STATE OF NORTH CAROLINA COUNTY OF WAKE	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 24CV039723-910
JOSHUA H. STEIN, in his official capacity as GOVERNOR OF THE STATE OF NORTH CAROLINA, Plaintiff, v. DESTIN C. HALL, in his official capacity as SPEAKER OF THE NORTH CAROLINA HOUSE OF REPRESENTATIVES; and PHILIP E. BERGER, in his official capacity as PRESIDENT PRO TEMPORE OF THE NORTH CAROLINA SENATE; and FREDDY L. JOHNSON, in his official capacity as COMMANDER OF THE STATE HIGHWAY PATROL Defendants.	**MEMORANDUM IN RESPONSE TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

INTRODUCTION

Legislative Defendants claim the right to appoint a member of the Governor's Cabinet and to make that member unremovable for his full term. Our Constitution allows no such thing. "Cabinet members play . . . a critical role in executive branch functions"; accordingly, "the Governor's control over them must be significant." *Cooper v. Berger*, 371 N.C. 799, 817 (2018) ("*Cooper Confirmation*"). Senate Bill 382 leaves the Governor with very little control over a Cabinet agency for at least five-and-a-half-years. For that reason, it is unconstitutional.

The legislatively appointed Commander of the State Highway Patrol also moves for summary judgment. His brief argues that "Senate Bill 382 affords the Governor ample control over the Commander." Comm. Br. 20. But the very existence of the Commander's request for judgment ***against the Governor*** betrays his argument. If the Governor had any meaningful control over the Commander, the Commander would not have filed a brief adopting arguments that the Governor believes are inconsistent with the Constitution.

Without this Court's intervention, Legislative Defendants will not only be responsible for making the state's criminal law and organizing the executive branch, they will also be in direct control of a Cabinet agency charged with statewide enforcement of the criminal law. Our Constitution's framers included an express Separation of Powers clause to avoid this concern. Accordingly, this Court should deny Legislative Defendants' and the Commander's motions for summary judgment.

ARGUMENT

I. The Governor Has Standing.

Legislative Defendants first argue that the Governor lacks standing because he has not thus far attempted to remove or replace Defendant Colonel Freddy Johnson as Commander of the State Highway Patrol. LD Br. 6-8. Legislative Defendants are incorrect. On its face, Senate Bill 382 prohibits the Governor from removing the Commander. Senate Bill 382 (Session Law 2024-57), § 3E.1.(u). The Governor's standing cannot depend on his willingness to flout statutory restrictions that the legislature has enacted.

More importantly, however, Legislative Defendants misunderstand the injuries Senate Bill 382 causes the Governor. First, Senate Bill 382 injures the Governor by stripping him of his ability to appoint the Commander. Legislative Defendants make much of the fact that Governor Cooper at one point appointed Colonel Johnson. As explained below, that is entirely beside the point. For purposes of standing, however, no one disputes that, under Senate Bill 382, *Governor Stein* is stripped of the authority to appoint a Commander. That injury alone suffices to confer standing.

Senate Bill 382 inflicts an additional injury, though. By eliminating the Governor's removal authority, the law deprives him of sufficient control over Colonel Johnson to ensure that the Patrol is faithfully executing the law. *Cooper Confirmation*, 371 N.C. at 800. Because the legislature has barred the Governor from removing the Commander, the legislature has empowered the Commander to defy the Governor, including by refusing to faithfully execute the laws. *See State ex rel. McCrory v. Berger*, 368 N.C. 633, 647 (2016) ("When the General Assembly appoints executive officers that the Governor has little power to remove, it can appoint them essentially without the Governor's influence. That leaves the Governor with little control over the views and priorities of the officers. . . ."). After all, the Governor has no recourse if the Commander ignores him. It is this inability to ensure that the Commander enforces the law, not the continued service of any particular individual as Commander, that is the source of the constitutional harm to the Governor.

Consistent with this theory, our Supreme Court has held that the Governor suffers a cognizable harm when legislation prevents him from ensuring that officials in his government will faithfully enforce the law. In both *McCrory* and *Cooper I*, the Governor challenged legislation that would have established boards or commissions in a manner that prevented the Governor from taking care that the laws be faithfully executed. The Court did not require the Governor to assert that he would appoint someone different if he reclaimed his appointing authority. Instead, the Court found it obvious that the Governor had standing under such circumstances. As *Cooper I* held, "if a sitting Governor lacks standing to maintain a separation-of-powers claim predicated on the theory that legislation impermissibly interferes with the authority constitutionally committed to" him, no one has standing to challenge separation of powers violations. *Cooper v. Berger*, 370 N.C. 392, 412 (2018) ("*Cooper I*").

Likewise, the three-judge panel appointed in *McCrory* held that "[t]he alleged usurpation of Executive power is a cognizable injury under the law." *State ex rel. McCrory v. Berger*, 2015 WL 1324855, at *3 (Wake Co. Sup. Ct. 2015); *see also id.*, at *4 ("We can imagine no individual with greater standing to raise the issues in this case. The Governor is elected and empowered by the Constitution to execute the laws of North Carolina. Who better to question the constitutionality of Legislative action which is alleged to encroach on the powers of another branch of government?").

The Governor has asserted just such a theory in this case—the Legislative Commander Provision violates the Constitution by stripping him of his appointment

authority and impermissibly interfering with his ability to ensure that the laws are faithfully executed. Nothing more is required to establish standing.[1]

II. The Governor's Claims Are Justiciable.

Defendants make two different arguments that the Governor's claims are non-justiciable. Both are foreclosed by precedent.

A. The Governor's claims are consistent with Article III, § 5(10).

The Commander argues that Article III, § 5(10) of the Constitution sets forth the exclusive process for organizing the executive branch, rendering any question related to executive organization a non-justiciable political question. Comm. Br. 9-12. In making this argument, the Commander relies on the ***dissenting*** opinion in *Cooper v. Berger*, 370 N.C. 392 (2018) ("*Cooper I*"); Comm. Br. 10 (citing *Cooper I*, 370

[1] Legislative Defendants' cases do not help their argument. In *Gaston Board of Realtors, Inc. v. Harrison*, 311 N.C. 230 (1984), the plaintiff trade organization held a disciplinary hearing and decided to expel defendant from their organization. The trade organization then filed a declaratory judgment action and asked the court to decide whether the disciplinary proceedings had complied with due process. The Supreme Court declined. That court held that the courts lacked jurisdiction to assess the plaintiff's disciplinary proceedings when it was unclear whether the subject of those proceedings would ever even challenge them. *Id.* at 236-237, *see also ACLU of NC v. State*, 181 N.C. App. 430, 433 (2007) ("The evidence suggested that the defendant demonstrated no intent to sue the board over its decision in the proceedings; thus, litigation was not unavoidable."). Here, by contrast, the legislation at issue has already deprived the Governor of rights assigned to him by the Constitution, and he is challenging that deprivation in this action. There is an "actual controversy" about whether Senate Bill 382 violates the Constitution and deprives the Governor of powers vested solely in him. *See Sharpe v. Park Newspapers of Lumberton, Inc.*, 317 N.C. 579, 584 (1986) (noting "requirement for an actual controversy").

N.C. at 438 (Newby, J., dissenting)); *id.* at 11 (citing *Cooper I*, 370 N.C. at 437 (Newby, J., dissenting)).

The Commander's reliance on the dissenting opinion in *Cooper I* underscores that the ***majority*** considered and rejected his argument. The Court there held that the Governor's challenge was justiciable because he was not "challenging the General Assembly's decision to 'prescribe the functions, powers, and duties of the administrative departments and agencies of the State,'" but rather was "challenging the extent . . . to which the statutory provisions governing the manner in which the [State Board of Elections] is constituted and required to operate . . . impermissibly encroach upon his constitutionally established executive authority to see that the laws are faithfully executed." *Id.* at 409-10. The same is true here: the Governor contends that Senate Bill 382 is unconstitutional because it violates other provisions of the Constitution, including the Take Care Clause. *Cooper I* is therefore sufficient to overcome the Commander's non-justiciability arguments.

Indeed, in light of the controlling Supreme Court precedent, Legislative Defendants appear to have only raised this argument for preservation purposes. *See* Leg. Def. Mem. At 31-32; *see id.* at 31 ("Legislative Defendants reserve their arguments that the separation-of-powers claim presents a political question over which the courts lack subject matter jurisdiction."). Legislative Defendants' brief effectively concedes that any non-justiciability argument is foreclosed by controlling precedent. *See also id.* at 31 (using "*but see*" signal in citing *Cooper I*).

In any event, the Commander's argument relies on an expansive, atextual and ahistorical reading of Article III, § 5(10). That provision recognizes the General Assembly's authority to "prescribe the functions, powers, and duties of the administrative departments and agencies of the State." N.C. Const. art. III, § 5(10). It was added to our Constitution to empower the Governor, not the Legislature. The Act that gave rise to § 5(10) was entitled "An Act to Amend the Constitution of North Carolina To Require the General Assembly to Reduce the State Administrative Departments to 25 and to Authorize the Governor to Reorganize the Administrative Departments Subject to Legislative Approval." Session law 1969-932; *see State v. Fletcher*, 370 N.C. 313, 328 (2017).

Relying on Article III, § 5(10), the Commander incorrectly argues that this case "turns on whether the legislature may reallocate authority within the executive branch, by . . . consolidating duties that existed elsewhere and entrusting those responsibilities to the new State Highway Patrol." Comm. Br. 14. Respectfully, that is not what this case is about. The Governor has not challenged the legislature's decision to make the State Highway Patrol a Cabinet agency, nor has he challenged the transfer and assignment of certain executive responsibilities to the Patrol. The Governor has challenged the legislature's selection of one of his "closest deputies" and the insulation of that individual from gubernatorial supervision and removal. *Cooper Confirmation*, 371 N.C. at 807.[2]

[2] To the extent the Commander relies on *Stein v. Berger*, No. 114P25, slip op. at 3 (N.C. May 23, 2025), Comm Br. 10-11, that reliance is misplaced. There, the Supreme Court denied the Governor's petition for a writ of supersedeas and writ of

These are not political questions. Rather, they are core constitutional questions that the Supreme Court has addressed in *McCrory*, *Cooper I*, and *Cooper Confirmation*.

B. The General Assembly does not have plenary power to appoint the Governor's Cabinet.

The Commander alternatively argues that this case is non-justiciable because the General Assembly "wields the plenary power" to reorganize administrative agencies and that this power to reorganize includes the power to appoint the Commander and prohibit his removal. Comm. Br. 15-17. This argument is belied by the text of the Constitution and decades of precedent.

The Commander seems to argue that the case is non-justiciable in part because, in his view, the challenged provisions of Senate Bill 382 do not "contravene[] an explicit constitutional provision." Comm. Br. 15. Though Legislative Defendants do not frame their argument in terms of justiciability, they similarly argue that the Governor has failed to identify an express duty or power in the Constitution that is infringed upon by Senate Bill 382. LD Br. 17-20.

These arguments are incorrect. Though the defendants' briefs largely ignore the Separation of Powers, Vesting, and Take Care Clauses, the Supreme Court has repeatedly relied on those provisions as the basis for its review of the General

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certiorari in a different case that involves the General Assembly's authority to assign executive functions to the Council of State. The Court did not overrule *Cooper I* and, with respect to the Take Care Clause, stated that it applied to all elected constitutional executive officers and that "all ten members of the Council of State … bear the burden to faithfully discharge—that is, execute—the laws as they relate to their respective executive offices." *Id.* at 6 n.4.

Assembly's enactments regarding organization of the executive branch. *McCrory*, 368 N.C. at 649 ("[T]he challenged appointment provisions … prevent the Governor from performing his constitutional duty to take care that the laws are faithfully executed. By doing so, these provisions violate the separation of powers clause."); *Cooper Confirmation*, 371 N.C. at 801 (holding that the challenged "senatorial confirmation requirement leaves the Governor with enough control to take care that the laws be faithfully executed, and therefore does not violate the separation of powers clause"); *Cooper I*, 370 N.C. at 422 (holding that the challenged provisions "impermissibly interfere with the Governor's ability to faithfully execute the laws"); *State ex rel. Wallace v. Bone*, 304 N.C. 591, 608-09 (1982) ("[W]e conclude that [the challenged statutory provision] violates Section 6 of Article I of the North Carolina Constitution.").

In other words, the Supreme Court has repeatedly held that the General Assembly's enactments that affect the organization and structure of executive branch agencies are subject to review under the very same provisions at issue in this case: the Vesting, Take Care, and Separation of Powers Clauses. This is consistent with the purpose motivating the framers of our Constitution, who included the Separation of Powers Clause in the original 1776 Constitution. As Montesquieu explained then: "When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehension may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a

tyrannical manner." *The Spirit of Laws*, 174 (1766) (Thomas Nugent trans., Robert Clarke & Co. 1873).

The Commander makes much of the fact that the Constitution expressly mentions other boards, such as the State Board of Education and the Council of State, arguing that because the State Highway Patrol is not mentioned, there are no limits on the General Assembly's power to structure it. Comm. Br. 19. But whether an agency is specifically mentioned in the Constitution has no bearing on whether claims involving that agency's structure are justiciable. History is replete with precedent that proves the point.

In *Wallace v. Bone*, the Supreme Court held unconstitutional a statute governing appointments to the Environmental Management Commission. *Wallace*, 304 N.C. at 606-07. That commission is not mentioned in the Constitution, and yet the Supreme Court held that the appointment structure enacted by the General Assembly violated the Separation of Powers Clause. *Id.* at 608-09. So, too, in *McCrory*, which concerned the Oil and Gas Commission, Mining Commission, and Coal Ash Commission. 368 N.C. at 636-38. Though none of those commissions are mentioned in the Constitution, the Court held that the challenged statutes nonetheless prevented the Governor from "performing his constitutional duty to take care that the laws are faithfully executed" and, therefore, "violated the separation of powers clause." *Id.* at 649. In *Cooper I*, which involved the State Board of Elections, far from holding that the case presented a non-justiciable political question, the Court

held that the General Assembly had "impermissibly interfere[d] with the Governor's ability to faithfully execute the laws." 370 N.C. at 422.

None of the boards at issue in *Wallace*, *McCrory*, and *Cooper I* are mentioned specifically in the Constitution, but the Supreme Court nonetheless held that the General Assembly cannot control the execution of the laws enforced by those agencies.

To be clear, the Governor agrees that—under the Constitution and controlling precedent—the General Assembly has the power to assign duties and functions to the agencies of the executive branch and to organize executive branch agencies. Accordingly, the Governor has not challenged the vast majority of legislative changes to the State Highway Patrol contained in Senate Bill 382.

But, as the Governor has also made clear, the General Assembly's enactments must comply with the rest of the Constitution, including the Vesting and Take Care Clauses, which assign ***to the Governor*** the responsibility for overseeing the executive branch. As the Supreme Court held in *Cooper I*, "the authority granted to the General Assembly pursuant to Article III, Section 5(10) is subject to other constitutional limitations, including the explicit textual limitation contained in Article III, Section 5(4)." 370 N.C. at 411.

This case is justiciable. Binding precedent requires this Court to determine whether the challenged provisions of Senate Bill 382 comply with "other constitutional limitations," including the Vesting Clause and the Take Care Clause. *Cooper I*, 370 N.C. at 411. As shown in the Governor's opening memorandum and below, they do not. They should therefore be enjoined.

III. The Legislative Commander Provision Violates Separation of Powers.

Our Supreme Court's precedents set out a straightforward test for "assess[ing] a separation of powers challenge that implicates the Governor's constitutional authority": Does the Governor have sufficient control over the entity in question to ensure that the laws are faithfully executed? *McCrory*, 368 N.C. at 646; *Cooper I*, 370 N.C. at 414. Perhaps because Senate Bill 382 so plainly fails this test, Defendants largely attempt to avoid the test's application. These efforts fail.

Under *McCrory*, *Cooper I*, and *Cooper Confirmation*, this Court must consider whether the Governor has sufficient appointment, supervisory, and removal authority over the Commander to uphold his take care obligations. He does not—Senate Bill 382 strips the Governor of any meaningful control over the Commander—so the law is unconstitutional.

A. Legislative Defendants cannot avoid the test set forth in *McCrory*, *Cooper I*, and *Cooper Confirmation*.

Legislative Defendants first argue that the Governor's "claim fails because he cannot identify a constitutional duty at issue here." LD Br. 12. The Constitution, Legislative Defendants explain, does not "assign[ ] to the Governor the duty of enforcing the state's criminal and public-safety laws." LD Br. 12-16. Instead, the Constitution assigns law enforcement to local officials like sheriffs and district attorneys. LD Br. 14-16. Hence, they say, Senate Bill 382 "does not impact any of the Governor's core executive powers." LD Br. 21.

The Governor does not claim a right to supervise the actions of sheriffs, district attorneys, or other local law enforcement officials. The Governor's claim is simple

and grounded in the plain language of our Constitution and controlling precedent: The Constitution tasks the Governor with the duty to "take care that the laws be faithfully executed." N.C. Const. Art. III, § 5(4). To ensure that he can comply with this responsibility, the Governor must be able to control any executive agency that falls "under [his] purview," including every principal department. *McCrory*, 368 N.C. at 646 n.5; *see also Cooper Confirmation*, 371 N.C. at 817 ("Because Cabinet members play such a critical role in executive branch functions, the Governor's control over them must be significant.").

Senate Bill 382 runs afoul of this principle. That law creates a "principal department" that is plainly "executive in character"—the Cabinet-level State Highway Patrol. Senate Bill 382, §§ 3E.1.(a), 3E.1.(c); *McCrory*, 368 N.C. at 646; *see also Cooper Confirmation*, 371 N.C. at 807 (noting that "[a]s department heads, Cabinet members have far more discretion, and wield far more executive power, than the commissioners in *McCrory* did"). Yet the law does not afford the Governor sufficient control over the Patrol to "perform his constitutional duty." *McCrory*, 368 N.C. at 646; *see infra* Part III.B. The law is therefore unconstitutional. *McCrory*, 368 N.C. at 645-46.

This framework applies to all executive branch officials (except, potentially, for certain duties assigned to the Council of State), and is not tied to a specific law enforcement duty. The Supreme Court has repeatedly reaffirmed that the requirement for gubernatorial control of executive agencies arises out of the Separation of Powers, Vesting, and Take Care Clauses. N.C. Const. art. I, § 6; art.

III, §§ 1, 5(4). *Cooper Confirmation* explained it well: "The separation of powers clause safeguards the Governor's ability to have enough control over his Cabinet members ***to perform his duty under the take care clause***." 371 N.C. at 817 (emphasis added); *see also McCrory*, 368 N.C. at 644-646. Thus, the Supreme Court unanimously confirmed that the key question in a separation of powers case like this is "whether a statutory framework which involves the General Assembly in the appointment of executive-branch statutory officers affords the Governor enough control over those officers." 371 N.C. at 806.

Senate Bill 382 violates the Constitution because it deprives the Governor of meaningful control over a Cabinet agency for five-and-a-half years.

Legislative Defendants next make the novel assertion that violations of the Separation of Powers Clause are subject to means-ends scrutiny. They claim that legislative interference with the Governor's ability to fulfill his duties may be acceptable if the "disruption is justified." LD Br. 11. This claim finds no support in the Court's past precedents. In *Cooper I*, the Court did not ask whether the legislature had good reason to structure the Bipartisan State Board of Elections and Ethics Enforcement in the manner it had. And in *McCrory*, the Court did not care how the legislature might have justified its decision to reorganize the three administrative commissions at issue. Instead, the Court asked only whether the Governor had retained sufficient control to uphold his take care obligations. That should be the Court's focus here as well.

Legislative Defendants base their contrary argument on *Bacon v. Lee*, 353 N.C. 696 (2001). There, however, the Court simply held that "judicial review of the exercise of clemency power would unreasonably disrupt a core power of the executive." *Id.* at 717. The Court has never suggested—in *Bacon* or in any other case—that disruptions of the Governor's ability to take care that the laws are faithfully executed are somehow acceptable if they are justified.

Instead, the Court has reiterated time and again that the key question is one of control. *Cooper Confirmation*, 371 N.C. at 806 ("[T]he separation of powers clause requires that the Governor have 'enough control over' executive officers 'to perform his constitutional duty' under the take care clause" (quoting *McCrory*, 368 N.C. at 646)). Whether the Governor has enough control "is a question of degree." *Cooper Confirmation*, 371 N.C. at 806. To the extent the Court has framed the inquiry as one of looking for "unreasonable" disruptions of the Governor's executive power, it has been in the context of "examin[ing] ***the degree of control*** that the challenged legislation allows the General Assembly to exert over the execution of the laws." *Id.* (quoting *McCrory*, 368 N.C. at 646-647) (emphasis in original). In other words, if a statute enables the General Assembly to exercise executive power or it overly disrupts the Governor's ability to exercise executive power, then the law is "unreasonable" and, therefore, unconstitutional. Senate Bill 382 does both.

B. Senate Bill 382 leaves the Governor without sufficient control over the State Highway Patrol.

"Cabinet members play … a critical role in executive branch functions." *Cooper Confirmation*, 371 N.C. at 817. For that reason, "the Governor's control over them

must be significant." *Id.* According to precedent, control "can be measured by considering '[the Governor's] ability to appoint [a particular official], to supervise their day-to-day activities, and to remove them from office." *Id.* at 806 (quoting *McCrory*, 368 N.C. at 646).

Here, Legislative Defendants have removed the Governor completely from the decision to appoint Colonel Johnson. They have also forbidden the Governor from removing him, thereby rendering the Governor's supervisory authority over the Commander illusory at best. In other words, they have undermined—if not destroyed outright—the Governor's control under all three factors.

Legislative Defendants and the Commander resist this conclusion with a range of arguments. First, they emphasize that Governor Cooper was the first person to appoint Colonel Johnson as Commander and stress that governors will reclaim appointment authority five years from now. LD Br. 22; Comm. Br. 21, 23. Second, they insist that Senate Bill 382 affords the Governor "adequate power" to supervise the Commander, because the Governor retains "several means of controlling the Patrol." LD Br. 22, 24; Comm. 24-25. And third, they maintain that "the power to remove is not a constitutional imperative." LD Br. 22; *see also* Comm. Br. 27-28. These arguments all miss the mark.

1. The Governor does not have appointment power until 2030

Defendants employ several strategies to obscure the fact that the General Assembly has claimed for itself the authority to appoint the Commander of the State Highway Patrol. None is persuasive.

First, Legislative Defendants point out that Governor Cooper initially appointed Colonel Johnson to head the State Highway Patrol. True, but irrelevant. Then-Governor Cooper did not appoint Colonel Johnson to lead a Cabinet agency; he appointed him to lead a division *within* a Cabinet agency, under the supervision of one of the Governor's appointees and subject to at-will removal. *See, e.g.*, N.C. Gen. Stat. § 20-184 (2023) (prior version of statute providing that "The Secretary of Public Safety, under the direction of the Governor, shall have supervision, direction and control of the State Highway Patrol Division"). *Legislative Defendants* appointed Colonel Johnson to something else entirely—they appointed Colonel Johnson to serve as the first Commander of the Cabinet agency created by Senate Bill 382.[3]

Governor *Stein*, moreover, did not appoint Colonel Johnson to *any* position. The Governor does not dispute any of Colonel Johnson's credentials, which are extensive and impressive. But the fact that Colonel Johnson may be qualified to be a member of Governor Stein's Cabinet does not change the fact that our Constitution empowers the *Governor* to decide who should actually be a member of his Cabinet. Governor Stein, who was elected overwhelmingly by the people in November 2024, is entitled "to choose, from the universe of all eligible people," the people who will serve in his Cabinet and "on whom the [General Assembly] will have an up-or-down vote." *Cooper Confirmation*, 371 N.C. at 807-808. That is not what happened here. Instead,

[3] Colonel Johnson, for his part, does acknowledge in at least one place in his brief that the General Assembly appointed him. *See* Comm. Br. 35 (contending that "the General Assembly's rationale for ***appointing*** Commander Johnson" was sufficient to survive a challenge under the Exclusive Privileges Clause (emphasis added)).

the General Assembly picked Colonel Johnson, and Governor Stein played no role in the appointment whatsoever.

Legislative Defendants respond by arguing that Governor Stein did in fact play a role in Colonel Johnson's appointment because he "could have tried to remove Colonel Johnson at any time and invited potential litigation, but he hasn't tried." LD Br. 22-23. This argument is both wrong and dangerous. The provision stripping the Governor of the ability to remove Colonel Johnson took effect when Senate Bill 382 became law on December 11, 2024. Senate Bill 382, § 3E.1.(u) (protecting Colonel Johnson from removal); *id.* § 3E.1.(x) (stating that subsection (u) becomes effective as soon as it becomes law). For the five months Governor Stein has been in office, then, he could not have removed Colonel Johnson without openly defying duly enacted law. As explained above, Governor Stein's ability to vindicate his executive authority cannot possibly turn on his willingness to risk the profoundly destabilizing effect that outright statutory defiance might have on the rule of law. *See supra* Part I.[4]

Defendants next attempt to argue that the General Assembly has not appointed Colonel Johnson, but rather has merely "extended" or "continued" his term. Comm. Br. 2, 21-24; LD Br. 32-33. This semantic gambit also fails. Prior to Senate

[4] Legislative Defendants similarly fault the Governor for failing to challenge the legislature's decision to set the length of the Commander's term at five years, thereby allowing Commanders to serve terms that "straddle" different governors' administrations. LD Br. 23. If the Governor retains the authority to remove the Commander at will, however, the prospect of a term-straddling appointment poses far less constitutional concern. If a Governor disapproves of the Commander who his predecessor appointed, he can simply remove that Commander and appoint his own preferred candidate.

Bill 382, there was no "unified cabinet-level department" called the State Highway Patrol, nor was there a place in the Governor's Cabinet for the Commander. Senate Bill 382 created that role, and the legislature filled it with Colonel Johnson.

Senate Bill 382 itself, moreover, belies the notion that Colonel Johnson's term has simply been extended. The law specifically references the *new* five-year term that begins on July 1, 2025, and appoints Colonel Johnson to begin serving on the first day of that new term. Senate Bill 382, § 3E.1.(u).

Defendants' "extension" theory also proves too much. If the Constitution allows the legislature to "extend" the term of a gubernatorially appointed Cabinet secretary, then the legislature could statutorily retain one Governor's entire Cabinet even if the people chose not to reelect the Governor who appointed that Cabinet.

Lastly, the Commander tries a different, but equally unsuccessful, strategy. Unlike Legislative Defendants, he concedes that the Legislative Commander Provision is a "departure" from the Governor's typical appointment authority. But he urges the Court not to worry too much about the departure because it is "limited" and "temporary"—lasting only five-and-a-half years. Comm. Br. 21. The Court should reject this request. Nothing supports the Commander's suggestion that our Constitution permits separation-of-powers violations, so long as they are time-limited.

The Commander points to *State ex rel. Martin v. Preston*, 325 N.C. 438 (1989), but his reliance on that case is misplaced. There, the Supreme Court held that the legislature's decision to postpone elections for nine judgeships did not violate the

Constitution's eight-year term provision because the eight-year term was a floor that was not violated by a one-time delay in elections. *Id.* at 455. Further, the extension did not interfere with the Governor's power to fill vacancies because no vacancy was created—"the Constitution's 'hold over' provision operates and allows the incumbents to continue serving in the interim." *Id.*; *see also* N.C. Const. art. IV, § 16 (providing that officeholders continue to serve until their successors are elected and qualified).

Martin does not hold that the Constitution permits "temporary, time-limited" constitutional violations so long as they "serve a legitimate public function." Comm. Br. 22. To the contrary, the *Martin* Court was careful to explain how its decision was consistent with the Constitution: "In summary, our Constitution does not specify when judicial elections must be held, and it does have a 'hold over' provision. Our legislature was thus free under our Constitution to delay elections one time in certain districts for a public purpose, which resulted in the incumbents holding over." 325 N.C. at 456.

The argument that this is a "transitional" or "temporary" appointment is also belied by reality. The legislatively-bestowed five-and-a-half-year term granted to Colonel Johnson would last throughout the entirety of the Governor's first term of office and well into his second—should he be elected to one. And, of course, various hold over provisions in North Carolina law could extend the Commander's term even further—until the Governor's appointee for the term beginning July 1, 2030 is actually ***confirmed*** by the General Assembly. *See generally* N.C. Gen. Stat. § 128-7.

Fundamentally, the Governor has not selected the Commander of the State Highway Patrol, which was established as a Cabinet-level agency in Senate Bill 382, and no Governor will until at least 2030. This inability to select the Commander severely diminishes the Governor's control over the agency. *Cooper Confirmation*, 371 N.C. at 807-808; *see also McCrory*, 368 N.C. at 647 (noting that allowing "the General Assembly [to] appoint every statutory officer . . . , even those with final executive authority" combined with "prohibit[ing the Governor from having any power to remove those officers . . . would nullify the separation of powers clause").

2. The Governor cannot meaningfully supervise the Commander because, among other things, he cannot remove the Commander.

The Commander makes much of the Governor's supposed supervisory authority over him, but his assertions fall flat. If the Governor could meaningfully supervise the Commander, then the Commander would not be participating in this case as a Defendant. The fact that the Governor is litigating the constitutionality of a legislative enactment against a member of his own Cabinet—a situation that appears to be unique in the history of our State—says all this Court needs to know about the Governor's supervisory control over the Commander.

To be sure, the Governor may retain a modicum of statutory supervisory authority after Senate Bill 382, but two fundamental problems persist. First, the Commander has many powers that are not subject to any statutory supervision by the Governor. Second, and most importantly, whatever supervisory powers the Governor has are rendered toothless by his inability to remove the Commander.

i. The Governor has extremely limited supervisory power

The Commander claims that the Governor has "extensive" supervisory authority over him because of requirements that Cabinet members submit a plan of work and report on various programs that they have undertaken annually. Comm. Br. 25. He also points to the Governor's ability to direct the Patrol to take charge of investigations and to request assistance on behalf of local officials. *Id.*; *see also* N.C. Gen. Stat. §§ 143B-1701, 1702. For their part, Legislative Defendants also point to various provisions that require gubernatorial approval for certain actions. LD Br. 24-25.

This quibbling about reports and specific actions that might still require gubernatorial approval is largely irrelevant. The Commander is now "the head[] of [an] entire administrative department[]." *Cooper Confirmation*, 371 N.C. at 807. As such, the Commander has "far more discretion, and wield[s] far more executive power, than the commissioners in *McCrory* did." *Id.* The Commander has "the authority to reorganize [his] department[], to create and fill subordinate staff positions, and to establish advisory committees." *Id.* (citing N.C. Gen. Stat. § 143B-10 (2017)). The Commander has the power to make rules. N.C. Gen. Stat. § 143B-1702 ("Rulemaking. – The Commander is authorized to adopt rules and procedures for the implementation of this section."); *see also* Senate Bill 382, § 3E.1.(r) ("The State Highway Patrol shall adopt rules or amend its rules consistent with the provisions of this section.").

While the Commander may have to submit plans and reports to the Governor, if the Governor disagrees with the Commander's choices on any of these important actions, he has no recourse. This differs greatly from *Cooper Confirmation*, where the reporting obligations were combined with the plenary power to remove. 371 N.C. at 809 (noting that even after enactment of the challenged statute, "the Governor retains plenary authority to remove the members of his Cabinet" and that "[w]ith that authority, [the Governor] may prevent any member of his Cabinet from refusing to properly implement his preferred policies").

Importantly, the Commander is also given authority to create up to ten positions within his agency that are exempt from the State Personnel Act without any approval or input by the Governor. Senate Bill 382, § 3E.1.(d) (amending N.C. Gen. Stat. § 126-5(c1)(40)). Thus, for example, while the Chief of the State Capitol Police must be appointed "with the approval of the Governor," N.C. Gen. Stat. § 1750(b), if the Chief is made exempt by the Commander, that means that the Chief could be removed by the Commander at any time.

The Commander will also be responsible for implementing the many important duties assigned to the Patrol, such as providing law enforcement and emergency services to protect the public against crime, natural disasters, and man-made disasters; planning and directing a coordinated effort by State and local law enforcement to fight crime; and serving as the State's chief coordinating agency to control crime, ensure the safety of the public, and ensure an effective criminal justice system. *See* N.C. Gen. Stat. § 143B-1701. The Commander will do this without any

direct supervision by the Governor and the Governor will have no recourse if the Commander makes decisions contrary to the Governor's preferences.

ii. The Governor has no removal power.

Defendants do not dispute that the Legislative Commander Provision prohibits the Governor from removing the Commander for any reason until at least July 1, 2030. The Commander recycles his argument with respect to the constraints on the Governor's appointment power that the complete denial of removal authority is acceptable as a "one-off, transitional measure." Comm. Br. 27. Legislative Defendants argue that removal authority is not a constitutional imperative and that the Supreme Court has "left open the door for the General Assembly" to strip the Governor of that authority. LD Br. 26. Again, all of the Defendants miss the mark.

Most fundamentally, neither Defendant acknowledges the extent to which removal authority and supervisory authority go hand in hand. A Governor who lacks any authority to remove an official lacks any meaningful authority to supervise that official, for the official knows that he will retain his position whether he implements the Governor's policies or not. If Colonel Johnson opts to disregard the Governor's direction and, in the Governor's view, fails to faithfully execute the law, the Governor can do little to rectify the situation.

Tellingly, neither Defendant addresses the key precedents about removal, *Cooper Confirmation* and *McCrory*—both of which make clear that the Governor's removal power is an essential part of his ability to ensure that the laws are faithfully executed. As the Court explained in *Cooper Confirmation*:

> [W]ith respect to the third *McCrory* factor, members of the Governor's Cabinet "serve at the Governor's pleasure," N.C. Gen. Stat. § 143B-9(a), meaning that the Governor may remove them for any reason or for no reason at all. If a Cabinet member's performance does not conform to the Governor' wishes, the Governor may remove him or her. If a Cabinet member acts too slowly to implement the Governor's policies, the Governor may remove him or her. If the Governor decides to change directions in a given policy area and the corresponding Cabinet member is not willing to be flexible, the Governor may remove him or her. In other words, the Governor retains plenary authority to remove the members of his Cabinet. With that authority, he may prevent any member of his Cabinet from refusing to properly implement his preferred policies.

371 N.C. at 799. None of that control is available to the Governor with respect to the Commander.

Indeed, even in *McCrory*, which involved legislative appointees to administrative commissions who had far less authority than Cabinet secretaries, the Court found that limiting the Governor's removal authority to removal for cause "sharply constrain[ed] the Governor's power to remove members" and contributed to the challenged legislation's unconstitutionality. *McCrory*, 368 N.C. at 646. Senate Bill 382 goes far beyond a sharp constraint on removal authority; it completely eliminates the Governor's removal authority for any reason for five-and-a-half years.

* * *

Legislative Defendants and the Commander ask the Court to look at each of the three factors—appointment, supervision, and removal—in isolation, but that is contrary to Supreme Court precedent. While each of the factors clearly demonstrates that the Governor lacks the control required by the Constitution, looking at those

factors as a whole makes the violation even more plain. As the Supreme Court explained in *McCrory*, a law violates separation of powers "[w]hen the General Assembly appoints executive officers that the Governor has little power to remove." 368 N.C. at 647; *see also Cooper Confirmation*, 371 N.C. at 817 (no violation where "the Governor has unfettered power to nominate any eligible individual to serve in his Cabinet, has significant supervisory power over his Cabinet members, and has the power to remove Cabinet members at will."). Here, Legislative Defendants have appointed an executive officer that the Governor has ***no*** power to remove.

IV. The Legislative Commander Provision is an unconstitutional emolument.

Defendants confuse the Governor's argument about the Legislative Commander Provision as an unconstitutional emolument, focusing on the Commander's pay instead of his five-and-a-half-year term. LD Br. 33; Comm Br. 29. To be clear, the Governor does not object to the Commander of the State Highway Patrol being paid; the Governor objects to Legislative Defendants using legislation to bestow a unique, five-and-a-half-year, unremovable term in office to a specifically identified person in the executive branch. All past Patrol Commanders and all future Commanders have served and will serve "at the Governor's pleasure." *See* N.C. Gen. Stat. § 20-195(a) (2023); Senate Bill 382, §§ 3E.1.(p), (u). It is only *this* Commander who was bestowed a special appointment and unique treatment by Legislative Defendants. The Exclusive Privileges Clause forbids that kind of individual benefit.

Legislative Defendants' reliance on *Crump v. Snead*, 134 N.C. App. 353 (1999) is inapposite. LD Br. 33. There, the General Assembly adopted legislation to change

a city's charter to ensure that all members of the City Council would be elected in the same year. To achieve that goal, the legislation extended the term of one council seat by two years, which the City Council itself requested prior to the election for that seat. *Id.* at 354. When that two-year extension was challenged as an improper exclusive privilege, the Court of Appeals rejected the claim, concluding that "SB 540 served the public interest and did not solely benefit respondent." *Id.* at 357. The Court was able to ascertain a public purpose for the provision because it was directly stated in the legislation itself: "to provide for election of all the members of the Rockingham City Council for four-year terms." *Id.* (quoting 1995 N.C. Sess. Laws ch. 698).

Despite Defendants' efforts to supply post-hoc rationalizations for the public purpose that might have motivated the Legislative Commander Provision, Senate Bill 382 provides no explanation for the decision to bestow a unique, one-time benefit to Defendant Colonel Johnson. The extended term at issue in *Crump* happened to benefit a particular person, but the legislation evinced no intention of seeking to benefit a particular person. Senate Bill 382 does the opposite—it bestows a privilege on a single person, clearly identified and targeted for the benefit in the legislation itself, with no explanation of a public purpose for doing so.

Our courts have a long history of striking down laws that provide unique benefits to individuals or small groups of people where the legislation provides no reason for singling out the beneficiary. *See, e.g.*, *State v. Warren*, 211 N.C. 75, 189 S.E. 108 (1937) (declaring unconstitutional a real estate licensing statute that applied

only in certain counties); *Edgerton v. Hood*, 205 N.C. 816, 821, 172 S.E. 481, 483 (1934) (invalidating under the Exclusive Privileges Clause a statute that "attempts to confer a privilege on the creditors and debtors of certain banks in the State, but discriminates against creditors and debtors of all closed banks in the State to which it is not applicable"); *Fowler*, 193 N.C. at 292, 136 S.E. at 711 ("In our judgment [a law that benefits residents of just five counties] is neither equal protection of the laws nor the protection of equal laws; it is the grant of a special exemption from punishment or an exclusive or separate privilege which is forbidden by the [Constitution]."). Senate Bill 382 is no different and should be enjoined as an unconstitutionally bestowed exclusive privilege.

CONCLUSION

For the foregoing reasons, Plaintiff Governor Joshua H. Stein respectfully requests that Defendants' Motions for Summary Judgment be denied and that this Court grant his Motion for Summary Judgment and permanently enjoin Sections 3E.1.(u) and 3E.1.(q) of Session Law 2024-57 (Senate Bill 382).

Respectfully submitted, this the 9th day of June, 2025.

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CERTIFICATE OF SERVICE

I hereby certify that on this day a copy of the foregoing document was served on the following parties via email as follows:

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This the 9th day of June, 2025.

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