No. COA24-406 TENTH JUDICIAL DISTRICT

NORTH CAROLINA COURT OF APPEALS

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ROY A. COOPER, III, in his official capacity as GOVERNOR OF THE STATE OF NORTH CAROLINA, Plaintiff, v. PHILIP E. BERGER, in his official capacity as PRESIDENT PRO TEMPORE OF THE NORTH CAROLINA SENATE; TIMOTHY K. MOORE, in his official capacity as SPEAKER OF THE NORTH CAROLINA HOUSE OF REPRESENTATIVES; THE STATE OF NORTH CAROLINA, Defendants.	)	From Wake County

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BRIEF OF DEFENDANT-APPELLEE
STATE OF NORTH CAROLINA

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ISSUES PRESENTED

I. Was the panel correct to permanently enjoin Session Law 2023-139 (S 749)?

INTRODUCTION

This appeal concerns whether the General Assembly can do what the Supreme Court enjoined it from doing just a few years ago: restructure boards of elections to eliminate the Governor's constitutional authority to take care that the laws are faithfully executed. Because nothing has changed in the law since the General Assembly's previous attempt to usurp the Governor's authority in this way, the panel below was correct to hold no.

Last year, the General Assembly enacted a law that restructures the State Board of Elections and the 100 county boards of elections. The law strips the Governor's authority to appoint any members of the State Board or the county boards and grants that authority to the legislature. It is structured to grant authority to appoint the chairs of the State Board and the county boards to the legislature as well. And it denies the Governor any authority to supervise the day-to-day activities of the State Board through the Executive Director, and again functionally grants that authority to the legislature instead.

Under binding Supreme Court precedent, this restructuring violates constitutional separation of powers and renders the Governor unable to exercise his constitutional take-care obligations. *Cooper v. Berger*, 370 N.C. 392, 809 S.E.2d 98 (2018) (*Cooper I*). This Court should therefore affirm the decision of the panel below to enjoin this restructuring.

STATEMENT OF THE CASE

Last year, the General Assembly enacted Senate Bill 749 over the Governor's veto. Act of Oct. 10, 2023, S.L. 2023-139. SB 749 alters the structure and composition of the State Board of Elections and the 100 county boards of elections the State Board supervises. *Id.*

After SB 749's enactment, Governor Roy Cooper filed this lawsuit and simultaneously moved for a preliminary injunction and requested that the case be transferred to a three-judge panel as it sought the facial invalidation of a state statute. (R pp 3-61) The case was transferred to a three-judge panel to consider the motion for preliminary injunction. (R pp 66-68)

Following briefing and argument on the Governor's motion for a preliminary injunction, the three-judge panel unanimously held that the Governor had "shown a likelihood of success on the merits of his case and that issuance of an injunction is necessary to preserve the status quo and

protect his rights during the course of this litigation." (R p 101) Accordingly, the panel granted the Governor's motion and enjoined the reorganization of the State Board and the county boards of elections. (R pp 100-01)

Legislative Defendants subsequently moved to dismiss the case on the basis that it raised nonjusticiable political questions, and for judgment on the pleadings in the alternative. (R pp 117-19) The Governor moved for summary judgment. (R pp 120-22)

The panel unanimously ordered summary judgment for the Governor and denied Legislative Defendants' motions. (R pp 123-29) The panel therefore entered final judgment enjoining the reorganization of the State Board and the county boards. (R p 128) Legislative Defendants appealed and requested discretionary review by the Supreme Court prior to determination by this Court. (R pp 130-32) The Supreme Court denied their request.

STATEMENT OF THE GROUNDS FOR APPELLATE REVIEW

This Court has jurisdiction under section 1-277 of the General Statutes, which allows appeals of orders that determine the action. *See* N.C. Gen. Stat. § 1-277(a).

STATEMENT OF THE FACTS

The Governor challenged as facially unconstitutional the restructuring of the State Board of Elections and the 100 county boards of elections that the State Board supervises.

A. The General Assembly Reconstitutes the State Board and County Boards to Give Itself Appointment Authority over Their Members.

SB 749 restructures the State Board and the county boards in six ways.

First, it increases the total number of members of the State Board from five to eight. S.L. 2023-139 § 2.1 (amending N.C. Gen. Stat. § 163-19(b)).

Second, the law strips the Governor of the power to appoint any of the State Board's members. Before SB 749's enactment, the Governor had the authority to appoint all five members of the State Board, with a majority of the appointees being members of his own political party. N.C. Gen. Stat. § 163-19(b)-(c) (2023). Under SB 749, appointment authority for all the Board's eight members is transferred to the General Assembly, with recommendations to be made equally by the majority and minority leaders of each chamber of the General Assembly. S.L. 2023-139 § 2.1 (amending N.C. Gen. Stat. § 163-19(b)-(c)). As a result of this structure, the Board is likely to deadlock on many matters of consequence.

Third, SB 749 functionally gives the power to select the State Board's chair to the General Assembly. It authorizes the legislature to appoint the chair in the event that the evenly split State Board cannot select a chair itself within 30 days. *Id.* (amending N.C. Gen. Stat. § 163-19(e)).

Fourth, SB 749 likewise functionally empowers the General Assembly to appoint State Board's Executive Director. Before the law's enactment, the State Board had authority to appoint the Board's Executive Director. Under SB 749, the General Assembly itself may appoint the Director in the event that the evenly split State Board cannot select a director within 30 days. *Id.* § 2.5 (amending N.C. Gen. Stat. § 163-27(b)).

Fifth, SB 749 strips the Governor of the power to appoint any of the members of the 100 county boards. Before the law's enactment, the State Board had authority to appoint the four members of each county board, and the Governor was responsible for appointing one member. N.C. Gen. Stat. § 163-30(a) (2023). Under SB 749, each county board will consist only of four members, all appointed by the General Assembly with recommendations made equally by the majority and minority leaders of the two chambers of the General Assembly. S.L. 2023-139 § 4.1 (amending N.C. Gen. Stat. § 163-30(a)).

Finally, SB 749 strips the Governor of the power to select each county board's chair. Before the law's enactment, the Governor's appointee to each county board served as its chair. N.C. Gen. Stat. § 163-30(a) (2023). SB 749 again effectively grants the General Assembly the authority to appoint the county boards' chairs by empowering the legislature to select the chairs in the event that the evenly split county boards are deadlocked. S.L. 2023-139 § 4.1 (adding N.C. Gen. Stat. § 163-30(c1)).

B. The Three-Judge Panel Enjoins SB 749 as Unconstitutional Under Binding Supreme Court Precedent.

The panel below granted the Governor's motion for summary judgment and permanently enjoined SB 749. (R pp 123-29)

The panel first held that the Governor's challenge presented a justiciable political question and was suitable for review. (R pp 126-27) On this point, the panel explained, our Supreme Court's analysis in *Cooper I* was controlling. In *Cooper I*, the Supreme Court held that the political-question doctrine applies only when a claim requires the judiciary to "interfere with an issue committed to the sole discretion of the General Assembly"—and not merely to "ascertain the meaning of an applicable legal principle." (R p 126 (citing *Cooper I*, 370 N.C. at 409, 809 S.E.2d at 108)). The Supreme Court

held that, because the Governor was challenging a reorganization of the State Board of Elections as impermissibly encroaching on his take-care obligations, the Governor was asking only that the court ascertain the meaning of legal principles. (R pp 126-27 (citing *Cooper I*, 370 N.C. at 409-10, 809 S.E.2d at 108)).

The panel below observed that it was being asked to perform the same task here: decide whether the General Assembly's reorganization of the state and county boards of elections was an impermissible encroachment on the Governor's take-care obligations. *Id.* As a result, the Governor's challenge to SB 749 was on all fours with *Cooper I* and constituted a justiciable legal question. *Id.*

The panel also rejected Legislative Defendants' argument that our Supreme Court's recent decision in *Harper v. Hall*, 384 N.C. 292, 886 S.E.2d 393 (2023), requires a different result. (R p 127). The panel noted that the test set out in *Harper* for determining whether a challenge involves a nonjusticiable political question was the same as the test set out in *Cooper I*. The panel then concluded that the "reach of *Harper* is limited to redistricting, the General Assembly's explicit redistricting authority in the Constitution, and the lack of explicit constitutional text prohibiting or

limiting the General Assembly's authority." (R p 127). By contrast, *Cooper I*—and, by extension, this case—involved a challenge to the restructuring of an executive board. This challenge therefore relies on "different sections of the Constitution" and involves "wholly different authority granted to the General Assembly." (*Id.)*

On the merits, the panel outlined the three-part test set forth by our Supreme Court for determining whether the Governor has constitutionally sufficient control over an executive board. (R p 127 (citing *McCrory v. Berger*, 368 N.C. 633, 781 S.E.2d 248 (2016)) The panel held that this test applies here, because the State Board and county boards of elections "exercise primarily executive functions." (R p 127) The panel noted that "[t]he State Board's duties and authorities have not changed since *Cooper I* was announced, where the Supreme Court determined that the State Board's duties are executive in nature." (R p 127) The panel then applied the framework from *McCrory* and *Cooper I* to analyze whether the Governor retained the "ability to appoint members, supervise their activities, and remove them from office." (*Id.)* In addition, the panel reiterated *Cooper I*'s requirement that the Governor retain "the ability to affirmatively implement the policy decisions that executive branch agencies subject to his or her

control are allowed, through delegation from the General Assembly, to make as well." (R p 128 (citing *Cooper I*, 370 N.C. at 415, 809 S.E.2d at 112)).

Applying these precedents, the panel held that SB 749 infringes upon the Governor's take-care obligations because:

- "all appointment power was removed from the Governor and given to the General Assembly";
- Legislative Defendants "have the final decision on the Chair and Executive Director of the State Board";
- Legislative Defendants have final authority over the Chair of the county boards; and
- the Governor "has no power to remove members of the State Board and County Boards." (R p 128)

The panel concluded by emphasizing that SB 749's restructuring is "the most stark and blatant removal of appointment power from the governor since *McCrory* and *Cooper I*." (*Id.)* As a result, the panel held, the restructuring required in SB 749 must be permanently enjoined. (*Id.)*

This appeal followed.

SUMMARY OF THE ARGUMENT

The Supreme Court has set forth a clear test to determine whether and when the legislature interferes with the executive power so as to impede the executive from exercising its obligations under the Take Care Clause of our state Constitution. The test's first part asks whether the challenged board or commission is "primarily administrative or executive in character." *McCrory*, 368 N.C. at 645-46 & n.5, 781 S.E.2d at 256 & n.5. The second part requires courts to consider whether the Governor has the authority to: (1) appoint a majority of commissioners or board members, (2) supervise their day-to-day activities, (3) remove them from office, and (4) affirmatively implement his policy preferences. *Id*. at 645- 46, 781 S.E.2d at 256-57; *Cooper I*, 370 N.C. at 414-15, 809 S.E.2d at 111-12.

Applying this test, the panel was correct to enjoin the changes to the State Board of Elections and the county boards of elections that the State Board supervises. The analysis is particularly straightforward here, as controlling Supreme Court precedent is precisely on point. The Supreme Court has already concluded that the legislature cannot strip the Governor's authority to appoint a majority of the members of the State Board. *Cooper I*,

370 N.C. at 416, 809 S.E.2d at 112. As the panel below rightly recognized, that precedent is controlling here.

To start, the State Board and county boards of elections are primarily administrative or executive in character because they have "general supervision over the primaries and elections in the State." N.C. Gen. Stat. § 163-22(a); *see also* SJ Order (R p 127). Indeed, the Supreme Court has specifically held that the State Board's powers are "primarily executive." *Cooper I*, 370 N.C. at 415, 809 S.E.2d at 112.

And like the changes to the structure of the State Board in *Cooper I*, the restructuring at issue here does not allow the Governor to fulfill his constitutional duties because SB 749 results in the Governor lacking the authority to appoint the members of the state and county boards, supervise their day-to-day activities, and remove them from office. *McCrory*, 368 N.C. at 646, 781 S.E.2d at 256; *see also* SJ Order (R p 128). In fact, SB 749 goes beyond even what the Supreme Court held was unconstitutional in *Cooper I*: Under SB 749, the Governor can no longer make *any* of the appointments to the State Board and county boards of elections.

Moreover, because SB 749 is structured so that the evenly split State Board and county boards will inevitably be unable to select chairs and the

Executive Director themselves, SB 749 hands that power to the General Assembly. As a result, the law strips the Governor of any authority to supervise the day-to-day operation of the boards as well.

The panel was also correct to reject Legislative Defendants' argument that, after the Supreme Court's decision in *Harper v. Hall*, this challenge presents a nonjusticiable political question. This argument was rejected by the Supreme Court in *Cooper I*, which is directly controlling here. Nowhere in *Harper* did the Court modify the standard applied in *Cooper I* to determine whether challenges like the one here present justiciable questions suitable for judicial review. Instead, as the panel rightly held, "where the General Assembly restructures and reconstitutes a board with final executive authority," *Cooper I* remains controlling precedent. (R p 128)

Because the changes to the State Board and county boards of elections impede the Governor's ability to exert control and exercise his policy preferences over those bodies, the panel's decision to enjoin SB 749 should be affirmed.

ARGUMENT

Standard of Review

A trial court's grant or denial of a motion for summary judgment on questions of law is reviewed de novo. *Morrell v. Hardin Creek, Inc.*, 371 N.C. 672, 680, 821 S.E.2d 360, 366 (2018).

Discussion of Law

I. Precedent Requires That the Governor Have Enough Control Over Agencies Under His Purview to Ensure That the Law Is Faithfully Executed.

The separation of powers requires that "[t]he legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other." N.C. Const. art. I, § 6. Under our Supreme Court precedent, this separation requires that "as the three branches of government carry out their duties, one branch will not prevent another branch from performing its core functions." *McCrory*, 368 N.C. at 636, 781 S.E.2d at 250.

The Supreme Court has established a test for when the legislative branch impermissibly impedes on the Governor's executive authority. In general, when the General Assembly takes away power from the Governor, there is no "categorical rule that would resolve every separation of powers

challenge to the legislative appointment of executive officers" and so courts "must resolve each challenge by carefully examining its specific factual and legal context." *McCrory*, 368 N.C. at 646-47, 781 S.E.2d at 257. In doing so, to preserve the Governor's constitutional duty to "take care that the laws are faithfully executed," N.C. Const. art. III, § 5(4), the Governor must have "enough control over" commissions and boards that are "primarily administrative or executive in character." *McCrory*, 368 N.C. at 645-46, 781 S.E.2d at 256.

To determine whether a commission or board is "primarily administrative or executive in character," the Supreme Court looks to factors such as whether the entity "ha[s] final authority over executive branch decisions" or engages in "discretionary determinations" under its statutory or constitutional powers. *Id.* at 645, 781 S.E.2d at 256; *Cooper I*, 370 N.C. at 415 n.11, 809 S.E.2d at 112 n.11. Kinds of activities that the Supreme Court has determined make agencies primarily executive or administrative in character include setting standards, granting and revoking permits, issuing orders, directing investigations, and authorizing penalties. *McCrory*, 368 N.C. at 646, 781 S.E.2d at 256; *Wallace v. Bone*, 304 N.C. 591, 607, 286 S.E.2d 79, 88 (1982).

To assess whether the Governor has "enough" control over boards and commissions like the State Board of Elections, the Court has evaluated the Governor's "ability to appoint the commissioners, to supervise their day-to-day activities and to remove them from office." *Cooper I*, 370 N.C. at 414, 809 S.E.2d at 111; *see also McCrory*, 368 N.C. at 646, 781 S.E.2d at 256. Without this authority, the Governor would have "little control over the views and priorities" of a board and would lose the "final say" on how to implement the laws—undermining the ability to fulfill the Governor's constitutional obligation under the Take Care Clause. *Id*. at 647, 781 S.E.2d at 257.

Under Supreme Court precedent, this ability to exert control over the views and priorities of a board or commission serves as the key principle to resolve challenges to laws transferring the Governor's executive power. It is insufficient, for example, for the Governor to only be able to "preclude others from forcing him or her to execute the laws in a manner to which he or she objects." *Cooper I*, 370 N.C. at 415, 809 S.E.2d at 111-12. Rather, the Governor must be able to "affirmatively implement" the law. *Id.*

The Supreme Court recently applied this framework in three cases. In 2016, in *McCrory v. Berger*, the Court considered a statute that gave the General Assembly the power to "appoint a majority of the voting members of

three administrative commissions" and "constrain[ed] the Governor's power to remove members . . . allowing him to do so only for cause." 368 N.C. at 636, 646, 781 S.E.2d at 250, 257. Applying its analytical framework, the Court held that the statutes at issue deprived the Governor of "enough control" over the newly created commissions by denying him the ability to appoint the majority of the members. *Id.*

Two years later, and most relevant here, in *Cooper I* the Court considered a statute that changed the composition of the State Board of Elections to make it an eight-member board and required the Governor to appoint four members each from two lists submitted by the chairs of the Republican and Democratic parties. 370 N.C. at 415-18, 809 S.E.2d at 112-14. Again applying the analytical framework articulated in *McCrory*, the Court observed that the challenged statute denied the Governor the ability to appoint a majority of the Board from his own party or to remove board members at will. *Id.* at 416, 809 S.E.2d at 112. As a result, the Court held that

the statute unconstitutionally deprived the Governor of the ability to execute the law. *Id.*[1]

Finally, that same year in *Cooper v. Berger (Cooper II)*, the Court considered a statute that grants the North Carolina Senate the authority to confirm the Governor nominees to serve in the Governor's Cabinet. 371 N.C. 799, 800-01, 822 S.E.2d 286, 290 (2018). Applying the same framework, the Court explained that, even though the law constrained the Governor's appointment authority, the Governor still had "the power to nominate [his Cabinet officials], ha[d] strong supervisory authority over them, and ha[d] the power to remove them at will." *Id.* at 807 822 S.E.2d at 294. With these powers, the Governor maintained "immense influence over who serves in his Cabinet and over what his Cabinet members do." *Id.* at 809, 822 S.E.2d at 295. The Court therefore held that this statute did not unconstitutionally intrude on the Governor's take-care authority.

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[1] Shortly after the Court decided *Cooper I*, the General Assembly proposed a constitutional amendment that would have effected the same reorganization that the Court had just invalidated. This proposed amendment was rejected by more than 61% of North Carolina voters in the November 2018 election. https://s3.amazonaws.com/dl.ncsbe.gov/State_Board_Meeting_Docs/2018-11-27/Canvass/State%20Composite%20Abstract%20Report%20-%20Contest.pdf

II. The Panel Below Correctly Held That the Reorganization of the State Board of Elections and the County Boards of Elections Violated Binding Supreme Court Precedent.

The challenged law—like the one struck down in *Cooper I*—directly contravenes these precedents. SB 749 denies the Governor the ability to execute the laws by depriving him the right to appoint a majority of the State Board and the chair of each county board, or to have any influence on the appointment of the State Board's Chair and Executive Director or the county board members. Taken together, these changes interfere with the Governor's take-care obligations in direct defiance of controlling Supreme Court precedent.

Under our Supreme Court's precedents, there is no question that the State Board and county boards of elections are "primarily administrative or executive in character." *Cooper I*, 370 N.C. at 414, 809 S.E.2d at 111 (quoting *McCrory*, 368 N.C. at 645-46, 781 S.E.2d at 256); *see also* SJ Order (R p 127). The State Board of Elections has "general supervision over the primaries and elections in the State," including the authority to, for example:

- issue rules, regulations, and guidelines;
- advise county board members on 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.

N.C. Gen. Stat. §§ 163-22(a)-(p), -22.2, -24, -27.1, -82.12, -82.24, -91, -104, -166.8, -182.12, -227.2. County boards of elections exercise similar executive functions, including to:

- administer elections on the county level;
- appoint and remove board employees;
- prepare ballots;
- prepare budgets; and
- issue certificates of elections.

N.C. Gen. Stat. § 163-33(6)-(11).

In fact, the Supreme Court has specifically held that the State Board of Elections "clearly performs primarily executive . . . functions." *Cooper I*, 370 N.C. at 415, 809 S.E.2d at 112. The Court cited the Board's role in deciding "the extent to which particular administrative rules and regulations should be adopted"; "the extent to which jurisdiction should be asserted over election-related protests pending before county boards of elections," and

"the number and location of the early voting sites to be established in each county and the number of hours during which early voting will be allowed at each site." *Id*. at n.11, 809 S.E.2d at 112 n.11.

Because the State Board and county boards of elections are executive agencies, the Governor must be able to exert sufficient control to carry out his take-care obligations. The changes required in SB 749 prevent him from doing so. SB 749 leaves the Governor without authority to appoint the members of the boards, supervise their day-to-day activities, or remove them from office. This fails the multifactor test established by our Supreme Court. *Id.* at 414, 809 S.E.2d at 111; *McCrory*, 368 N.C. at 646, 781 S.E.2d at 256; *see also* SJ Order (R p 128).

The three-judge panel described SB 749 as the "the most stark and blatant removal of appointment power from the Governor since *McCrory* and *Cooper I*." SJ Order (R p 128). In fact, SB 749 goes beyond even what the Supreme Court held was unconstitutional in *McCrory* and *Cooper I*. In *McCrory*, the challenged law allowed the Governor to make "two or three appointees per commission" while giving a majority of appointments to the legislature. *McCrory*, 368 N.C. at 646, 781 S.E.2d at 256. In *Cooper I*, the challenged law allowed the Governor to make appointments to the State

Board from nominations submitted to him. *Cooper I*, 370 N.C. at 415, 809 S.E.2d at 112. Under SB 749, the Governor is able to make *none* of the appointments.

The ability of the legislature to appoint the Board's Chair and the Executive Director compound this problem. Previously, the Governor had indirect control of who served in these positions because the majority of the members of the State Board that he appointed from his own political party could select both. Under SB 749, the Governor has no influence over the appointments to those positions, as he does not appoint any State Board members, and that authority is instead vested in the General Assembly if the State Board cannot decide those appointments itself within thirty days. The law is designed to make that kind of deadlock virtually certain, by structuring the Board to be composed of an even number of members from each of the two major political parties. *Cooper I*, 370 N.C. at 416 n.12, 809 S.E.2d at 112 n.12. By creating a system that is likely to lead to the majority party in the General Assembly appointing the Chair and the Executive Director of the State Board, the challenged law does not allow the Governor to adequately supervise the Board's day-to-day activities.

The changes to the structure of the county boards further hamstring the Governor's ability to execute his constitutional duties. Like for the State Board, SB 749 gives the appointment authority for each county board entirely to the General Assembly. *McCrory* and *Cooper I* forbid granting the legislature that kind of control over an executive body, particularly one responsible for the administration of elections. *Cooper I*, 370 N.C. at 415, 809 S.E.2d at 112; *McCrory*, 368 N.C. at 647, 781 S.E.2d at 257.

The approach of SB 749 to the appointment of the chairs of the county boards give rise to similar concerns. Like for the State Board, SB 749 virtually guarantees that the General Assembly will have authority to appoint county board chairs by engineering deadlock, through the evenly divided partisan composition of the county boards. Denying the Governor authority to select county board chairs—as the law before SB 749's enactment allows—further frustrates his ability to supervise the implementation of state law. Such an outcome is flatly inconsistent with controlling Supreme Court precedent. *See Cooper I*, 370 N.C. at 415, 809 S.E.2d at 112; *McCrory*, 368 N.C. at 647, 781 S.E.2d at 257.

On appeal, Legislative Defendants barely contest any of this straightforward analysis. Instead, their only attempt to distinguish *Cooper I*

is on the basis that SB 749 *entirely* strips the Governor of any appointment authority over the state and county boards of elections, whereas the law in *Cooper I* did not go so far. Leg. Br. 28-30. This argument is simply untenable. Our Supreme Court has been clear that the central question in a separation-of-powers challenge is what "degree of control that the challenged legislation allows the General Assembly to exert over the execution of the laws." *McCrory*, 368 N.C. at 647, 781 S.E.2d at 257. If the General Assembly ultimately retains control over an executive board or commission—not the Governor—then the appointment regime violates the Constitution. Under that test, removing the Governor from the appointment process altogether, as SB 749 does, is a *more severe* constitutional violation than the one at issue in *Cooper I*.

Because "[t]he 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," the panel below correctly enjoined SB 749's restructuring of the state and county boards of elections. *Id*.

III. The Panel Was Correct To Exercise Subject-Matter Jurisdiction In This Case.

Legislative Defendants concede that, under *Cooper I*, there is no question that the Governor's challenge is justiciable. Leg. Br. 8. However, they claim that *Cooper I* does not control because the Supreme Court's reasoning in *Harper v. Hall* purportedly abrogates *Cooper I*. *Id.* Legislative Defendants are wrong. Nothing in *Harper* disturbs the Court's central holding and analysis in *Cooper I*.

Legislative Defendants first insist that the test for whether an issue raises a nonjusticiable political question in *Harper* is different from the test in *Cooper I*. *See* Leg. Br. 11. That is untrue. The test the Supreme Court used in *Harper* is the same as the one used in *Cooper I*. In *Cooper I*, the Court described political questions as "controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the legislative or executive branches of government" and lack "satisfactory criteria for a judicial determination." 370 N.C. at 407-08, 809 S.E.2d at 107 (internal quotation marks omitted). In *Harper*, the Court articulated and applied the exact same standard, stating that "a matter is nonjusticiable if the constitution expressly assigns responsibility to one branch of

government, or there is not a judicially discoverable or manageable standard by which to decide it, or it requires courts to make policy determinations that are better suited for the policymaking branch of government." 384 N.C. at 350, 886 S.E.2d at 431. Importantly, in *Harper*, the Court emphasized throughout that it was merely applying the same, longstanding test for determining a political question that our Supreme Court has adhered to for decades—not formulating a new, novel test. *See id.*

It is true that the *Harper* Court came to a different determination than *Cooper I* on how the political-question doctrine applied in that case. But that was merely because of the different claims and circumstances at issue. Specifically, the Court in *Harper* held that "redistricting is explicitly and exclusively committed to the General Assembly by the text of the constitution" and therefore that the partisan-gerrymandering claims raised in that case were non-justiciable. *Id.* at 326, 886 S.E.2d at 416. But the General Assembly's constitutional role in redistricting is completely unrelated to the constitutional issue raised in both *Cooper I* and this case: the General Assembly's authority to structure executive agencies in a way that impedes the Governor's constitutional role in supervising those agencies. In *Harper*, the Court held that redistricting was exclusively

committed to the legislative branch, largely because the "executive branch has no role in the redistricting process." *Id*. In *Cooper I*, by contrast, the Court held that the General Assembly's power to define the "functions, powers, and duties" of executive agencies, N.C. Const. art. III, § 5(10), is constrained by the Governor's express constitutional obligation to ensure that the "laws be faithfully executed," *id.* § 5(4). 370 N.C. at 411, 809 S.E.2d at 109. This clear textual distinction explains the different outcomes in *Harper* and *Cooper I* on whether an issue is expressly committed to one branch of government.

Nor does *Harper* disturb *Cooper I*'s analysis of whether deciding the separation-of-powers question here would force the judiciary to make policy choices better suited to the legislature or executive. In *Harper*, the Court held that deciding whether a redistricting map resulted in unconstitutional partisan gerrymandering would require courts to decide how much gerrymandering is too much. 384 N.C. at 346-50, 886 S.E.2d at 428-32. Deciding that question, the Court held, would require courts to select the appropriate metrics and standards used to determine whether a map was too gerrymandered and analyze them on a case-by-case basis. *Id.* These

decisions, the Court held, were policy determinations that "courts are not equipped to make." *Id.* at 350, 886 S.E.2d at 432.

By contrast, the Court in *Cooper I* explicitly rejected the idea that determining whether the General Assembly had unconstitutionally encroached upon the Governor's take-care obligations requires making extensive policy determinations. 370 N.C. at 417-18, 809 S.E.2d at 113-14. Instead, the Court held that determining whether law restructuring an executive agency prevents the Governor from "within a reasonable period of time, to take care that the laws be faithfully executed" is *not* a policy question, but a legal one that is subject to judicial review. *Id.* at 418, 809 S.E.2d at 114.

Legislative Defendants seek to avoid the above analysis by arguing that SB 749 is consistent with constitutional text and history on the General Assembly's appointment power. *See* Leg. Br. 13-19. But these arguments are nothing more than efforts to overturn *Cooper I*—which, of course, this Court lacks the authority to do. *See Cannon v. Miller*, 313 N.C. 324, 324, 327 S.E.2d 888, 888 (1985) (holding that the Court of Appeals lacks "authority to overrule decisions of the Supreme Court of North Carolina" and has

"responsibility to follow those decisions, until otherwise ordered by the Supreme Court").

For example, Legislative Defendants point to the Article III, Section 5(10), which grants the General Assembly authority to "prescribe the functions, powers, and duties of the administrative departments and agencies of the State." N.C. Const. art. III, § 5(10). But our Supreme Court squarely held in *Cooper I* that Article III, Section 5(10) empowers the legislature to decide "what the agencies in question are supposed to do," not "the extent to which the Governor has sufficient control over those departments and agencies to ensure that the laws be faithfully executed." 370 N.C. at 410, 809 S.E.2d at 109. Therefore, under *Cooper I*, while Section 5(10) might give the General Assembly the authority to create executive-branch agencies and define their core duties, it does not allow the General Assembly to impede the Governor's take-care obligations by taking appointment authority over those agencies for itself.

Likewise, Legislative Defendants argue that the legislature has historically made certain executive-branch appointments. But that argument, too, has also already been rejected by the Supreme Court. In *McCrory*, the Court acknowledged that the General Assembly may

"appoint[ ] statutory officers to administrative commissions," but still found a separation-of-powers violation because the legislature exercised that appointment authority in a way that impeded the Governor's ability to perform his constitutional duty under the Take Care Clause. 368 N.C. at 644-46, 781 S.E.2d at 255-56. As a result, under binding Supreme Court precedent, while the legislature may make *some* statutory appointments, that permission does not extend to usurping the Governor's executive power. *Id.* at 647, 781 S.E.2d at 257.

CONCLUSION

The State respectfully requests that this Court affirm the panel's order permanently enjoining SB 749's reorganization of the State Board of Elections and the county boards of elections the State Board supervises.

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

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N.C. R. App. P. 33(b) Certification:
I certify that the attorney listed below has authorized me to list his name on this document as if he had personally signed it.

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CERTIFICATE OF COMPLIANCE

I certify that the attached brief complies with Appellate Rule 28(j)(2). The brief uses 14-point Constantia type. According to Microsoft Word, the body of the brief (including footnotes and citations) contains fewer than 8,750 words.

This 28th day of October, 2024.

/s/ Electronically submitted
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I certify that today, I caused the above brief to be served on counsel by e-mail, addressed to:

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