No. 333PA25 TENTH JUDICIAL DISTRICT

SUPREME COURT OF NORTH CAROLINA

JOSHUA H. STEIN, in his official capacity as GOVERNOR OF THE STATE OF NORTH CAROLINA,

Plaintiff-Appellee/Appellant,

v.

PHILIP E. BERGER, in his official capacity as PRESIDENT PRO TEMPORE OF THE NORTH CAROLINA SENATE; DESTIN C. HALL, in his official capacity as SPEAKER OF THE NORTH CAROLINA HOUSE OF REPRESENTATIVES,

Defendant-Appellants/Appellees,

and THE STATE OF NORTH CAROLINA; NORTH CAROLINA ENVIRONMENTAL MANAGEMENT COMMISSION, et al.,

Defendant-Appellees.

From the Court of Appeals
No. COA24-440

AND

No. 53PA26 TENTH JUDICIAL DISTRICT

SUPREME COURT OF NORTH CAROLINA

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Plaintiff-Appellee/Appellant,

v.

From the Court of Appeals

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Defendants-Appellants/Appellees,

and BRADFORD B. BRINER, in his official capacity as STATE TREASURER OF NORTH CAROLINA,

Intervenor-Defendant-Appellee.

No. COA25-745

AMICUS CURIAE BRIEF OF THE JOHN LOCKE FOUNDATION IN SUPPORT OF LEGISLATIVE DEFENDANTS-APPELLEES AND INTERVENOR-DEFENDANT-APPELLEE STATE TREASURER

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AMICUS CURIAE BRIEF OF THE JOHN LOCKE FOUNDATION IN SUPPORT OF LEGISLATIVE DEFENDANTS-APPELLEES AND INTERVENOR-DEFENDANT-APPELLEE STATE TREASURER

INTRODUCTION[1]

The Governor has abandoned the premise on which this litigation began. He now concedes that North Carolina has a plural, "unbundled (rather than unitary) executive," Gov. Br. 31–34, as this Court held in *Stein v. Berger*, 387 N.C. 575, 576, 915 S.E.2d 146, 147 (2025) (per curiam) ("*Stein I*"). In its place, he offers three rules found nowhere in the Constitution's text: that control of every statutory board must be "consolidated in a single executive official"; that the Governor must control any board housed in one of his Cabinet departments; and that other Council of State

[1]No one other than Amicus John Locke Foundation and its counsel wrote or helped write this brief or contributed money for its preparation. *See* N.C. R. App. P. 28.1(b)(3)(c).

members may receive only duties matching the "major purpose" of their offices. Gov. Br. 36, 39, 45–46.

The Legislative Defendants and the Treasurer have shown why each rule fails. Amicus John Locke Foundation writes to add points the parties have not made. First, the Governor's history—the 1868 Constitution's grant of "Supreme executive power" and its borrowing of the federal Take Care Clause—proves the opposite of what he claims. The same Constitution, as amended in 1876, left the duties of the other executive officers and the filling of statutory offices to the General Assembly. Second, the current Constitution confirms that allocation in places the parties have not discussed: the contrast between the executive and judicial vesting clauses, the exemption of legislative appointments from the Governor's veto, and Article III, Section 11's express statement that regulatory agencies need not be housed in any principal department at all.

These points also show that the Governor loses regardless of whether the Court revisits *State ex rel. McCrory v. Berger*, 368 N.C. 633, 781 S.E.2d 248 (2016), and *Cooper v. Berger*, 370 N.C. 392, 809 S.E.2d 98 (2018) ("*Cooper I*"). If those decisions stand, they do not reach the allocation of appointments within the executive branch. If they fall, the Governor's claims fall with them. The Court should affirm.

NATURE OF AMICUS'S INTEREST

The John Locke Foundation (Locke) was founded in 1990 as an independent, nonprofit think tank. It employs research, journalism, and outreach to promote its

vision of North Carolina—of responsible citizens, strong families, and successful communities. It is committed to individual liberty, limited constitutional government, and fair, meaningful elections. Locke has a long history of researching, analyzing, and reporting about state government structure and operations, including separation of powers, administrative organization, and regulatory reform.

Locke filed a joint amicus brief with the North Carolina Institute for Constitutional Law in support of Legislative Defendants in the Court of Appeals in No. COA24-440.

ISSUES ADDRESSED

I. Whether the Governor's challenges fail whether or not the Court revisits *McCrory* and *Cooper I*.

II. Whether the 1868 Constitution's grant of "Supreme executive power" and its Take Care Clause require that the Governor, or any single executive officer, control statutory boards and commissions.

III. Whether the text of Article III and related provisions leaves the allocation of appointments to statutory boards and commissions to the General Assembly.

ARGUMENT

I. The Governor Loses Whether or Not the Court Revisits *McCrory* and *Cooper I*.

The Legislative Defendants ask the Court to reconsider *McCrory* and *Cooper I*. Amicus agrees that those decisions rest on a reading of the Take Care Clause that

the Constitution's text does not support. *See infra* Parts II–III. But the Court need not overrule them to affirm.

A. If *McCrory* and *Cooper I* stand, they do not govern this case.

Both decisions addressed statutes in which the General Assembly took control of executive commissions for itself—by appointing a majority of their members, *McCrory*, 368 N.C. at 636, 646–47, 781 S.E.2d at 250, 256–57, or by requiring the Governor to choose half of a board from a list supplied by the opposing party, *Cooper I*, 370 N.C. at 415–18, 809 S.E.2d at 112–14. Both expressly reserved the question presented here: "Our opinion takes no position on how the separation of powers clause applies to those executive departments that are headed by the independently elected members of the Council of State." *McCrory*, 368 N.C. at 646 n.5, 781 S.E.2d at 256 n.5; *Cooper I*, 370 N.C. at 407 n.4, 809 S.E.2d at 107 n.4 (same). This Court has since described those decisions as "inapposite" to the reallocation of duties among Council of State members. *Stein I*, 387 N.C. at 577, 915 S.E.2d at 148.

The statutes here leave the executive branch with a majority of appointments to every board at issue, and leave the Governor himself with a majority of the Residential Code Council and the Building Code Council. *Stein v. Berger*, 923 S.E.2d 579, 589–90 (N.C. Ct. App. 2025) ("*Stein Boards & Commissions*").[2] Because the duty to take care that the laws be faithfully executed "is a nonexclusive duty

[2]Amicus agrees with the Legislative Defendants that the Residential Code Council and Building Code Council are constitutional, *see* Legislative Defs.' Br. 59–63, and does not separately address the quorum and voting requirements of those councils.

conferred upon all ten Council of State members," *Stein I*, 387 N.C. at 578 n.4, 915 S.E.2d at 148 n.4, appointments by the Commissioner of Agriculture, the Commissioner of Insurance, and the Treasurer are executive appointments. As Judge Murry put it below, "an 'ultimate responsibility' for law enforcement does not mean a singular one." *Stein Boards & Commissions*, 923 S.E.2d at 594 (Murry, J., concurring).

The Governor's arguments are therefore not applications of *McCrory*. They are extensions of it into territory *McCrory* declined to enter. And "[i]n cases of first impression," the presumption of constitutionality "is especially strong." *Stein I*, 387 N.C. at 577, 915 S.E.2d at 148.

B. If *McCrory* and *Cooper I* are overruled, the Governor's claims fall with them.

The Governor's appeal depends on the premise that the Take Care Clause gives the Governor a constitutional claim to control statutory boards through their membership. Gov. Br. 31–46. That is the premise of *McCrory*'s "enough control" test. If the Court concludes that the premise lacks textual support, nothing remains of the Governor's case. Parts II and III show that neither the history nor the text of the Constitution supports it.

II. The 1868 Constitution Borrowed Federal Words, Not the Federal Structure.

The Governor's principal historical argument is that the 1868 Constitution gave the Governor a "special role" by vesting in him "the Supreme executive power of the State" and by adding a Take Care Clause with "language copied verbatim from the federal Constitution." Gov. Br. 40–42. He frames his appeal with

Madison's warning that "[t]he legislative department is everywhere extending the sphere of its activity, and drawing all power into its impetuous vortex." *Id.* at 3 (quoting *The Federalist No. 48* (James Madison)). The history he invokes points the other way.

A. "Supreme" executive power never included control over statutory offices.

The 1868 vesting clause did not stand alone. The same article provided that "[t]he respective duties of the Secretary of State, Auditor, Treasurer, Superintendent of Public Works, Superintendent of Public Instruction, and Attorney General shall be prescribed by law." N.C. Const. of 1868, art. III, § 13. The "Supreme executive power" coexisted with a plural executive whose duties the General Assembly assigned.

Nor did "supreme" executive power carry an exclusive right to fill statutory offices. When this Court read the 1868 Constitution to bar legislative appointment of the directors of the State Penitentiary, it relied on the text of the 1868 appointments clause, not on the vesting clause. *People ex rel. Welker v. Bledsoe*, 68 N.C. 457, 464 (1873). The people responded within two years. Because the 1868 restriction was "not . . . satisfactory to the dominant sentiment in the state," the Convention of 1875 proposed amendments ratified in 1876 that removed "the inhibition on the legislative power to appoint to office." *State ex rel. Salisbury v. Croom*, 167 N.C. 223, 226, 83 S.E. 354, 354–55 (1914).

Thereafter, the General Assembly freely assigned the membership of regulatory bodies—sometimes to itself. In 1891 it created the Railroad Commission,

the predecessor of today's Utilities Commission, and appointed all three commissioners. N.C. Laws of 1891, ch. 320, § 1; *see* Treasurer's Br. 16–17. That commission set rates, investigated complaints, and imposed penalties. No one suggested that it encroached on the Governor's "Supreme executive power." If the Governor's reading of the 1868 text were right, the Railroad Commission was unconstitutional from the start.

The 1971 Constitution dropped the word "Supreme." N.C. Const. art. III, § 1 ("The executive power of the State shall be vested in the Governor."). Whether that change was substantive or, as Judge Murry observed, a semantic simplification that "substantively reaffirmed" the 1868 grant, *Stein Boards & Commissions*, 923 S.E.2d at 592 (Murry, J., concurring) (citing Report of the N.C. State Constitution Study Commission 71–73 (1968) ("1968 Report")), the Governor gains nothing. If the change was editorial, the current clause carries forward an 1868 vesting that was always compatible with legislative allocation of statutory appointments. If it was substantive, it moved away from the Governor's position, not toward it.

Either way, the Governor's reliance on *Beshear v. Coleman*, No. 2024-SC-0228-DG, 2026 WL 1839841 (Ky. June 25, 2026), is misplaced. Kentucky's constitution still vests "[t]he supreme executive power of the Commonwealth" in its Governor. Ky. Const. § 69. Ours does not.

B. The 1868 framers copied the Take Care Clause but not the federal means of supervision.

The federal Take Care Clause does not stand alone either. In the same sentence, the President "shall Commission all the Officers of the United States."

U.S. Const. art. II, § 3. The Supreme Court of the United States has treated that pairing as significant: the President "is provided with the means of fulfilling this obligation by his authority to commission all the officers of the United States, and, by and with the advice and consent of the Senate, to appoint the most important of them and to fill vacancies." *Myers v. United States*, 272 U.S. 52, 133 (1926). The federal Constitution assigns a duty and couples it with a means of performance.

The 1868 framers took the duty but provided a different means. They paired the Take Care Clause instead with a power to obtain information: "[T]he Governor may, at any time, require information in writing from the officers in the Executive Department upon any subject relating to the duties of their respective offices, and shall take care that the laws be faithfully executed." N.C. Const. of 1868, art. III, § 7 (quoted in Gov. Br. 41). That pairing is telling. It recognizes that the other executive officers held "respective offices" with duties of their own—duties the General Assembly prescribed under Section 13—and it gives the Governor a right to be informed about those duties, not a right to direct them. The current Constitution keeps the information power, N.C. Const. art. III, § 5(9), and still contains no commissions clause. A Take Care Clause adopted without the federal tools of supervision does not bring the federal theory of supervision with it.

That is why the federal decisions on which the Governor relies—*Seila Law LLC v. CFPB*, 591 U.S. 197 (2020); *Collins v. Yellen*, 594 U.S. 220 (2021); *Free Enterprise Fund v. PCAOB*, 561 U.S. 477 (2010); and *Trump v. Slaughter*, 146 S. Ct. 2283 (2026), *see* Gov. Br. 36–38—do not translate. They rest on a single vesting

of executive power in "a President" and on the appointment and removal tools the federal Constitution supplies. "[E]ach state constitution has its own unique history of development." *Cooper v. Berger*, 371 N.C. 799, 813, 822 S.E.2d 286, 297 (2018) ("*Cooper Confirmation*").

C. Madison described North Carolina's choice, and North Carolina made it knowingly.

The Governor's quotation from *Federalist No. 48* omits Madison's account, one paper earlier, of North Carolina's own Constitution. Surveying the state constitutions, Madison observed that North Carolina, while declaring that the three powers "ought to be forever separate and distinct from each other," "refers, at the same time, to the legislative department, the appointment not only of the executive chief, but all the principal officers within both that and the judiciary department." *The Federalist No. 47* (James Madison) (Clinton Rossiter ed., 1961).

North Carolina's founders did not overlook the risks Madison described. They chose a legislature "as supreme as ever John Locke might desire." *Stein Boards & Commissions*, 923 S.E.2d at 592 (Murry, J., concurring) (quoting Earle H. Ketcham, *The Sources of the North Carolina Constitution of 1776*, 6 N.C. Hist. Rev. 215, 218 (1929)). Later generations strengthened the Governor in specific, enumerated ways, but they never adopted the unitary model. They declined repeated proposals to shorten the ballot and, in 1944, made three more executive offices elective. Treasurer's Br. 12–13. The Study Commission, whose work produced the 1971 Constitution, acknowledged that "most of the Governor's powers derive from statute, not the [C]onstitution." *Stein Boards & Commissions*, 923 S.E.2d at 593

(Murry, J., concurring) (quoting 1968 Report at 104). Powers the General Assembly conferred by statute, it may reallocate by statute.

III. Article III's Text Leaves the Allocation of Statutory Appointments to the General Assembly.

The parties have explained how Article III, Sections 5(8), 5(10), and 7(2) commit the duties of the Council of State and the organization of state agencies to the General Assembly. Legislative Defs.' Br. 17–19, 47–49, 54–56; Treasurer's Br. 20–23. Three further features of the text confirm that allocation.

A. Article III contains no counterpart to Article IV's express limit on the General Assembly.

When the people meant to protect a branch's powers against legislative rearrangement, they said so. Article IV vests the judicial power in the courts and then adds: "The General Assembly shall have no power to deprive the judicial department of any power or jurisdiction that rightfully pertains to it as a co-ordinate department of the government, nor shall it establish or authorize any courts other than those permitted by this Article." N.C. Const. art. IV, § 1. Article III contains nothing comparable. It vests the executive power in the Governor, *id.* art. III, § 1, and then directs that the duties of the other executive officers "shall be prescribed by law," *id.* art. III, § 7(2).

The contrast matters. If vesting a power in a branch were by itself enough to bar the General Assembly from rearranging authority within that branch, Article IV's express limitation would be surplusage. The Governor's theory—that the General Assembly may not move an appointment from the Governor to another

elected executive officer—reads into Article III the very limitation the people wrote into Article IV and left out of Article III. A limit on the General Assembly's power must be express. *Harper v. Hall*, 384 N.C. 292, 323, 886 S.E.2d 393, 414 (2023); *McKinney v. Goins*, 387 N.C. 35, 42 (2025).

B. The people shielded legislative appointments from the Governor's veto.

The Constitution also assumes that the General Assembly may fill public offices. When the people gave the Governor a veto, they exempted every bill "[i]n which the General Assembly makes an appointment or appointments to public office and which contains no other matter." N.C. Const. art. II, § 22(5)(a). That exemption would be pointless if the Constitution reserved appointment to the Governor. Its timing is significant, too. In the amendment that most expanded the Governor's power in modern times, the people took care to put the General Assembly's appointments beyond its reach.

The point is even stronger for the appointments at issue here, which the General Assembly has not kept for itself but has instead given to independently elected executive officers. If the Constitution allows the General Assembly to fill statutory offices directly, beyond the reach of a veto, it allows the General Assembly to assign that duty to the Commissioner of Agriculture, the Commissioner of Insurance, or the Treasurer. Appointment is "not an executive, legislative or judicial power, but only a mode of filling the offices created by law." *Cooper Confirmation*, 371 N.C. at 813, 822 S.E.2d at 297 (quoting *Cunningham v. Sprinkle*, 124 N.C. 638, 643 (1899)).

C. Section 11 defeats, rather than supports, the Governor's Cabinet rule.

The Governor argues that he must control any board housed within one of his Cabinet departments, Gov. Br. 39, 43–44, 53–55, and that Article III, Section 11's "major purposes" language limits the duties the General Assembly may give other Council of State members, *id.* at 45–46. Section 11 does neither.

First, Section 11 makes the departmental placement of regulatory bodies optional. After directing that administrative agencies be grouped into no more than 25 principal departments, it provides that "[r]egulatory, quasi-judicial, and temporary agencies may, but need not, be allocated within a principal department." N.C. Const. art. III, § 11. The Treasurer has shown how that sentence applies to the Utilities Commission. Treasurer's Br. 33–34. It applies equally to the other commissions here. The Environmental Management Commission adopts rules and may overrule civil penalty assessments; the Coastal Resources Commission designates areas of environmental concern, administers permits, and rules on appeals from permit decisions; and the Wildlife Resources Commission makes licensing rules and designates protected species. *Stein Boards & Commissions*, 923 S.E.2d at 588–89. Each is a regulatory body that the Constitution permits to exist outside any principal department.

A constitution that does not require a regulatory commission to be housed in a Cabinet department cannot make that housing the source of a constitutional right to control it. Where a commission sits is a choice that both political branches can change—the General Assembly by law and the Governor by executive order, subject to legislative disapproval by either chamber. N.C. Const. art. III, § 5(10). The

General Assembly often houses a commission in a department by a "Type II transfer," under which the commission "shall exercise all its prescribed statutory powers independently of the head of the principal department." N.C. Gen. Stat. § 143A-6(b); see, e.g., id. § 143B-431(a)(2)(b) (Utilities Commission). And Session Law 2026-41 will move the Residential Code Council from the Department of Insurance to the Department of Labor, effective January 1, 2027. N.C. Sess. L. 2026-41, §§ 13.3(a), 13.4(r), 13.5(c), (p). Constitutional authority that appears and disappears with the location of a commission's offices is not constitutional authority at all.

Second, Section 11's "major purposes" language governs how agencies are grouped into departments. It says nothing about who may appoint their members, and nothing about the duties of the Council of State, which Section 7(2) separately leaves to the General Assembly. As Judge Murry noted below, the phrase may modify only the grouping of administrative departments, not the "offices of the State." *Stein Boards & Commissions*, 923 S.E.2d at 594 (Murry, J., concurring). The Study Commission that proposed Section 11 explained that "[t]he General Assembly will not be deprived of any of its present authority over the structure and organization of state government." 1968 Report at 131. The Governor would turn a 1975 reorganization deadline into a permanent limit on Section 7(2). The text does not permit that reading.

CONCLUSION

The Governor has abandoned the unitary executive, but his argument would rebuild it one board at a time. Nothing in the Constitution's text or history requires

that result, and the Governor's claims fail whether or not the Court revisits *McCrory* and *Cooper I*. The Court should affirm the decisions of the Court of Appeals upholding the structures of the Environmental Management Commission, Coastal Resources Commission, Wildlife Resources Commission, Utilities Commission, Residential Code Council, and Building Code Council.

Respectfully submitted, this the 16th day of October, 2026.

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