT OF THE FACTS

This is a facial challenge to an act of the General Assembly that was brought and determined before the law was implemented. Accordingly, the relevant facts are primarily the projected operation of the law in question.

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Senate Bill 749, enacted as 2023 N.C. Sess. Laws 139, changes the structure of the State Board of Elections from a five-person make-up, consisting of no more than three individuals from the same political party, and creates an eight-person board whose members are most likely evenly politically divided but could be politically unaffiliated. *See* N.C. Gen. Stat. § 163-18(b) and 2023 N.C. Sess. Laws 139, § 2.1. The Session Law diffuses the power of appointment for the Board of Elections through the recommendation of four legislative leaders of opposing political parties instead of concentrating all appointments in a single office, presently the Governor. The Session Law also minimizes political heavy handedness at the county elections board level by changing membership from its current five-person make-up, which generally consists of no more than three individuals from the same political party, to four-person boards with likely equal political representation. *See* N.C. Gen. Stat. § 163-30(a) and 2023 N.C. Sess. Laws 139, § 4.1. While still maintaining the power to carry out its decisions independently, the Elections Board moves administratively under the Secretary of

State. 2023 N.C. Sess. Laws 139, § 1.1(b). These changes are designed to better insulate the elections boards from political influence, promote compromise rather than polarity, and establish a greater sense of trust in elections administration.

The Governor vetoed the bill, arguing that it is a "serious threat to democracy," (*see* Governor's Veto Message),[1] one that it will "doom our state's elections" (*id.*) and "fails to respect fundamental principles of representative government," (R p 5). The General Assembly rejected this hyperbole and overrode his veto. *See* 2023 Sess. Law 139. This Court should reverse the denial of Legislative Defendants' motion to dismiss or, alternatively, judgment on the pleadings.

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ARGUMENT

I. THE TRIAL COURT ERRED IN DETERMINING THAT THE GOVERNOR'S CHALLENGE DID NOT RAISE A POLITICAL QUESTION AND THAT IT HAD SUBJECT MATTER JURISDICTION.

The people of North Carolina expressly set out the mechanism by which the Governor could amend "the allocation of offices and agencies and in the allocation of those functions, powers, and duties as he considers necessary for efficient administration." N.C. Const. Art. III, § 5(10). And that is via executive order, reviewed and approved or rejected by the General Assembly. *Id*. The Governor may not amend the laws regarding the organization of state agencies by arguing for a judicial determination of an agency structure that would better suit the Governor's policy preferences. The process in the text of the Constitution and the fact that the

[1] https://webservices.ncleg.gov/ViewBillDocument/2023/7382/0/S749-BILL-NBC-11457

court is weighing which agency structure is best, in part, is what makes this case inappropriate for judicial review under the separation of powers. As our Supreme Court most recently held on the subject: "[w]hen we cannot locate an express, textual limitation [in our Constitution] on the legislature, the issue at hand may involve a political question that is better suited for resolution by the policymaking branch." *Harper v. Hall*, 384 N.C. 292, 325, 886 S.E.2d 393, 415 (2023). Article III, Section 5(4) is not that express textual limitation on the Legislature's ability to organize and appoint administrative offices. "As essentially a function of the separation of powers, the political question doctrine operates to check the judiciary and prevent its encroaching on the other branches' authority." *Id.* (cleaned up). Heeding that encroachment, this Court should reverse the trial court's determination and dismiss this case as a political question.

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A. Standard of Review of Jurisdictional Motion to Dismiss

"Concepts of justiciability have been developed to identify appropriate occasions for judicial action [and] the central concepts often are elaborated into more specific categories of justiciability—advisory opinions, feigned and collusive cases, standing, ripeness, mootness, political questions, and administrative questions." *McAdoo v. Univ. of N. Carolina at Chapel Hill*, 225 N.C. App. 50, 51, 736 S.E.2d 811, 814 (2013). Justiciability is a component of subject matter jurisdiction. And whether a trial court is vested with subject matter jurisdiction is a question of law. *Clark v. Clark*, 280 N.C. App. 403, 418, 867 S.E.2d 704, 717 (2021). Accordingly, this Court

reviews the trial court's determination of subject matter jurisdiction *de novo*. *Harris v. Matthews*, 361 N.C. 265, 271, 643 S.E.2d 566, 570 (2007).

Because determining whether a matter presents a political question is itself an exercise of constitutional interpretation, this Court must look to our Supreme Court, which has the last say on whether a question is nonjusticiable. *See Baker v. Carr*, 369 U.S. 186, 211 (1962). *Harper* articulated the correct test.

> Out of respect for separation of powers, a court must refrain from adjudicating a claim when any one of the following is present: (1) a textually demonstrable commitment of the matter to another branch; (2) a lack of judicially discoverable and manageable standards; or (3) the impossibility of deciding a case without making a policy determination of a kind clearly suited for nonjudicial discretion.

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Harper, 384 N.C. at 325, 886 S.E.2d at 415-16 (relying on *Baker*, 369 U.S. at 217). Each of these grounds is present here and the trial court erred in determining that the Governor's challenge here is not a political question.

B. Trial Court Misunderstood the Interplay of Harper v. Hall and Cooper I.

In paragraph six of its opinion, the trial court summarizes *Cooper I* noting that a justiciable question is whether the court is called on to interpret a constitutional provision or "ascertain the meaning of an applicable legal principle." (*See* R. p 126) (quoting *Cooper I*, 370 N.C. at 409, 809 S.E.2d at 108). The *Cooper I* court determined that there is no political question when the Court is called upon to construe two competing constitutional provisions. *Cooper I,* 370 N.C. at 412, 809 S.E.2d at 111.

Following its discussion of *Cooper I*, in paragraph 7 of its opinion, the trial court found the Governor's challenge here the same as in *Cooper I*: just construing

the breadth of the faithful execution of the laws clause in Article III, Section 5(4), and whether that "checks" the otherwise textual commitment of agency organization to the General Assembly.

> Here, like in *Cooper I*, the Governor's Complaint challenges the manner in which the State Board and County Boards are constituted and required to operate pursuant to the Session Law and seeks determination as to the extent of his power in N.C. Const. Art. III, Section 5(4) contradistinguished from the power of Defendants in N.C. Const. Art. III, Section 5(10).

(R p 126). The trial court essentially held that it had jurisdiction because it was construing the meaning of a constitutional provision and, more pointedly, whether that constitutional provision checked another provision.

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It is relatively easy to see how that "test" for a political question eviscerates the doctrine. "Under the majority's new test, every separation-of-powers dispute is justiciable." *Cooper I*, 370 N.C. at 440, 809 S.E.2d at 127 (Newby, J., dissenting).

In *Harper*, our Supreme Court vacated its earlier opinions attempting to create a constitutional standard for when political considerations in redistricting passed from the permissible into the unconstitutional. 384 N.C. at 300, 886 S.E.2d at 401 ("[W]e hold that partisan gerrymandering claims present a political question that is nonjusticiable under the North Carolina Constitution.") In holding that the issue on rehearing was a political question, the Court affirmed the trial court's determination that political consideration in redistricting was a nonjusticiable issue. *Id*.

In *Harper*, our Supreme Court outlined the separation of powers and how to analyze that doctrine in determining whether there exists a political question that the courts cannot answer.

> Given that "a constitution cannot violate itself," *Leandro v. State*, 346 N.C. 336, 352, 488 S.E.2d 249, 258 (1997), a branch's exercise of its express authority by definition comports with separation of powers. A violation of separation of powers only occurs when one branch of government exercises, or prevents the exercise of, a power reserved for another branch of government. *State ex rel. McCrory v. Berger*, 368 N.C. 633, 660, 781 S.E.2d 248, 265 (2016) (Newby, J., concurring in part and dissenting in part). **Understanding the prescribed powers of each branch, as divided between the branches historically and by the text itself, is the basis for stability, accountability, and cooperation within state government.** *See State v. Emery*, 224 N.C. 581, 584, 31 S.E.2d 858, 861 (1944) ("[Constitutions] should receive a consistent and uniform construction ... even though circumstances may have so changed as to render a different construction desirable.").

Harper, 384 N.C. at 322, 886 S.E.2d at 413 (emphasis added). The Court also reiterated the high bar for unconstitutionality of a statute:

> When this Court looks for constitutional limitations on the General Assembly's authority, it looks to the plain text of the constitution just as it would look to the plain text of a statute. Thus, a claim that a law is unconstitutional must surmount the high bar imposed by the presumption of constitutionality and meet the highest quantum of proof, a showing that the statute is unconstitutional beyond a reasonable doubt.

Id. at 324, 886 S.E.2d at 414–15.

Examining *Bayard v. Singleton*, 1 N.C. 5, 1 Mart. (NC) 48 (1787), where the North Carolina Supreme Court first applied judicial review to strike down the

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constitutionality of a statute that did away with the right to a jury trial in property cases—a constitutional right expressly in its text—the *Harper* Court summarized the crux of judicial review on the constitutionality of statute under our Constitution: "the judiciary performs the role of judicial review, but it only declares an act of the General Assembly void when it directly conflicts with an express provision of the constitution." *Harper*, 384 N.C. at 325, 886 S.E.2d at 415.

The presence of an express provision of the constitution prohibiting legislative action is important to the political question doctrine, which is itself an exploration of the separation of powers.

> Thus, plainly stated and as applied to this case, the standard of review asks whether the redistricting plans drawn by the General Assembly, which are presumed constitutional, violate an express provision of the constitution beyond a reasonable doubt. When we cannot locate an express, textual limitation on the legislature, the issue at hand may involve a political question that is better suited for resolution by the policymaking branch. As "essentially a function of the separation of powers," the political question doctrine operates to check the judiciary and prevent its encroaching on the other branches' authority. *Baker v. Carr*, 369 U.S. 186, 217, 82 S. Ct. 691, 710, 7 L.Ed.2d 663 (1962). Under this doctrine, courts must refuse to review political questions, that is, issues that are better suited for the political branches. Such issues are considered nonjusticiable.

Id. at 325, 886 S.E.2d at 415. The Court went on to note that redistricting was textually committed to the General Assembly, *id*. at 330, 886 S.E.2d at 418, just like organization and structure of North Carolina's agencies are a function of Legislative, and even express gubernatorial power in executive orders. *See* N.C. Const. Art. III, § 5(10).

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But the plaintiffs in *Harper* were not arguing that the Legislature could not draw a map, which is a legislative prerogative; instead, they were arguing that the resulting district map violated other North Carolina constitutional provisions: "the free elections clause, the equal protection clause, the free speech clause, and the freedom of assembly clause." 384 N.C. at 306, 886 S.E.2d at 404. If the *Cooper I* principles applied on the question of justiciability, the question would have been justiciable. The parties were, after all, seeking resolution of two competing constitutional provisions. But the Supreme Court rejected that principle as sufficient to create a justiciable controversy.

> Plaintiffs are mistaken; these state constitutional provisions do not expressly limit the General Assembly's redistricting authority or address partisan gerrymandering in any way. Where there is no express limitation on the General Assembly's authority in the text of the constitution, this Court presumes an act of the General Assembly is constitutional."

Id. at 351, 886 S.E.2d at 431.

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Applying our Supreme Court's more recent jurisprudence, this Court is simply not bound by the political question conclusions drawn by the *Cooper I* because that Court ignored the political question *Harper* reinvigorated.

The trial court doubled down on its mistake that *Cooper I* as controlling in determining that *Harper* was limited to redistricting. (*See* R p 127, ¶10). *Harper* is factually about redistricting. But the Court did nothing to indicate its mode of analysis was limited to redistricting. For instance, the *Harper* court noted that when it "looks for constitutional limitations on the General Assembly's authority, it looks

to the plain text of the constitution just as it would look to the plain text of a statute." *Harper*, 384 N.C. at 324, 886 S.E.2d at 414–15. The Court did not say that when it looks for limitations on the General Assembly's redistricting authority, it looks to the plain text. Again, "a claim [not just a redistricting claim] that a law is unconstitutional must surmount the high bar imposed by the presumption of constitutionality and meet the highest quantum of proof, a showing that the statute is unconstitutional beyond a reasonable doubt." *Id*. There is no insinuation that standard of review is just for redistricting. Instead, the tenants were applied in that case to redistricting plans just as should be applied to the General Assembly's plans for the organization of an agency or board; they are both acts of the General Assembly.

> Accordingly, the holding of Bayard is clear: the judiciary performs the role of judicial review, but it only declares an act of the General Assembly void when it directly conflicts with an express provision of the constitution.
>
> Thus, plainly stated and as applied to this case, the standard of review asks whether the redistricting plans drawn by the General Assembly, which are presumed constitutional, violate an express provision of the constitution beyond a reasonable doubt. When we cannot locate an express, textual limitation on the legislature, the issue at hand may involve a political question that is better suited for resolution by the policymaking branch. As "essentially a function of the separation of powers," the political question doctrine operates to check the judiciary and prevent its encroaching on the other branches' authority.

Harper, 384 N.C. at 325, 886 S.E.2d at 415. For instance, inserting "boards of election plans" for "redistricting plans" in the above creates no misapplication of law.

C. Appropriate Examination of the Political Question

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That the General Assembly has the power to alter and amend the structure of agencies of North Carolina is understood. *See, e.g., Adams v. N. Carolina Dep't of Nat. & Econ. Res.*, 295 N.C. 683, 696–97, 249 S.E.2d 402, 410 (1978). It is not merely a function of the legislative branch's plenary power but is textually committed authority:

> 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, but the Governor may make such changes in the allocation of offices and agencies and in the allocation of those functions, powers, and duties as he considers necessary for efficient administration. If those changes affect existing law, they shall be set forth in executive orders, which shall be submitted to the General Assembly not later than the sixtieth calendar day of its session, and shall become effective and shall have the force of law upon adjournment sine die of the session, unless specifically disapproved by resolution of either house of the General Assembly or specifically modified by joint resolution of both houses of the General Assembly.

N.C. Const. Art. III, § 5(10).

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Where the text of our Constitution makes clear that the commitment of the power to alter the functions and duties of state agencies is reserved for the Legislature and the Governor through executive order, there is no room for the Court to impose extra-textual constraints on the General Assembly or to give extra-textual power to the Governor. The issue is a political question. *See Baker,* 369 U.S. at 217; *see also Harper*, 384 N.C. at 325, 886 S.E.2d at 415–16. Because the Constitution recognizes the right of the General Assembly to alter the organization of state agencies and textually grants the Governor a mechanism for challenging the

organization the General Assembly has put in place, there is no constitutional controversy for this Court to decide.

1. Textual Commitment

Looking to the text of the Constitution and the historical understanding of the General Assembly's ability to organize and manage agencies within the executive branch against the Governor's execution of the laws buttresses the fact that execution of the laws is not an express limitation or check on the law-making power in this circumstance.

By design *in the text* of the Constitution, the General Assembly and the Governor are proscribed to a certain relationship in the management and alteration of state agencies, with the General Assembly having the final authority. *See* Article III, § 5(10). Where the General Assembly acts, the Governor can evaluate and "may make such changes in the allocation of offices and agencies and in the allocation of those functions, powers, and duties as he considers necessary for efficient administration." *Cooper I*, 370 N.C. at 435, 809 S.E.2d at 125. If changes to a law are necessary, an executive order outlining the changes is proposed to the General Assembly within 60 days of its session, and the General Assembly can approve, disapprove, or take no action. *Id.*

The *Cooper I* court said that Article III, Section 5(10) deals with "what the agencies in question are supposed to do, rather than the extent to which the Governor has sufficient control over those departments and agencies to ensure 'that the laws be faithfully executed.'" *Id.* at 410, 809 S.E.2d 98 at 109. The Court does not develop

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this point any further. That is because it did not need to. *Cooper I*'s aside about Article III, Section 5(10) was in the context of the Court construing its "judicial interpretation is not a political question" test and not in the context of determining the textually committed power of Article III, Section 5(10) and whether that power organize and amend the makeup of the administrative state is given to other branches of government without explicit textual limitation on that power. Examining Article III, Section 5(10) in that light, changes things. Article III, Section 5(10) discusses not only the General Assembly's authority but also precisely how the ***Governor*** can affect change or improve his or her perceived efficiencies of government. In other words, if there was a better way to execute and administer the laws for North Carolina than the General Assembly has devised, the Governor has a textually-granted specific power to make a change—subject to its later approval by the General Assembly.

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And further, appointing statutory officers within the administrative state has been a part of the General Assembly's plenary power for centuries. While under the 1868 Constitution, most of the executive branch was elected by the people, and the Governor had exclusive appointment rights, that gubernatorial power was rather short-lived. When political power in the General Assembly changed hands, power was returned to the General Assembly:

> The principal aim of the 1876 amendments[2] was to restore to the General Assembly more of the power it had lost. The

[2] "[T]he voters on November 7, 1876, approved by a vote of 120,159 to 106,554 - a set of 30 amendments affecting 36 sections of the state constitution." John L. Sanders, *Our Constitution: An Historical Perspective*, p.3, available at: https://www.sosnc.gov/static_forms/publications/North_Carolina_Constitution_Our_Co.pdf

> elective officers created in 1868 had lessened legislative control over the executive and judicial branches; the General Assembly now reclaimed the power to provide for legislative appointments to executive offices created by statute.

John V Orth & Paul Martin Newby, *The N.C. State Constitution*, p.25 (2d ed. 2013). Appointment power was restored to the General Assembly by the deletion of the phrase that prohibited the General Assembly from appointments.

The *Cunningham* and *Salisbury* decisions of this Court confirm that, in North Carolina, the Governor's ability to appoint after 1875 was constrained by the General Assembly's power to make direct appointments and that the power to appoint in the hands of the General Assembly did not violate the separation of powers clause. The *Cunningham* Court, fresh off the new constitutional amendments to the second constitution of the state, which included a separation of powers clause and the Governor's duty to "take care that the laws be faithfully executed," rejected the theory that appointment power violated the separation of powers when exercised by another branch of government.

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> This view of that learned court was strictly in accordance with the constitutional history of this State. The constitution of 1776 in section 4 of the declaration of rights, declared that 'the legislative, executive and supreme judicial powers of government ought to be forever separate and distinct from each other.' Yet articles 13, 14 and 15 provided that the legislature should by joint ballot elect the governor, and appoint judges of the supreme courts of law and equity, judges of admiralty, attorney general, generals and field officers in the militia, and all officers of the regular army of this state. The governor continued to be elected by the legislature until the convention of 1835, and the judges until the constitution of 1868. *It is thus clear*

> *that the power of appointment was not regarded as exclusively an executive prerogative.*

Cunningham v. Sprinkle, 124 N.C. 638, 642-43, 33 S.E. 138, 139 (1899) (emphasis added). In *Salisbury v. Board of Directors of State Hospital*, 167 N.C. 223, 83 S.E. 354 (1914), this Court compared the appointments clause of 1875 to the one of 1868 in determining whether a statute subjecting the Governor's appointment of director of the State hospital to advice and consent of the Senate was constitutional.

> It will thus be noted that the inhibition on the legislative power to appoint to office is removed and the inherent power of the Governor to appoint is restricted to constitutional offices and where the Constitution itself so provides. Accordingly, it has since been the accepted view that, in all offices created by statute, including these directorates and others of like nature, the power of appointment, either original or to fill vacancies, is subject to legislative provision as expressed in a valid enactment.

Salisbury, 167 N.C. at 226, 83 S.E. at 355.

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Gubernatorial appointment power, much less exclusive control of agency authority, is not historically found in the obligation of the Governor to take care that the laws are executed faithfully. In *Winslow v. Morton*, 118 N.C. 486, 24 S.E. 417, 418 (1896) the Court held that the General Assembly's ability to regulate and discipline the militia through statutes "imposes, pro tanto, a limit upon the incidental authority of the governor as commander in chief, and charges him, as the constituted head of the executive department (article 3, § 1), with the duty of seeing that the statute is carried into effect." *Id*. Through time other courts have come to the same conclusion of Article III, Section 5(4)'s execution of the laws. For instance, while a fractured opinion, our Supreme Court in *State ex rel. Martin v. Melott*, 320 N.C. 518, 523–24,

359 S.E.2d 783, 787 (1987) noted that the ability to appoint was not an executive power:

> Article III, Sec. 1 of the Constitution provides that "The executive power shall be vested in the Governor" but it does not define executive power. We believe it means "the power of executing laws." *See Advisory Opinion In re Separation of Powers*, 305 N.C. 767, 774, 295 S.E.2d 589, 593 (1982). The appointment of someone to execute the laws does not require the appointing party to execute the laws. Article III, Sec. 5 of the Constitution lists the duties of the Governor. Subsection (4) of this section provides that "The Governor shall take care that the laws be faithfully executed." Subsection (8) provides for the appointment power of the Governor. This indicates that the appointment power is not the same as taking care that the laws are executed.

Id. The Court of Appeals even in 2009 did not interpret a great well of power associated with the Governor's execution of the laws. "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." *Goldston v. State*, 199 N.C. App. 618, 629, 683 S.E.2d 237, 244 (2009), *aff'd, ordered not precedential*, 364 N.C. 416, 700 S.E.2d 223 (2010).

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Nothing about our historical understanding of the text of Article III, Section 5(4) counsels that it should be interpreted to create a controlling interest of appointments in the Governor or an explicit limitation on the General Assembly's authority to organize and structure state agencies.

In fact, when our latest Constitution was drafted the framers, fully aware of the Governor's faithful execution of the laws, set out a separate proposed amendment to provide the Governor with the ability to appoint and remove the heads of all

administrative departments and agencies of the State. *See Report of the North Carolina State Constitution Study Commission 1968,* p. 113 (1968).[3] This amendment was not adopted by the General Assembly, but its inclusion demonstrates that the framers did not interpret the Constitution to already provide that power to the Governor. The text of the clause bears this out. Rather than operate as a grant of power, it imposes a duty on the Governor, by providing: "The Governor shall take care that the laws be faithfully executed." N.C. CONST. art. III, § 5(4). These are words of limitation. They obligate the Governor to use those powers granted him to see that the laws enacted by the General Assembly—which, of course, serves as the policy-making body of State Government—are "faithfully executed."

Apart from following the law enacted by the General Assembly, nothing about the Governor being able to enforce his views and priorities that are out-of-sync with his execution obligations is found in this explicit text. *See also Cooper I*, 370 N.C. at 438, 809 S.E.2d at 127, (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.").

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[3] The North Carolina Supreme Court has relied on the Commission's Report when analyzing constitutional questions. *See, e.g., Sneed v. Greensboro City Bd. of Ed.*, 299 N.C. 609, 616, 264 S.E.2d 106, 112 (1980).

2. Policy Choices

Further, there is no historical support for equating the lack of political party control of a commission with an inability to execute the laws. Over the years the elections board has been moved and retooled. Before 1901, the Board of Elections was housed within the Department of the Secretary of State. (R S p 37). In 1901, the General Assembly organized the Board of Elections "as a separate and independent bi-partisan Board, for the purpose of removing it from political pressure and control as far as is possible to so do under our system of State Government." (*Id.*) The Governor appointed all five members, and no more than three could be from the same political party. S.L. 1901-89, § 5 (R S p 39). The members of the Board of Elections served for just two years. (*Id.*) In 1971, the Board of Elections was placed under the Department of the Secretary of State again where it was to "be administered under the direction and supervision of that principal department, but shall exercise all its prescribed statutory powers independently of the head of the principal department." 1971 N.C. Sess. Laws 864, §§ 1(6), 4(5). On 13 April 1974, and without any commission or study, the Democratic-controlled General Assembly ratified Session Law 1973-1409, removing the State Board of Elections from under the Secretary of State and making it into the "independent agency." 1973 N.C. Sess. Laws 1409, § 2.

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Changes have also been made over who may supervise or control the Executive Director for the Elections Board. For instance, on 11 April 1974, during the term of Republican Governor James Holshouser, the Democratic-controlled General Assembly created the position of Executive Secretary-Director of the Board of

Elections. *See* 1973 N.C. Sess. Laws 1272, § 4. This law did not impose a term or other restriction on the position. The General Assembly also "extended" the appointment of the Executive Secretary-Director of the State Board of Elections for just over three years to "May 15, 1977," (following the end of Governor Holshouser's term); imposed a four-year term on the Executive Secretary-Director; established that the Executive Secretary-Director could only be removed for cause; and gave the Board of Elections (rather than the Governor or Secretary of State) the authority to appoint the Executive Secretary-Director. The General Assembly again extended the term of the then-Democratic Executive Director for another four years (by deleting "1977" and replacing it with "1989"). 1985 N.C. Sess. Laws 62, § 2.

Service on the Board has also been tweaked to achieve the policy goals of the time. Amendments to N.C. Gen. Stat. § 163-19 in 1975 insulated the Board of Elections from active political influence by placing restrictions on who could serve. *See* 1975 N.C. Sess. Laws 286, § 1. Pursuant to Session Law 1985-62, the General Assembly required the Governor to make his appointments from lists provided by the political parties. During its 2005-2006 session, buried in an appropriations bill, the General Assembly briefly removed the requirement that the Governor appoint members of the Board of Elections from party lists. *See* 2005 N.C. Sess. Laws 276, § 23A.3 (changing "shall" appoint members from party lists to "may" appoint members from party lists). However, the General Assembly repealed that change a year later in a bill dealing with election law changes, thereby restoring the requirement that members be appointed from party lists. *See* 2006 N.C. Sess. Laws 262, § 4.2.

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It does not appear that any of these changes or amendments to the Board of Elections over the last 50 years (including those related to the statutory influence of the Governor, the terms of the Executive Director, the use of lists, or the independence of the Board of Elections) were challenged as unconstitutionally limiting the Governor's ability to execute the laws until the *Cooper I* case. And rightfully so: *Cooper I* is a bit of an aberration in our political question jurisprudence. Dictating a change in public policy, a change from majority party control to bipartisan representation, or placing the Elections Board within an agency or independent of them, is squarely within the prerogatives of the legislative branch. It is not unconstitutional to question and try different solutions. *See Redev. Comm'n v. Sec. Nat'l Bank of Greensboro*, 252 N.C. 595, 612, 114 S.E.2d 688, 700 (1960) ("The General Assembly has the right to experiment with new modes of dealing with old evils, except as prevented by the Constitution.")

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This Court has repeatedly held that:

> The General Assembly is the policy-making agency because it is a far more appropriate forum than the courts for implementing policy-based changes to our laws. This Court has continually acknowledged that, unlike the judiciary, the General Assembly is well equipped to weigh all the factors surrounding a particular problem, balance competing interests, provide an appropriate forum for a full and open debate, and address all of the issues at one time.

Rhyne v. K-Mart Corp., 358 N.C. 160, 169–70, 594 S.E.2d 1, 8–9 (2004) (internal quotations and citations omitted); *see also State v. Wetmore*, 298 N.C. 743, 747, 259 S.E.2d 870, 873 (1979) (change in law should be directed to the General Assembly); *Mincey v. Atl. Coast Line R. Co.*, 161 N.C. 467, 77 S.E. 673, 675–76 (1913) ("such

arguments should be addressed to the Legislature and not to us, who do not make the law, but simply construe it, or declare what it is."). But to suggest, as the Governor does, that faithful *execution* of the laws means the Governor's political party must control a state agency, thereby stripping the Legislature of its lawful ability to shift public policy through legislative *enactment*, would leave the Court weighing whether the Governor or General Assembly's policies are better for the people of North Carolina. This is a constitutional space the courts cannot occupy. A court's wisdom in knowing when to abstain from becoming involved in a case may be as important to maintaining the separation of powers as a court's decision ruling on separation of powers.

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* * *

The recognition of the political question in *Harper* supports a determination that this case is a political question into which this Court should not tread. Given the history of the appointment power of the General Assembly; the General Assembly's textually committed authority to structure an agency; and the history of unchallenged political changes to the elections board in North Carolina based on policy choices at the time, the Governor cannot show that the Legislature's current policy change in the makeup and structure of the Elections Board is justiciable. The Governor can closely monitor the efficiency of the Elections Board. If the Elections Board proves incapable of working efficiently, the Governor can propose any necessary changes to the General Assembly in the light of concrete examples and study—as opposed to offering speculative hyperbole to this Court.

II. THE STRUCTURE OF THE ELECTIONS BOARD IN 2023 SESS. LAW 139 IS NOT UNCONSTITUTIONAL.

No court has ever addressed the organizational structure implemented by Senate Bill 749. Thus, total reliance on *State ex. rel. McCrory v. Berger*, 368 N.C. 633, 781 S.E.2d. 248 (2016) (herein *McCrory*) and *Cooper I* is insufficient to carry the Governor's high burden of unconstitutionality beyond a reasonable doubt. *See Cooper I*, 370 N.C. at 417, 809 S.E.2d 98 at 113 (describing the test as "functional, rather than formulaic, in nature").

Our appellate courts have established the standard of review on any decision of constitutionality that "every presumption is to be indulged in favor of the validity of an Act of the General Assembly." *City of Greensboro v. Wall*, 247 N.C. 516, 520, 101 S.E.2d 413, 416 (1958). And "the courts will not declare void an Act of the Legislature unless the question of its constitutionality is presently presented and it is found necessary to do so in order to protect rights guaranteed by the Constitution." *Fox v. Bd. of Comm'rs of Durham Cty.*, 244 N.C. 497, 500–01, 94 S.E.2d 482, 485 (1956) (quotations omitted). Justice Mitchell described the deferential manner of constitutional review of a law as one whereby the Court works under "every reasonable presumption that the legislature as the lawmaking agent of the people has not violated the people's Constitution[.]" *State ex rel. Martin v. Preston*, 325 N.C. 438, 448–49, 385 S.E.2d 473, 478 (1989) (citing *McIntyre v. Clarkson*, 254 N.C. 510, 515, 119 S.E.2d 888, 891 (1961)).

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The presumption of constitutionality of an act of the General Assembly is more than just a standard of review; it is rooted in a recognition of the actual power

embraced by the right and ability to make law. *State v. Revis*, 193 N.C. 192, ___, 136 S.E. 346, 348 (1927) ("It is only when the General Assembly undertakes to exceed the grant of legislative authority, made to it in the organic law, that the courts are directed to restrain its action."). "Our Constitution, as has been so frequently pointed out, is a constitution of limitations, where powers not surrendered expressly or by necessary implication are reserved to the people, to be exercised through their representatives in the General Assembly." *Wells v. Hous. Auth. of City of Wilmington*, 213 N.C. 744, ___, 197 S.E. 693, 696 (1938); *Preston*, 325 N.C. at 448, 385 S.E.2d at 478 (1989) ("[I]t is firmly established that our State Constitution is not a grant of power.").

In other words, the limitations on the General Assembly's authority are only those expressly stated in the Constitution. *Crump v. Snead*, 134 N.C. App. 353, 355, 517 S.E.2d 384, 386 (1999) (citations omitted) (emphasis added) ("[A] statute cannot be declared unconstitutional under the State Constitution *unless that Constitution clearly prohibits the statute*."); *see also McKinney v. Goins*, 290 N.C. App. 403, 425, 892 S.E.2d 460, 476 (2023) (upholding the constitutionality of a law in the face of contrary precedent argued to be on point by framing the issue as whether the case was "clear and dispositive," "in establishing that such an exercise of the General Assembly's otherwise plenary powers '*directly* conflicts with an *express* provision of the constitution.'" *Id*. (emphases in original) (quoting *Harper*, 384 N.C. at 325, 886 S.E.2d at 415)).

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The presumption that the laws enacted by the General Assembly are constitutional is fortified by the standard of review courts apply in finding an act unconstitutional: beyond a reasonable doubt. *Morris v. Holshouser*, 220 N.C. 293, 17 S.E.2d 115, 117 (1941); *Turner v. City of Reidsville*, 224 N.C. 42, 46, 29 S.E.2d 211, 214 (1944) ("The presumption is that an Act of the Legislature does not violate a constitutional prohibition. The contrary must appear beyond a reasonable doubt."). Protection of the presumption of constitutionality and the requirement of proof beyond a reasonable doubt necessitate a *clear* violation, apparent on its face. The Governor lacks that clarity here.

The Governor's citation of clear text is Article III, Section 5(4)—that the Elections Board composition violates his power to take care that laws are faithfully executed—and the *McCrory* and *Cooper I* cases interpreting it. However, the Governor pushes that text and those cases beyond the breaking point, and the trial court erred in determining that the Session Law fails to pass constitutional muster.

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Our courts have repeatedly noted that "the legislative branch of government is without question the policy-making agency of our government." *Harper v. Hall*, 384 N.C. 292, 322, 886 S.E.2d 393, 414 (2023). Policy-making is, therefore, not an inherent constitutional power of the executive branch. As noted in *Cooper I*, the policy choices the Governor had a "preference" to make in that structure were only so much as the General Assembly, in *its* delegated authority, provided. *See Cooper I*, 370 N.C. at 416, n.11, 809 S.E.2d at 113 ("[C]onsistent with much modern legislation, the General

Assembly has delegated to the members of the Bipartisan State Board the authority to make numerous discretionary decisions[.]").

The phrase used by the *Cooper I* Court, "interstitial policy decisions," appears only once in our state's jurisprudence: *Cooper I*. But the notion of delegated legislative authority, which that Court is discussing by noting that "the General Assembly has, in the exercise of its authority to delegate the making of interstitial policy decisions to administrative agencies, given decision making responsibilities to the executive branch," *id.*, has been repeatedly examined. "A modern legislature must be able to delegate in proper instances a limited portion of its legislative powers to administrative bodies which are equipped to adapt legislation to complex conditions involving numerous details with which the Legislature cannot deal directly." *Adams*, 295 N.C. at 697, 249 S.E.2d at 410 (cleaned up). "The constitutional inhibition against delegating legislative authority does not deny to the Legislature the necessary flexibility of enabling it to lay down policies and establish standards, while leaving to designated governmental agencies and administrative boards the determination of facts to which *the policy as declared by the Legislature* shall apply." *Carolina-Virginia Coastal Highway v. Coastal Tpk. Auth.*, 237 N.C. 52, 60, 74 S.E.2d 310, 316 (1953) (emphasis added). Admitting that the General Assembly provides, if at all, the ability of the executive branch agencies to make policy, the *Cooper I* Court noted: "[t]he use of ["the Governor's policy preferences"] should not be understood as suggesting that the Bipartisan State Board has the authority to make any policy decision that

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conflicts with or is not authorized by the General Assembly, subject to applicable constitutional limitations." *Cooper I*, 370 N.C. at 416, n.11, 809 S.E.2d at 113.

A material aspect of the structure of the Bipartisan Board, which is different from the Elections Board here, is the Governor's involvement. In *Cooper I*, the legislation in question provided the Governor with all the appointments to the Bipartisan Board but he argued that "the challenged portions of Session Law 2017-6 should be invalidated because they deprive him of the ability to exercise enough control over the views and priorities of the officers that implement executive policy to allow the Governor to fulfill his constitutional duty of faithful execution." *Id.* at 402, 809 S.E.2d at 104. In other words, the Governor was arguing he should be constitutionally able to affect delegated policy-making decisions through *his appointees* but he could not. The same is at play in *McCrory*: in light of the ability of the commissions in that case to potentially overrule *his appointees*, he "must have enough control over the members of the commissions to perform his constitutional duty." *McCrory*, 368 N.C. at 646, 781 S.E.2d at 256. Here, the administrative agency—the Elections Board—is given legislatively delegated authority but the Governor is not a part of the formation of the Board at all: the Governor has no appointees. Just as exists in the Secretary of State or the other established executive departments headed by independent, elected, executive officers, the Governor has not been delegated any legislative policy-making authority. Borrowing the parlance of *Cooper I*, but obviously different from the structures of agencies in both *Cooper I* and *McCrory*, the General Assembly has not delegated the ability for the Governor to

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make his "policy preferences." The Governor now plays no role in the appointment of the members of the Elections Board. The Elections Board elects its chair; it hires its own executive director. The Governor plays no role in the appointment of the county boards of elections. In short, the Board is the executive entity that makes use of legislatively delegated policy-making authority, not the Governor.

What the Governor is seeking as a matter of law and beyond a reasonable doubt is that *Cooper I* does not just stand for a constitutional principle that where some level of control of an agency is given to the Governor that he must have enough control to effectuate his preferences on the interstitial policy decisions of that agency, but a much more bold and breathtaking holding that our Constitution requires him and him alone to be the sole executive with *any* control.

An analogous argument would be the right to vote. "The right to vote *per se* is not a fundamental right granted by either the North Carolina Constitution or the United States Constitution." *Comer v. Ammons*, 135 N.C. App. 531, 539, 522 S.E.2d 77, 82 (1999) (citing *State ex rel Martin v. Preston*, 325 N.C. 438, 385 S.E.2d 473 (1989)). For instance, we do not have a right to vote for the Secretary of Commerce even though we elect the Commissioner of Insurance. "What is fundamental is that once the right to vote has been conferred, the equal right to vote is a fundamental right." *See id.*

Likewise, instead of arguing that where he has been delegated *some* control that he must *enough* control to affect his policies, the Governor instead argues that any delegated legislative policy-making authority to an executive agency must,

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essentially, be controlled by his office alone; that his "interstitial policy decisions" are the only ones that matter throughout the entire executive branch. That far exceeds the holding of *McCrory* or *Cooper I*. That type of authority originating from the Governor's obligation to take care that the laws be faithfully executed would reduce the entirety of the executive branch to one office. Why have a Secretary of State, a Treasurer, a Utilities Commission, or an Elections Board? These departments and agencies are allegedly "executive" in nature, so is it the Governor's position that the Constitution says that his office alone must have control over those entities' ability to make delegated decisions?

The trial court appears to errantly answer that question, yes. The trial court, not engaging in this type of analysis simply noted that *Cooper I* controlled. (R pp 127-128, ¶¶ 11-14). The trial court determined because the Governor was not given any appointments, that the legislation was "the most stark and blatant removal of appointment power from the Governor since *McCrory* and *Cooper I*." (R p 128, ¶ 14). "*Cooper* and *McCrory* control[.]" (*Id.*) But as noted above that analysis leads to a conclusion far beyond those cases. It leads to a conclusion that laws where the Governor has *no* statutory delegated appointment rights are unconstitutional because the Governor has a constitutional right to appointment, supervision, and control of all executive functioning. *Cooper I* notes that Article I, Section 5(4) contemplates that the Governor will have enough control over those agencies that are subject to his control, through delegation from the General Assembly, to implement his policy decisions. *Cooper I*, 370 N.C. at 415, 809 S.E.2d at 112. But neither *Cooper*

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I nor *McCrory* touch on situations where the General Assembly has given the Governor no control over the agency.

The Governor's overreach must be denied and the trial court reversed because he has not shown sufficient legal authority that the Constitution, beyond a reasonable doubt, prohibits the structure of the agency in this case. The Elections Board is not an executive structure where the Governor is given some control through appointees as in *McCrory* and *Cooper I*, but is instead an independently designed agency housed in a different executive office that has no appointees of the Governor's. There is no jurisprudential authority that would hold the Governor is *required* to have control where another executive officer or Board has, independent of his control, been delegated legislative policy-making in a specific area of law.[4] As such, Defendants are entitled to judgment as matter of law and Session Law 2023-139 should be declared not unconstitutional.

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CONCLUSION

For the foregoing reasons, this Court should reverse the trial court's denial of Defendants' motion to dismiss for lack of subject matter jurisdiction, and barring

[4] The leadership of the General Assembly, in just making the appointments to the Elections Board, is not delegating any control of legislative policy-making to individual legislators, which was a constitutional concern in *Wallace v. Bone*, 304 N.C. 591 286 S.E.2d 79 (1982). Rather, the General Assembly is exercising its appointment power over statutory officials, which is within its purview. *See Cunningham v. Sprinkle*, 124 N.C. 638, 642-43, 33 S.E. 138, 139 (1899); *Salisbury v. Board of Directors of State Hospital*, 167 N.C. 223, 83 S.E. 354 (1914). "[T]he General Assembly's ability to appoint an officer obviously does not give it the power to control what that officer does." *McCrory*, 368 N.C. at 647, 781 S.E.2d at 257.

that, reverse the trial court's determination on the motion dismiss by Defendants and hold that that the law is not unconstitutional.

Respectfully submitted, this the 23rd day of September, 2024.

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CERTIFICATE OF WORD COURT

Pursuant to Rule 28(j) of the North Carolina Rules of Appellate Procedure, counsel for Defendants certifies that the foregoing brief, which was prepared using a 12-point proportionally spaced font with serifs, is less than 8,750 words (excluding covers, captions, indexes, tables of authorities, counsel's signature block, certificates of service, this certificate of compliance, and appendixes) as reported by the word-processing software.

This, the 23rd day of September, 2024.

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