No. 333PA17 TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

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NORTH CAROLINA STATE BOARD OF EDUCATION, Plaintiff-Appellant, v. THE STATE OF NORTH CAROLINA and MARK JOHNSON, in his official capacity, Defendants-Appellees.	)	From Wake County

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PLAINTIFF-APPELLANT NORTH CAROLINA STATE BOARD OF EDUCATION'S REPLY BRIEF

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INTRODUCTION

For multiple reasons, Defendants' opposition briefs only confirm that the Transfer Legislation cannot be upheld.

First, the State expressly *disavows* the SPI's statement that the Board's power "is whatever the General Assembly says it is." *Compare* T. p. 100 *with* State Br. at 3.[1] Instead, the State acknowledges that there *are* "limits on the

[1] The State also disavows this position in the companion case. State Br. at 3, n.1. Notably, the Rules Review Commission in that case also reveals its concern about being viewed side-by-side with the Transfer Legislation here, distancing itself from the Defendants in this case. No. 110PA16-2, RRC Br. at 23, n.11.

General Assembly's power" under Article IX, Section 5. State Br. at 3 (emphasis added).

Meanwhile, the SPI attempts to backtrack, suggesting an entirely new theory: that statutorily reassigning constitutional powers is fine as long as it is between "two constitutional actors sharing the same subject-matter space." SPI Br. at 21; *see also id.* at 24. As described below, this theory is one that the SPI invented without any authority. It also clashes with the constitutional text and contemporaneous proof of the framers' intent. Worse, this new theory would allow the General Assembly to rearrange constitutional roles at its pleasure—for example, flip-flopping the constitutional roles of this Court and the Court of Appeals, or flip-flopping the constitutional roles of the Governor and Lieutenant Governor. These flaws in the SPI's new theory only confirm that Defendants' arguments have no limiting principle.

Next, Defendants offer their take on the SPI's narrow constitutional role, attempting to inflate that role into one that stands on "equal constitutional footing with the State Board." SPI Br. at 23. As described below, however, Defendants' view of the SPI's narrow constitutional role cannot be squared with the constitutional text itself, much less the framers' intent.

Defendants then claim this case is controlled by this Court's decisions in *Whittle* and *Guthrie*, discussed below. As described below, however, neither of those decisions addressed the issue here. This is perhaps best evidenced by the fact that

not one of the seven jurists between this case and the companion case concluded that those decisions resolved the issues now before this Court.

Next, Defendants attempt to justify the Transfer Legislation by looking to old statutes, rather than constitutional provisions or contemporaneous proof of the framers' intent. In the Board's opening brief, it explained the three reasons why Defendants cannot justify the Transfer Legislation by simply pointing to more legislation. Defendants' opposition briefs offer no response to these points. Instead, they opt to proceed with a lengthy statutory discussion that is irrelevant to the constitutional inquiry before the Court.

Next, Defendants attempt to raise a severability defense. Yet their briefing on this issue confirms why the Transfer Legislation must fall as a whole—most notably, Defendants' concession that the Transfer Legislation is a single "piece of legislation" working toward the objective of divesting the Board of its constitutional power.

Finally, the State—and the SPI, to some degree—argue that the Transfer Legislation does not actually transfer the Board's constitutional powers. For several reasons discussed below, this argument should be dismissed out of hand. For starters, Defendants *conceded* in the trial court that the Transfer Legislation does, in fact, transfer the Board's power. This issue, therefore, is foreclosed.

Even if Defendants had preserved this argument, it would do no good. It takes no effort to see how the Transfer Legislation is, in fact, a transfer on its face:

Article IX, Section 5 of the North Carolina Constitution	**N.C. Sess. Law 2016-126 § 4**
It shall be the "dut[y]" of "***the State Board of Education*** . . . [to] supervise and administer the free public school system[.]"	"It shall be the duty of ***the Superintendent of Public Instruction*** . . . to have under his or her direction and control, all matters relating to the direct supervision and administration of the public school system."

For each of these reasons and the reasons in the Board's opening brief, the three-judge panel's decision should be reversed.

ARGUMENT

I. Defendants cannot justify the Transfer Legislation as a statutory transfer of constitutional powers.

A. The SPI's attempt to establish a limiting principle falls woefully short.

The SPI asserts that the Board's power "is whatever the General Assembly says it is." T. p. 100. The Board's opening brief explained why that position has no limiting principle. Bd. Br. at 36-37.

Now, the SPI points out that even though his constitutional role as "secretary and chief administrative officer *of* the board" is narrow, N.C. Const. art. IX, § 4 (emphasis added), the Constitution states that the General Assembly may give him additional duties as "prescribed by law." N.C. Const. art. III, § 7(2). Therefore, the SPI argues, he can be the recipient of the Board's constitutional powers, because the General Assembly is merely "prescribing" him additional "duties" under Article III.

This new theory still lacks a limiting principle. After all, the "respective duties" of every member of the Council of State are also "prescribed by law" under Article III, like the SPI. N.C. Const. art. III, § 7(2). Thus, while Defendants' theory might avoid the specter of the General Assembly turning over public education to the Rockingham County Clerk of Superior Court (the hypothetical example in the Board's opening brief), nothing in Defendants' new theory would prevent the General Assembly from turning over public education to the State Treasurer or the Commissioner of Agriculture, for example, whose duties are also "prescribed by law." N.C. Const. art. III, § 7(2).

Perhaps recognizing this problem, but without citing any authority, the SPI makes two mentions of a possible *second* theory: that the "prescribed by law" language in Article III allows for the statutory reassignment of constitutional powers here because the reassignment is "between two constitutional actors sharing the same subject matter space." SPI Br. at 21; *see also id.* at 24. The SPI further claims that this phenomenon exists "[n]owhere else in State Government"—a convenient theory, it would seem, for the SPI. *Id.* at 24.

There are two problems with this new theory.

First and foremost, the SPI's "two constitutional actors sharing the same subject-matter space" concept is one that the SPI has pulled out of thin air.[2] SPI

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[2] The SPI also attempts to distinguish the Board's out-of-state cases on these grounds. The fact that the SPI has concocted this "two constitutional actors sharing the same subject-matter space" theory without any legal support only further demonstrates that those out-of-state cases apply here.

Br. at 21 (citing nothing). Not a word of the constitutional text even remotely provides a basis for this new theory, and neither does the framers' intent.

Indeed, as the Board's opening brief explained, the framers intended precisely the opposite: that the supervision and administration of the public school system must be vested in the Board, *not* with the SPI. Bd. Br. at 21-30. Thus, the SPI's new theory reveals itself as a novel idea from the SPI's counsel, not one with any foundation in the constitutional text or contemporaneous proof of the framers' intent.

Second, two examples disprove the SPI's suggestion that his "two constitutional actors sharing the same subject-matter space" concept exists "[n]owhere else in State Government." Each of these examples show the dangers of the SPI's new theory.

The first example involves this Court.

This Court and the Court of Appeals are both constitutional entities. N.C. Const. art. IV, § 5. As the State's only two courts within the Appellate Division, *id.*, both this Court and the Court of Appeals exclusively decide appeals—in other words, they both "share the same subject-matter space."

Like the Board, this Court has express constitutional power. *See* N.C. Const. art. IV, § 12(1) (stating that the Court has the power of "general supervision and control over the proceedings of other courts" and the power to "review upon appeal any decision of the Courts below"). Meanwhile, like the SPI, the Constitution states that the Court of Appeals' role is prescribed by law. *See id.* § 12(2) ("The Court of

Appeals shall have such appellate jurisdiction as the General Assembly may prescribe").

Under the SPI's new theory, however, the General Assembly could enact legislation that is no different than the Transfer Legislation here: It could "prescribe by law" that the Court of Appeals, and not this Court, would be in charge of the judiciary, and that the Court of Appeals would have the power of "general supervision and control over the proceedings of other courts," including this Court.

Perhaps, like Defendants in this case, the General Assembly would also have the audacity to argue that the transfer legislation there did not actually transfer this Court's constitutional power of "general supervision" over the Court of Appeals, because this Court could still "supervise" the Court of Appeals through rulemaking—i.e., the Rules of Appellate Procedure. *See infra* at 24-25 (describing how Defendants make that argument here).

This Court would surely reject that transfer legislation. For all the same reasons, it should reject the Transfer Legislation here.

The next example involves the Governor.

The Governor and Lieutenant Governor are both constitutional officers. N.C. Const. art. III, § 2. The Governor and the Lieutenant Governor "share the same subject-matter space"—at least to the same degree that the SPI believes that he shares subject-matter space with the Board.

Like the Board, the Governor has express constitutional power. *See* N.C. Const. art. III, § 5 (stating that the Governor "shall take care that the laws be

faithfully executed," and shall exercise the veto power, appointment power, and clemency power, among other powers). Meanwhile, like the SPI, the Constitution states that the Lieutenant Governor's role is prescribed by law. *See* N.C. Const. art. III, § 6 (stating that the Lieutenant Governor "shall perform such additional duties as the General Assembly or the Governor may assign to him").

Under the SPI's new theory, however, the General Assembly could enact legislation that is no different than the Transfer Legislation here: It could "prescribe by law" that the Lieutenant Governor, and not the Governor, would be in charge of the executive branch, and that the Lieutenant Governor, rather than the Governor, would have the power to "take care that the laws are faithfully executed," as well as exercise veto power, appointment power, and clemency power, among other powers.

Perhaps, like Defendants in this case, the General Assembly would also have the audacity to argue that the transfer legislation did not actually transfer the Governor's constitutional power to supervise the executive branch, because the Governor could still supervise the executive branch through rulemaking—i.e., executive orders. *See infra* at 24-25 (describing how Defendants make that argument here).

This Court would surely reject that transfer legislation. And for all the same reasons, it should reject the Transfer Legislation here.

As these applications of the SPI's new theory show, if the General Assembly were empowered to flip-flop the constitutional roles of the Board and the SPI based

on the SPI's "two constitutional actors sharing the same subject-matter space" theory, then it could be tempted to flip-flop the constitutional roles of this Court and the Court of Appeals, or the Governor and the Lieutenant Governor.[3] These scenarios further illustrate that the SPI's new theory is just as flawed as the SPI's old one: that the Board's power "is whatever the General Assembly says it is." T. p. 100.

More broadly, these scenarios illustrate how dangerous it would be for this Court to allow the General Assembly to rearrange constitutional roles, as the Transfer Legislation seeks to do here. This danger is precisely why this Court has adopted a no-tolerance policy for statutory transfers of constitutional power. As described in the Board's opening brief, this Court has repeatedly reaffirmed its bright-line rule that *any* reassignment of constitutional powers without a constitutional amendment is too much. Bd. Br. at 31-32 (collecting this Court's

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[3] The SPI claims that unless the General Assembly is allowed to transfer the Board's constitutional powers to the SPI under the "prescribed by law" language in Article III, that language would "have no meaning." SPI Br. at 31. That is a gross overstatement. Rejecting the SPI's argument in this case would only mean that the General Assembly could not "prescribe by law" the powers that are vested in other constitutional entities or officers—here the power to "supervise," "administer," and "make rules" for the benefit of the public-school system. N.C. Const. art. IX, § 5.

prior cases). Notably, neither the SPI nor the State discusses a single one of those decisions in their briefs.[4]

In sum, the SPI's attempt to invent a new theory only makes matters worse for Defendants.

B. Defendants' views on the SPI's constitutional role cannot be squared with the constitutional text or the framers' intent.

In the SPI's opposition brief, he claims that the Constitution establishes a "bicameral approach" in which "the [SPI] stands on equal constitutional footing with the State Board." SPI Br. at 23-24. The State, likewise, bestows fictional titles on the SPI, such as "executive leader of the Board" and even "chief executive." State Br. at 16, 19; *see also* Bd. Br. at 41 (cataloguing the State's various made-up titles for the SPI throughout this litigation).

Defendants' "equal footing" concept is contrary to both the constitutional text and the framers' intent.

First, the constitutional text makes clear that the Board and the SPI are not "on equal footing." Simply put, the Board has *several* express constitutional powers,

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[4] Indeed, the SPI argues further that the General Assembly should be empowered to "make changes to [constitutional] allocations of power and duties to meet the changing priorities of the People over time." SPI Br. at 25. This runs right into the Board's observation that if constitutional powers can be reassigned by statute according to the legislature's "changing priorities," then there is no point in having a constitution at all. Bd. Br. at 35-36.

and the SPI has *none*.[5] Thus, the SPI's suggestion of "equal footing" is no different than suggesting that this Court (which has express powers) and the Court of Appeals (which has a role prescribed by law) are "on equal footing."

Moreover, Defendants are in no position to argue this "equal footing" theory, because the SPI repeatedly concedes that the Board's express powers to "supervise and administer" are so broad that they "cover essentially everything." SPI Br. at 9, 25. Meanwhile, the SPI's only constitutional role is to serve the Board in his capacity as "secretary and chief administrative officer *of* the board." N.C. Const. art. IX, § 4 (emphasis added). If the Board's express constitutional powers "cover essentially everything" and the SPI's only constitutional role is to be an "officer *of* the board," it is impossible to accept the SPI's "equal footing" concept.

Furthermore, the Board is composed of "the Lieutenant Governor, the Treasurer, and eleven members appointed by the Governor, subject to confirmation by the General Assembly in joint session." N.C. Const. art. IX, § 4. By contrast, the SPI is not even a voting member of the Board itself—he is only an "officer of the board." *Id.* Given this constitutional reality, Defendants cannot reasonably contend that a single, non-voting "officer *of* the Board" stands "on equal footing" with the entire twelve-member Board that actually makes the decisions.

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[5] In one portion of the SPI's opposition brief, he claims that he has "express duties." SPI Br. at 24. The SPI says that these "express duties" were "discussed at length in prior briefing." *Id.* The SPI does not give a citation to this "prior briefing," however, and the Board does not recall a time in this litigation when the SPI made the (incorrect) claim that he has "express" constitutional powers.

Second, the framers' intent makes clear that the Board and the SPI are not "on equal footing." In its opening brief, the State Board pointed out that the amendments in 1944 and 1971, which eliminated the SPI's then-existing powers in 1942, dispel any notion that the SPI could possess the power of supervision of the public schools. Bd. Br. at 26-30. That exhaustive discussion of the contemporaneous proof of the framers' intent covered a full ten pages of the Board's opening brief. *Id.*

In response, the State acknowledges some of Article IX's history, but argues that the SPI is not merely a "clerical secretary" or a "bookkeeper." State Br. at 18. The Board agrees. The Board has never argued that the SPI is the Board's "clerical secretary" or "bookkeeper." Rather, the Board has repeatedly acknowledged that the SPI has a constitutional role to play: the role of the "secretary and chief administrative officer *of* the Board." N.C. Const. art. IX, § 4 (emphasis added). The fact that the SPI is not the Board's "clerical secretary" or "bookkeeper," however, does not mean that the Transfer Legislation, which puts "under [the SPI's] direction and control, <u>all matters relating to the direct supervision and administration of the public school system</u>" (N.C. Sess. Law 2016-126 § 4) (emphasis added), is somehow a "codification" of the SPI's narrow constitutional role.

Meanwhile, in response to the Board's ten-page discussion about the framers' intent, the SPI offers only two short quips: (1) "Whether or not that is true, however, is irrelevant in the instant case," SPI Br. at 28-29; and (2) a conclusory

sentence that the Board's discussion of the 1944 amendment is "simply erroneous," SPI Br. at 30.

The SPI's claim that the framers' intent is "irrelevant" is contrary to this Court's teachings. This Court has repeatedly held that when it interprets the Constitution, it is "*bound* to 'give effect to the intent of the framers." *Beaufort Cty. Bd. of Educ. v. Beaufort Cty. Bd. of Comm'rs*, 363 N.C. 500, 505, 681 S.E.2d 278, 282 (2009) (quoting *Perry v. Stancil*, 237 N.C. 442, 444, 75 S.E.2d 512, 514 (1953)); *see also, e.g.*, *N.C. State Bar v. DuMont*, 304 N.C. 627, 633-34, 286 S.E.2d 89, 93-94 (1982).

As for the SPI's conclusory remark that the Board's discussion of the 1944 amendment is "simply erroneous," the 1944 amendment speaks for itself.[6] Bd. Br. at 26-27. It is revealing that the SPI seeks to rely on the 1942 amendment, which gave him certain powers, but avoids any meaningful discussion of the 1944 amendment, which took those powers away. *Compare* SPI Br. at 27-28 *with* Bd. Br. at 26-27.

As these points show, the SPI's "equal footing" concept is contrary to both the constitutional text and the framers' intent.

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[6] In the face of the 1944 amendment, the State suggests that the Board "presented no evidence" of the framers' intent in 1944. State Br. at 17. The 1944 amendment itself is evidence of the framers' intent, and speaks for itself—particularly given its ratification a mere two years after the 1942 amendment.

C. Neither *Guthrie* nor *Whittle* considered or addressed the issue presented in this appeal.

Defendants next suggest that this Court's decisions in *Guthrie* and *Whittle* are controlling in this appeal. Defendants are incorrect for several reasons.

First and foremost, both *Guthrie* and *Whittle* were far more limited in their scope than Defendants portray. *Guthrie* merely held that if the Board enacts a rule, the legislature may "specifically" reject that particular rule by revising or repealing it. *Guthrie v. Taylor*, 279 N.C. 703, 710, 185 S.E.2d 193, 198 (1971). *Whittle* only held that if the legislature "specifically" preempts the Board on a particular public-education topic, the Board cannot overrule the law by enacting a contrary rule. *State v. Whittle Commc'ns*, 328 N.C. 456, 402 S.E.2d 556 (1991).[7]

If *Guthrie* and *Whittle* were controlling on the issue of whether the General Assembly can statutorily reassign the Board's constitutional powers under the guise of "subject to laws," then the three-judge panel in this case, the Superior Court in the companion case, and the panel of the Court of Appeals in the companion case would have simply applied those decisions to the facts of these two companion cases. Yet none of those courts found that applying *Guthrie* or *Whittle* answered the question raised in either of these two companion cases. If *Guthrie* and *Whittle* were "controlling," as Defendants suggest, surely that fact would not have escaped the attention of seven jurists.

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[7] Defendants take issue with the Board's use of the word "specifically," even though that is the word that *Guthrie* and *Whittle* use. *Guthrie*, 279 N.C. at 711, 185 S.E.2d at 199; *Whittle*, 328 N.C. at 458, 463, 465, 470, 402 S.E.2d at 557, 560, 561, 564 (using "specifically" three times).

Indeed, in the companion case to this appeal, even the majority opinion of the Court of Appeals that ruled against the Board observed that neither *Guthrie* nor *Whittle* were relevant to an analysis of whether the General Assembly can statutorily reassign the Board's constitutional powers under the guise of Article IX, Section 5's "subject to laws" phrase. Thus, the Court there held that "[n]o North Carolina appellate court has previously decided the issue presented in this appeal." *North Carolina State Bd. of Educ. v. State*, No. COA15-1229, Slip op. at 18 (N.C. Ct. App. Sept. 19, 2017) (hereinafter "RRC Opinion"). The Court further explained that "the issue before us exceeds the parameters of *Whittle*." *Id.* at 20. The Court was correct on those points, and the same is true here.

Second, nothing in either *Guthrie* or *Whittle* suggests that those decisions were meant to extend beyond their narrow facts. Indeed, it takes the SPI five full pages of briefing just to set up the unique factual situation in *Whittle*, before ultimately acknowledging that "the details of *Whittle Communications* can be somewhat cumbersome[.]" SPI Br. at 14. The same is true about the facts of *Guthrie*, which involved a teacher's claim that the Board lacked *statutory* authority to enact teacher-certification rules under unique circumstances—a claim that ultimately failed in light of the "legislative power conferred upon [the Board] by the Constitution," which resulted in a victory for the Board.

In short, a decision affirming the Board's rule on five-year renewals of teaching certificates (*Guthrie*), and a decision that the legislature can tell local school boards to decide which TV programs their students can watch (*Whittle*) do

not stand for the remarkable proposition that Defendants suggest here: that the General Assembly can copy and paste the Board's constitutional powers into a statute and replace the word "State Board of Education" with "Superintendent of Public Instruction."

Along those same lines, neither *Guthrie* nor *Whittle* purported to erase nearly 150 years of precedent from this Court holding that statutory reassignments of constitutional powers—no matter how slight—are impermissible. Bd. Br. at 31-32. As noted above, Defendants do not respond to those cases at all, much less suggest that *Guthrie* or *Whittle* sought to overrule them.

Furthermore, as described in the Board's opening brief, state supreme courts across the nation have "uniformly denounced" Defendants' argument that constitutional phrases like "subject to laws" mean that the legislature can statutorily reassign constitutional powers. Bd. Br. at 32-33 (quoting *Hudson v. Kelly*, 263 P.2d 362, 368 (Ariz. 1953), and collecting cases).[8] If this Court in *Guthrie* or *Whittle* had intended to make North Carolina the first state supreme court to reach that conclusion, putting North Carolina in a class of one, surely the Court would have said so.

For these reasons, "[n]o North Carolina appellate court has previously decided the issue presented in this appeal." RRC Opinion at 18. Defendants' reliance on *Guthrie* and *Whittle* is misplaced.

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[8] Defendants' attempt to distinguish these out-of-state cases fails, as discussed *supra* at n.2.

D. Defendants cannot justify the Transfer Legislation by pointing to more legislation.

In the Board's opening brief, it explained why Defendants cannot justify the Transfer Legislation by pointing to more legislation. Bd. Br. at 39-41. The Board supplied three reasons:

- Defendants' "we've done it before" defense has no place in constitutional litigation. Bd. Br. at 39 (citing authorities).
- The 1995 legislation that Defendants rely on actually *confirmed* the Board's constitutional powers (albeit unnecessarily), so the General Assembly cannot violate the Constitution under the guise of "merely amending" the 1995 legislation. *Id.* at 40.
- None of the statutes that Defendants cited before the three-judge panel shed any light on the constitutionality of the Transfer Legislation because none of them attempted to reassign the Board's constitutional powers.

Neither the SPI nor the State responded to any of those points. Instead, they proceeded with a lengthy discussion of old legislation involving the Board and the SPI—a *statutory* discussion that is completely irrelevant to the *constitutional* inquiry before the Court.[9] SPI Br. at 32-41; State Br. at 25-26.

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[9] Relatedly, Defendants put their spin on the intent behind the Transfer Legislation, even though *statutory* intent (as opposed to the framers' intent) is not a defense to a *constitutional* challenge. State Br. at 19-20; *see, e.g.*, *City of Asheville v. North Carolina*, No. 391PA15, 794 S.E.2d 759, 766 (N.C. Dec. 21, 2016) ("If there is a conflict between a statute and the Constitution . . . the Constitution is the superior rule of law in that situation."). Regardless, Defendants' attempt to guess at a non-political reason for the Transfer Legislation clashes with the undeniable facts of when, how, and why the General Assembly enacted it. Bd. Br. at 2-3, 7-8.

For each of these three unrebutted reasons, Defendants cannot justify the Transfer Legislation by pointing to more legislation.

E. The Transfer Legislation must fall as a whole.

As anticipated in the Board's opening brief, Defendants also attempt a severability defense. Their briefing on this issue, however, confirms that the Transfer Legislation must fall as a whole.

First, the SPI himself repeatedly concedes that the words "supervise and administer cover essentially everything." SPI Br. at 9, 25. Yet those are the words that the General Assembly used in the Transfer Legislation: "It shall be the duty of the Superintendent of Public Instruction . . . to have under his or her direction and control, all matters relating to the direct *supervision and administration* of the public school system." N.C. Sess. Law 2016-126 § 4 (emphasis added).

Thus, as the Board pointed out in its opening brief, the constitutional flaws in the Transfer Legislation's four "cornerstones" (to use this Court's phrase in *Flippin*, *infra*) are so broad and sweeping that, if upheld, they would effectively subsume all of the implementing provisions, rendering them superfluous. Bd. Br. at 43-44. The fact that the SPI's brief doubles down on the meaning of "supervise and administer" only makes this point stronger.

Moreover, as the Board explained in its opening brief, this Court's severability test is straightforward: If "the cornerstones" of "a carefully meshed system" of provisions are unconstitutional, then the legislation must "fall as a whole." *Flippin v. Jarrell*, 301 N.C. 108, 119, 270 S.E.2d 482, 489 (1980); *see also, e.g.*, *G.I. Surplus Store, Inc. v. Hunter*, 257 N.C. 206, 214, 125 S.E.2d 764, 769-70

(1962) (observing that provisions that "are interrelated and inseparable parts of [an unconstitutional] Act" must also fall).[10]

In their opposition briefs, Defendants do not dispute that the Transfer Legislation is "a carefully meshed system" of legislation. If anything, Defendants actually embrace that description, affirmatively arguing that the Transfer Legislation is a single "piece of legislation" (SPI Br. at 51) with its subparts all working toward common "goals." State Br. at 19.

Defendants also do not dispute that the Transfer Legislation was rushed through the General Assembly as one "piece of legislation," enacted as one "piece of legislation," and signed into law as one "piece of legislation." Bd. Br. at 2-3, 7-8. And Defendants' opposition briefs provide no answer to the Board's point that without the "cornerstones" of the Transfer Legislation, the statute would make no sense and, worse, would result in utter dysfunction. Bd. Br. at 43-44.

For all of these reasons, the Transfer Legislation must "fall as a whole." *Flippin*, 301 N.C. at 118, 270 S.E.2d at 488-89.

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[10] Defendants attempt to distinguish *Flippin* on the grounds that this Court struck "small pieces of a single provision as opposed to dozens of entire provisions as sought by the State Board." SPI Br. at 43. In reality, the statutes in *Flippin* were a series of multiple provisions crammed together into a lengthy paragraph with colons and the repeated use of the words "provided further." *Id.* at 111-112, 270 S.E.2d at 485. Regardless, Justice Exum's teachings in *Flippin* did not suggest that severability depends on where the General Assembly puts its paragraph breaks. The SPI also does nothing to distinguish this Court's decision in *G.I. Surplus Store*, 257 N.C. at 214, 125 S.E.2d at 769-70, cited in the Board's opening brief, which applied essentially the same analysis to reject a severability defense.

II. The State's argument that the Transfer Legislation does not actually transfer the Board's constitutional powers should be summarily rejected.

In the Board's opening brief, the Board explained that this Court has a choice between two paths: (1) the framers' carefully chosen design under Article IX of the Constitution; or (2) the SPI's argument that the Board's power "is whatever the General Assembly says it is." T. p. 100.

In the SPI's opposition brief, he continues to push this expansive "General Assembly can do whatever it wants" theory, claiming that "the General Assembly is the ultimate arbiter and delegator of powers and duties." SPI Br. at 14. This is where the State parts ways with the SPI.

The State expressly *disavows* the SPI's argument that the Board's constitutional power "is whatever the General Assembly says it is." State Br. at 3. Indeed, the State even declares that the SPI's argument is not "valid." State Br. at 6.

The State then suggests that the "issue presented to this Court is more nuanced." State Br. at 6. According to the State, the Court can follow a third path: that the Transfer Legislation does not actually transfer the Board's constitutional powers.[11] For several reasons, the Court should reject this argument out of hand.

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[11] The three-judge panel's remarkably unsound decision stands as a reminder of how impossible it would be for this Court to write a plausible decision following the State down a third path. Bd. Br. at 14-15. Notably, both the State and the SPI avoid discussing the three-judge panel's rationale in any great detail, much less defend the three-judge panel's decision as one that this Court could plausibly adopt.

First and foremost, as the Board explained in its opening brief, if copying and pasting the Board's constitutional powers into a statute and replacing "State Board of Education" with "Superintendent of Public Instruction" is not a transfer of power, it begs the question of what could be. To say the least, the copied-and-pasted Transfer Legislation here presents this Court with a question that is anything *but* "nuanced."

To be sure, if this Court were to indulge the State's "not really a transfer" argument on *this* set of facts, the Court can expect its decision to be cited for a dangerous proposition: that the General Assembly can copy and paste constitutional text into a statute, remove constitutional entities or officers, replace them with individuals who better suit its political agenda, and effectively remake state government in its image.

For these reasons alone, the Court should summarily reject the State's "not really a transfer" argument.

Second, this argument is foreclosed by Defendants' own concessions. The State conceded in open court that the "plain meaning" of the Transfer Legislation was to strip the Board of its constitutional powers to supervise and administer the public school system, leaving the Board with only the power "to make rules and regulations"—in other words, a transfer of two of the Board's three constitutional powers. R. Supp. p. 39. Likewise, the SPI has conceded throughout this litigation that the Transfer Legislation "reallocated" the Board's powers (R. Supp. pp. 141-42),

and it concedes here, again, that the Transfer Legislation is a "reallocation of duties and powers." SPI Br. at 48.

Having conceded that the Transfer Legislation is, in fact, a transfer, Defendants cannot now argue otherwise. In view of Defendants' concessions, this issue is foreclosed.

Third, even if the State were not arguing the opposite of its concessions, the State's sole basis for suggesting that the Transfer Legislation is "not really a transfer" is by pointing to other *statutes*—this time, statutes in Chapter 115C. None of these statutes, however, purport to give the Board the power that the Constitution already confers: the power to "supervise and administer the free public school system." N.C. Const. art. IX, § 5.

Instead, these random, piecemeal statutes in Chapter 115C merely give the Board a hodge-podge of limited responsibilities, such as the responsibility to "select and adopt textbooks" or the responsibility to "propose, revise, and approve the State School Technology Plan." State Br. at 38-39. As the Board's opening brief explained, courts have rejected such attempts to rely on phrases like "subject to laws" to strip constitutional entities of their constitutional powers and leave them

with "limited and piecemeal" statutory powers.[12] *Powers v. State*, 318 P.3d 300, 321 (Wyo. 2014) (addressing virtually identical situation).

In any event, the SPI argues that his newfound statutory power to "supervise and administer" the public-school system would trump these piecemeal responsibilities anyway. Given the SPI's claims that his new power to "supervise and administer" the public school system covers "essentially everything" (SPI Br. at 9, 25), Defendants cannot seriously argue that the piecemeal responsibilities left over in Chapter 115C are equivalent to the Board's constitutional power to "supervise and administer the free public school system." Like Defendants' other attempts to defend this constitutional challenge by pointing to more *statutes*, the State's suggestion here is a non-starter.

Next, the State argues—and the SPI joins in—that the Transfer Legislation is not really a transfer of power because of a provision in the Transfer Legislation stating that "[t]he *general* supervision and administration of the free public school system shall be vested in the State Board of Education." N.C. Sess. Law 2016-126 § 2 (emphasis added). But that statutory provision only confirms what the

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[12] Furthermore, unlike the Board's constitutional powers, which the people of North Carolina intended to be permanent, these piecemeal responsibilities are merely *statutory*. As such, they are subject to shifting political winds, and the General Assembly could eliminate them at any time. In fact, the General Assembly in the Transfer Legislation itself expresses a clear intent to do just that: It directs the SPI, as the would-be head of the Department of Instruction, to "review all State laws . . . governing the public school system to ensure compliance with the intent of this Part to restore authority to the [SPI]," and "report to the 2017 General Assembly on the results of [that] review, including any recommended legislation." N.C. Sess. Law 2016-126 § 30.

Constitution already provides, and even then, only *some* of what the Constitution already provides. By using the modifier "general," that provision implies a limitation that is not present in the constitutional text. *Compare id. with* N.C. Const. art. IX, § 5.

More importantly, that provision is irrelevant in view of the Transfer Legislation's overarching declaration that the SPI "shall have under his or her direction and control, all matters relating to the direct supervision and administration of the public school system." N.C. Sess. Law 2016-126 § 4 (emphasis added). Defendants' only answer for that problem is to suggest that empowering the SPI to "directly supervise and administer the free-public school system" somehow does not infringe on the Board's power. This argument is contrary to the SPI's repeated arguments that the words "supervise and administer cover essentially everything"—a concession that his newfound statutory power to "supervise and administer" would "cover essentially everything," too. That concession, moreover, tracks the General Assembly's obvious objective in the Transfer Legislation to put the SPI in charge of "essentially everything" related to the entire public-education system.

In addition, this argument cannot withstand the text of the Constitution itself: "The State Board of Education shall supervise and administer the free public school system and the educational funds provided for its support," while the SPI "shall be the secretary and chief administrative officer of the board." N.C. Const. art. IX, § 4-5. Those provisions do not say, as the Defendants might wish, that the

Board will "supervise and administer the free public school system" while the SPI shall "directly supervise and administer the free public school system." Yet again, Defendants simply seek a rewrite of both Sections 4 and 5 of Article IX.

Finally, Defendants argue that the Transfer Legislation is "not really a transfer" because it still leaves the Board with the "big-picture power to govern public education through rules and regulations."[13] State Br. at 25 n.6. Defendants' argument proves too much: It is a tacit admission that General Assembly has taken away two of the Board's three constitutional powers (the power to "supervise" and "administer"), leaving only one power remaining (the power to "make rules"). N.C. Const. art. IX § 5.

This argument—that the General Assembly can take two constitutional powers, as long as it does not take all three—runs right into this Court's prior admonitions: that "[w]ith as much propriety every other office in the State may be cut up[.]" *King v. Hunter*, 65 N.C. 603, 612 (1871); *see also* Bd. Br. at 37, n.13 (citing authority warning that "[i]f . . . constitutional offices can be stripped of a *portion* of the inherent functions thereof, they can be stripped of *all* such functions . . . and the will of the framers of the constitution thereby thwarted").

If the Court were to sustain this "two-out-of-three" concept, then in the examples above involving this Court and the Governor, *supra* at 6-8, the General Assembly could strip this Court and the Governor of their supervisory powers by offering the same defense: that the transfer legislation there is permissible because

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[13] The words "big picture," of course, do not appear in the constitutional text.

this Court would still have "big picture" rulemaking power to supervise the appellate courts (the Rules of Appellate Procedure), and the Governor would still have "big picture" rulemaking power to supervise the executive branch (executive orders). As these examples show, Defendants' argument, yet again, lacks any limiting principle.

For all of these reasons, the State's argument that the Transfer Legislation does not actually transfer the Board's constitutional powers should be summarily rejected.

CONCLUSION

The Board respectfully requests that the three-judge panel's decision be reversed.

Respectfully submitted the 22nd day of January, 2018.

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