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No. COA 17-1259

TENTH JUDICIAL DISTRICT

NORTH CAROLINA COURT OF APPEALS

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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 No. 16-CVS-15607

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RULE 9(D) DOCUMENTARY EXHIBITS

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II. THE GENERAL ASSEMBLY'S ENACTMENT OF HB 17 WAS WELL WITHIN THE BOUNDS OF ITS CONSTITUTIONAL AUTHORITY.

A. The Board Has Failed To Accord Due Deference To The Legislature's Broad Authority To Enact Laws, As Protected By The Separation of Powers Doctrine.

"A clear understanding of the constitutionally prescribed powers and their division among the branches of government is a basis for stability and cooperation within government." *State ex rel. McCrory v. Berger*, 368 N.C. 633, 651 (2016). The Board's substantive argument fails to recognize the constitutional duty, and constitutional authority of the General Assembly to enact laws. Consistent with its predecessors, the 1971 North Carolina Constitution unequivocally and broadly declares that "[t]he legislative power of the State shall be vested in the General Assembly[.]" Art. II, Sect. 1. "Unlike the Federal Constitution, 'a State Constitution is in no matter a grant of power. All power which is not limited by the Constitution inheres in the people, and an act of a State legislature is legal when the Constitution contains no prohibition against it.'" *State ex rel. McCrory v. Berger*, 368 N.C. at 650 (*citations omitted*).

North Carolina's Constitution does not prohibit the General Assembly from enacting laws that affect education in general, and more specifically, the relationship between the appointed members of the State Board and the elected State Superintendent. Instead of prohibiting legislation, the Constitution unambiguously provides that "[t]he General Assembly shall provide by taxation *and otherwise* for a general and uniform system of free public schools," Art. IX, Sect. 2(1) (emphasis added), and makes the Board's rulemaking, supervisory and administrative authority on educational matters "subject to laws enacted by the General Assembly." Art. IX, Sect. 5. Instead of curtailing the General Assembly's authority to address matters related to education, our State Constitution specifically mandates the General Assembly's related legislative enactments.

Yet, despite this deeply rooted constitutional principle, that the legislature acts as "the agent of the people for enacting laws[,]" *Baker v. Martin*, 330 N.C. 331, 336 (1991), the Board makes a breathtaking and wide-reaching claim that the General Assembly's *only* legislative authority in the field of education is to enact laws (1) "*repealing* the Board's decisions[,]" or (2) "enact legislation *repealing* the Board's decisions ... by 'occupying the field,' as that term is used in preemption cases." (SBE Resp Br p 5) (emphasis in the original). In other words, the Board argues that the General Assembly is constitutionally authorized only to "'check' the Board on one of its decisions" by repealing or preempting the Board's action, but otherwise possesses no authority over statewide education. (SBE Resp Br p 6) According to this startling assertion, the Board essentially acts as the fourth branch of government in the field of education, subject only to occasional checks by the General Assembly.

The Board fundamentally misunderstands its own limited role to supervise and administer the free public school system "subject to laws enacted by the General Assembly[,]" and ignores legislature's broad constitutional authority to enact laws affecting statewide education, including the relationship between the Board and the Superintendent. The Board's constricted definition of legislative authority is not supported by the text of 1971 Constitution, contradicts well-established separation of powers' jurisprudence that gives great deference to General Assembly's enactments, and is contrary to the principle that "a restriction on the General Assembly is in fact a restriction on the people." *State ex rel. McCrory v. Berger*, 368 N.C. at 651 (citations omitted).

Further, as established in the State's and Superintendent's earlier briefs to the Court, the Board's constitutional interpretation is wholly unsupported by *Guthrie v. Taylor*, 279 N.C. 703 (1971), *State v. Whittle Communications*, 328 N.C. 456 (1991), *Sugar Creek Charter Sch., Inc. v. Charlotte-Mecklenburg Bd. of Educ.*, 195 N.C. App. 348, 351, *cert. denied, app. dism'd by*, 363

N.C. 663 (2009). Despite prominence on this issue, none of these cases stand for the proposition that the General Assembly's role in education is limited only to retroactively repealing unfettered actions taken by the Board. To the contrary, these decisions reaffirm the constitutional principle that the General Assembly has the broad authority to set public policy regarding education through legislation, including those policies that may amend the scope of the Board's authority. *State v. Whittle Communications*, 328 N.C. at 470-471 (the General Assembly's statutes setting "public policy ... so that the State Board of Education does not have any authority over the contracts which local school boards may enter into concerning the purchase of supplementary instructional materials" are constitutionally sound). Likewise, "[N.C. Const. art. IX, sect. 5] constitutional grant of powers to the BOE may be limited and defined by 'laws enacted by the General Assembly.'" *Sugar Creek Charter Sch.*, 195 N.C. App. at 351. This Court should reject Plaintiff's attempt to dismantle the apparatus of our State's government of three distinct branches, to include the Board as a quasi-independent fourth branch. This Court should further reject the Board's attempts to curtail the General Assembly's legislative authority in the field of education to a mere, retroactive reviewer of the Board's otherwise unobstructed power.

B. HB 17 Is A Proper Exercise Of The General Assembly's Legislative Powers, And Does Not Amount To An Attempt "To Eliminate The Board's Role In Public Education Altogether[.][1]"

The Board's argument that HB 17 "eliminates" the Board from the field of education serves as a rhetorical diversion that fully ignores the text of the statute it challenges. As the State argued in its May 19 response brief, (State Resp Br p 7), the Board's supervisory and administrative authority over educational matters is explicitly recognized in HB 17. In that regard, the Board is

[1] (Board's Resp Br p 6)

free to continue its role in instituting policies, rules and regulations that concern the State's public schools, while the Superintendent is directed to administer the Board's rules and regulations, and support and provide assistance to the Board. *See* HB 17 (amending N.C. Gen. Stat. §§ 115C-11, -12, -19 and -21, -410, -535). HB 17's clarification of the general policy-setting authority of the Board in educational matters, and the day-to-day role of the Superintendent in administering such policies, which are both subject to law enacted by the General Assembly, is not constitutionally suspect.

A 10 December 1985 Attorney General Opinion explained that "the framers of the Constitution intended to make the Superintendent of Public Instruction, as the elected representative of the people, responsible for administration of the powers conferred upon the State Board of Education." (State Ex. 7)[2] "The purpose of the framers of [Art. IX, sect. 4(2) and Art. IX, sect. 5] of the Constitution was to eliminate any potential conflict of authority between the Superintendent and the State Board by making it clear that the power to administer the public school system rests with the State Board and that Superintendent is the person responsible for carrying out the policies of the State Board." (State Ex. 7 p 3). HB 17 exactly comports with that opinion. Contrary to the Board's argument, (Board Resp Br pp 6-9), the general principle that the

[2] The Board argues that the Superintendent is nothing more than "the officer who takes minutes at the Board's meetings and carries out various administrative functions at the direction of the Board." (Board Resp Br p 10) North Carolina's constitutional history explains otherwise. The 1943 Amendment to the N.C. Const. explicitly made the State Superintendent "the administrative head of the public school system." The "editorial changes" compiled for "clarity and consistency of language" encompassed by 1971 Constitution made no "substantive" alterations to the scope of the Superintendent's important role as a chief administrative officer in the system of North Carolina public schools. (See State Ex. 4 pp 3-9, State Ex. 6 pp 6-8, State Ex. 7 pp 2-3). Further contrary to the Board's confusing suggestion, there is little constitutional significance to the fact that Superintendent serves as a nonvoting (rather than voting) member of the State Board, as "[t]he chief administrative officers of governmental agencies sometimes serve as nonvoting, presiding officers of those agencies." (State Ex. 7 p 2)

legislature cannot entirely abolish the Board's constitutional powers, (as acknowledged by the State in this litigation and further expressed in 1994 Op. N.C. Att'y Gen. 41 and 1995 Op. N.C. Att'y Gen. 32), is not violated by HB 17. HB 17 is a proper legislative exercise by the General Assembly to clarify the roles of the Superintendent and the Board in administration of public schools.

The Board suggests that this Court disregard *Atkinson v. State*, No. 09-CVS-006655 as having no precedential value. (Board Resp Br p 13) Yet, "[t]he well established rule in North Carolina is that no appeal lies from one Superior Court judge to another; that one Superior Court judge may not correct another's errors of law; and that ordinarily one judge may not modify, overrule, or change the judgment of another Superior Court judge previously made in the same action." *Calloway v. Ford Motor Co.*, 281 N.C. 496, 501 (1972). *Atkinson* has not been appealed, and thus constitutes a final superior court decision, and should be afforded due analytical weight.

The Board's next argument regarding the effect of decision in *Atkinson*, which recognized the inherent constitutional powers of the Superintendent, (Board Resp Br pp 13-14), is inconsistent with its position of the severely limited role of the Superintendent that is advanced in the remainder of its Brief. (Board Resp Br pp 13-14). Nevertheless, the decision of the Superior Court in *Atkinson* is fully compatible with the State's argument in this case, in that both Superintendent and the Board have constitutionally recognized powers in administering education in North Carolina, and both entities are subject to the laws enacted by the General Assembly. With *Atkinson*, the Board attempted to deprive the Superintendent of its inherent constitutional authority by assigning those executive responsibilities to the third party, accountable only to the Board. HB 17 neither eradicates either entity's roles in administration of public schools, nor assigns the Board's or the

Superintendent's educational responsibilities to third parties. Therefore, HB 17 falls squarely within the purview of the General Assembly's legislative powers.

Plaintiff has failed to articulate a sufficient response to the State's opposition to the Board's its motion for summary judgment and preliminary injunction. In that regard, State again refers this Court to the argument it propounded in previous filings. To the extent the Board belatedly present new issues in its own Reply brief, the State reserves the right to submit additional authorities and arguments.

CONCLUSION

This Court should dismiss the Board's Complaint for lack of subject matter and personal jurisdiction, for the State's sovereign immunity to declaratory judgment actions, and the Board's failure to state a cognizable claim. The Court should deny the Board's motions for preliminary injunction, and alternatively, enter a summary judgment for defendants for the reasons articulated in the State's various filings.

Respectfully submitted, this the 9th day of June, 2017.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing Brief has been served on the following counsel by electronic mail, and by depositing the same in the United States mail, postage prepaid, and addressed as follows:

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This the 9th day of June, 2017.

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APPENDIX O

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Department of Justice
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RALEIGH
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10 December 1985

Senator Robert D. Warren
Representative Edward N. Warren
Legislative Building
Raleigh, North Carolina

RE: Constitutionality of Proposed Legislation Concerning the Duties and Position of the State Superintendent of Public Instruction

Gentlemen:

As Co-Chairmen of the Legislative Research Committee on the Superintendent of Public Instruction and the State Board of Education you have asked, through your Committee Counsel, Libby Lefler, for our opinion about the constitutionality of proposed legislation. We understand that this proposed legislation would (1) make the Superintendent of Public Instruction the Chairman of the State Board of Education, and (2) would establish the position of Commissioner of Public Schools and confer upon the Commissioner responsibility for administration of the public school system under the direction of the State Board of Education. We will review the parts of this proposed legislation separately.

1. Does The General Assembly Have The Power, Without A Constitutional Amendment, To Make The Superintendent Of Public Instruction The Chairman Of The State Board Of Education.

The Constitution of 1868 provided that the Superintendent of Public Instruction was a member of the State Board of Education and that the Chairman of the State Board was elected by the Board. Constitution of 1868, Article IX, §9. Effective July 1, 1971 the Constitution was rewritten. Under our present Constitution the Superintendent of Public Instruction is not a member of the State Board, but serves as the "secretary and chief administrative officer of the State Board." Constitution of 1970, Article IX, §§4(1) and (2). Further, our present

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Constitution does not provide that the State Board shall elect its Chairman.

It was the express intention of the framers of our present Constitution to eliminate the Superintendent of Public Instruction as a voting member of the State Board. See Report of the N.C. State Constitution Study Commission, p. 37 (1968) where the drafters stated: "Proposed Sec. 4(1) modifies the State Board of Education slightly by eliminating the Superintendent of Public Instruction as a voting member of the Board while retaining him as the Board's secretary and chief administrative officer." The Report of the framers of the Constitution, however, is silent as to their intention in eliminating the provision of the Constitution of 1868 that the Board elect its Chairman. It may reasonably be assumed, however, that the framers believed that the election of the Chairman of the State Board was a relatively insignificant matter not appropriately addressed in the Constitution, and should be left to the General Assembly or the State Board itself. In this regard, G..S. §115C-11(a) provides: "The State Board of Education shall elect from its membership a chairman and vice-chairman."

The question arises as to whether the amendment to the Constitution eliminating the Superintendent of Public Instruction as a voting member of the State Board of Education deprived the General Assembly of the power to amend G.S. §115C-11(a) to make the Superintendent of Public Instruction Chairman of the State Board without the benefit of an amendment to the Constitution. In answering this question two principles appear especially pertinent. First, our State Constitution is "in no matter a grant of power" and the General Assembly has all political power not prohibited by the Constitution. LASSITER v. BOARD OF ELECTIONS, 248 N.C. 102, 112, 102 S.E.2d 853, aff'd 360 U.S 45 (1958). Second, in determing the effect of an amendment to the Constitution, the intention of the framers is controlling and their intention must be ascertained from the conditions existing at the time of the adoption of the amendment and the purpose sought to be accomplished by the amendment. PERRY v. STANCIL, 237 N.C. 442, 444, 75 S.E.2d 512 (1953); SNEED v. BOARD OF EDUCATION, 299 N.C. 609, 613-617, 264 S.E.2d 106 (1980). The express purpose of the framers of the Constitution of 1970 was to eliminate the Superintendent of Public Instruction as a voting member of the State Board. We find no indication that their purpose extended to prohibiting the Superintendent of Public Instruction from serving as the nonvoting, presiding officer of the State Board. The framers of the present Constitution expressly made the Superintendent of Public Instruction the chief administrative officer of the State Board. The chief administrative officers of governmental agencies sometimes serve as the nonvoting, presiding officers of those agencies. See

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MARKHAM v. SIMPSON, 175 N.C. 135, 138-139, 95 S.E. 106 (1918) and 56 Am.Jur. 2d, Municipal Corporations, §165.

In sum, the General Assembly has all political powers not denied it by the Constitution. It appears that these powers include the power to make the chief administrative officer of a public agency the nonvoting, presiding officer of the governing body of the agency. In amending the Constitution it appears that the framers only intended to eliminate the Superintendent of Public Instruction as a voting member of the State Board of Education. It does not appear that the framers' purpose extended to prohibiting the General Assembly from making the Superintendent of Public Instruction the nonvoting, presiding officer of the State Board of Education. Thus, we are of the opinion that it is likely within the power of the General Assembly under the present Constitution to amend G.S. §115C-11(a) to make the Superintendent of Public Instruction the nonvoting Chairman of the State Board.

2. Does The General Assembly Have The Power, Without A Constitutional Amendment, To Establish The Position Of Commissioner Of Public Schools And Confer Upon That Office Responsibility For Administration Of The Public School System Under The Direction Of The State Board Of Education.

Article IX, §4(2) of our present Constitution makes the Superintendent of Public Instruction "the chief administrative officer of the State Board of Education" and Article IX, §5 provides that "the State Board of Education shall supervise and administer the free public school system". The purpose of the framers of these two provisions of the Constitution was to eliminate any potential conflict of authority between the Superintendent and the State Board by making it clear that the power to administer the public school system rests with the State Board and that the Superintendent is the person responsible for carrying out the polices of the State Board. Report of the N.C. State Constitution Study Commission, p.87 (1968).

If the General Assembly makes the Superintendnet of Public Instruction the nonvoting Chairman of the State Board of Education, it has been suggested that the General Assembly should at the same time create the position of Commissioner of Public Schools to serve as chief administrative officer of the State Board. The principles described above suggest that the General Assembly may not enact legislation depriving the Superintendent of Public Instruction of his powers as chief administrative officer of the State Board. The General Assembly has all political power not denied it by the Constitution, but it appears that the framers of the Constitution intended to make the Superintendent of Public Instruction, as the elected

representative of the people, responsible for administration of the powers conferred upon the State Board of Education.

If our interpretation of the intention of the framers is correct, it is doubtful that the General Assembly, without a constitutional amendment, may take from the Superintendent of Public Instruction his responsibility as "chief administrative officer" and confer that responsibility upon some other officer. While we doubt that the General Assembly now has the power to confer the constitutional duties of the Superintendent of Public Instruction on some other officer, we do believe that the framers of the Constitution did not intend to require that the Superintendent of Public Instruction perform those duties on a day-to-day basis without assistance. Thus, we believe that the Constitution would not prohibit the General Assembly from establishing the position of Commissioner of Public Schools and conferring upon that office the day-to-day administration of the powers of the State Board so long as such legislation requires that such responsibilities be exercised through the Superintendent of Public Instruction or under his direction.

We trust that our opinion will be of assistance to you and the members of your committee.

Very truly yours,

LACY H. THORNBURG
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NORTH CAROLINA WAKE COUNTY	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 16 CVS 15607
NORTH CAROLINA STATE BOARD OF EDUCATION, Plaintiff, v. STATE OF NORTH CAROLINA and MARK JOHNSON, in his official capacity, Defendants.	**SUPERINTENDENT'S BRIEF IN REPLY TO PLAINTIFF'S RESPONSE**

North Carolina Superintendent of Public Instruction Mark Johnson ("Superintendent"), through undersigned counsel, respectfully submits the following brief in reply to the response to the Superintendent's motion for summary judgment filed by the plaintiff North Carolina State Board of Education ("State Board") and the motion to dismiss filed by the State.

ARGUMENT

I. THE SUPERINTENDENT IS A CONSTITUTIONAL OFFICER ELECTED BY THE PEOPLE.

The statement in the heading above is as elementary and undisputed as any fact in this case. The office of Superintendent of Public Instruction is not authorized by statute. The Superintendent is not appointed by the Governor or the State Board. The office exists because the People of North Carolina enshrined it in their most important document and determined that he or she would be "elected by the qualified voters of the State." N.C. CONST. Art. III, §7(1).[1] This fact fatally undermines the State Board's reliance on all the out of state cases cited in its first two briefs. None of those cases address the situation before this Court, in which the General Assembly has chosen to allocate responsibilities concerning the public school system among two entities of *constitutional* moment, both of which were created to oversee public education.

[1] North Carolina's Constitution has provided for a popularly elected Superintendent of Public Instruction without interruption since 1868. N.C. CONST. Art. III, § 13 (1868).

Rather, the non-North Carolina cases the State Board cites in its briefs involve acts by legislative bodies that take authority committed generally to a constitutional entity and re-assign such authority to a board or individual for which the constitution makes no provision.

For example, the State Board cites a case in which the North Dakota Supreme Court considered whether a statute authorizing the Governor to appoint a "deputy enforcement commissioner" to enforce prohibition laws to the exclusion of the elected state's attorney and sheriff improperly infringed on the authority conferred upon the elected officers by the state constitution. *Ex parte Corliss*, 16 N.D. 470, 471-72, 114 N.W. 962, 963 (1907). The court reasoned that if the legislature had the power to appoint a substitute sheriff, it likewise could appoint a substitute governor, substitute attorney general, or a substitute court, concluding:

> The governor, attorney general and the judges are no more constitutional officers than are state's attorneys and sheriffs. It seems too obvious for discussion that the framers of the constitution, in providing for the election of these officers by the people, thereby reserved unto themselves the right to have the inherent functions theretofore pertaining to said offices discharged only by persons elected as therein provided. The naming of these officers amounted to an implied restriction upon legislative authority to create other and appointive officers, for the discharge of such functions. If this is not true, then of what avail are the provisions of the constitution above referred to?

Id. at 475, 114 N.W. at 964. The court's conclusion, that the legislature "cannot transfer the duties of any [constitutional] officers to a new office created by them" makes quite plain why the holdings in these cases are inapplicable to the instant case. *Id.* at 481, 114 N.W. at 967.

Unlike the "new" deputy enforcement commissioner in *Corliss*, the North Carolina Superintendent is an elected *constitutional* officer, and his office has "inherent functions" traditionally associated with the office. In North Carolina, the General Assembly has given form and shape to these "inherent functions" through the enactment of and amendments to Chapter 115C and other statutes providing for the public school system. The powers and duties

reallocated back to the office in the 2016 legislation all are within this notion of "inherent functions" discussed in several of plaintiff's out of state cases. The State Board has not cited nor discussed a single case involving legislative allocations of authority between two constitutional actors sharing the same subject matter space.[2]

In the same way, the Arizona Supreme Court's ruling that the legislature's creation of a "state purchasing agent" improperly stripped the duties and authority of the constitutional executive office of State Auditor is inapposite to the current case, despite having been cited by the State Board. *Hudson v. Kelly*, 76 Ariz. 255, 263 P.2d 362 (1953). This is, again, because the court was considering a constitutional entity that had lost power to a non-constitutional entity through legislative action, which is quite different from the case before this Court. As such, the State Board's parenthetical after citing the case in its response brief, claiming that state courts have "uniformly denounced the same arguments that Defendants make here," indicates that the State Board does not understand the Superintendent's arguments. Plaintiff's Response to Defendants' Motion to Dismiss and Motion for Summary Judgment ("Response Brief") at 7.

Plaintiff's discussion of the recent Wyoming case, *Powers v. State*, 318 P.3d 300 (Wyo. 2014) misses the mark for the same reason. That case involved legislation shifting powers from the constitutionally-provided Superintendent of Education to a statutorily decreed Director of the Department of Education. *Id.* The Wyoming court did not consider the constitutionality of a legislative reallocation of powers and duties among two entities of constitutional authority both charged with oversight of the public school system.

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[2] To be sure, this "dual occupancy" of a single subject matter space likely is uncommon. North Carolina is one of only 13 states with an elected Superintendent. *See* Wikipedia, "State Education Agency" at https://en.wikipedia.org/wiki/State_education_agency (last accessed on 2 June 2017).

This is the same reason that the Superintendent did not discuss *Atkinson v. State* (09 CVS 6655 (Wake County Superior Court)) in previous briefs. It has no application to this case because it involved a transfer of powers from the Superintendent to a non-constitutional entity, the Chief Executive Officer ("CEO") of the Department of Public Instruction. Contrary to the State Board's assertion in its response brief, *Atkinson* did not involve "an attempted reallocation of constitutional roles *by the General Assembly*." Plaintiff's Response to Defendant's Motion to Dismiss and Motion for Summary Judgment ("State Board Response Brief") at 13 (emphasis supplied). Ironically, the CEO position and its powers were decreed *by the State Board of Education*, which amended its own Policy Manual to authorize the new CEO "to manage the Department of Public Instruction on a day to day basis subject to the direction, control, and approval of the State Board." Policy ID Number EEO-C-013.

Although not helpful to the State Board, *Hudson* and other out of state cases the State Board cites do shed light on the important issue of the legislature's role in allocating powers and duties to a constitutional office pursuant to constitutional clauses such as "[t]heir respective duties shall be prescribed by law[,]" in Article III, § 7(2) of the North Carolina Constitution. The constitutional language at issue in *Hudson* is nearly identical to that at issue in this case. The Arizona State Auditor is established as an executive branch office in the same provision that establishes the governor, secretary of state, treasurer, attorney general, and superintendent of public instruction. ARIZ. CONST., Art. V, § 1.[3] The Arizona constitution further provides that the "powers and duties of secretary of state, state treasurer, state auditor, attorney-general, and superintendent of public instruction shall be as prescribed by law." ARIZ. CONST., Art. V, § 9.

[3] Article III, § 1 of the Arizona Constitution has been amended since the 1953 *Hudson* opinion, but the provision cited has remained the same.

Despite this identical language, the State Board analogizes the North Carolina Superintendent to the legislatively created "state purchasing agent" in Arizona. In doing so, the State Board ignores that the North Carolina Superintendent stands on an equal constitutional footing with the State Board. It is instructive to consider the lengths to which the Arizona Supreme Court went in its *Hudson* opinion to reinforce the importance of this constitutional aspect of the office of State Auditor, despite the fact that the Arizona constitution neither defines the office nor prescribes its duties. The court observed:

> Clearly under the constitution the auditor is a member of the executive department of the state. Under our system of government, and of the state governments of the United States from the organization of the colonies and the states under our federal constitution, the offices of governor, secretary of state, state auditor, state treasurer and attorney general, have had a well-understood meaning and statute. They are words of long antiquity and in reference to officers of a government refer to offices occupied by these officers at common law.

Hudson, 76 Ariz. at 260, 263 P.2d at 365.

After an extensive historical analysis of the office of state auditor, utilizing sources from across the country, the Arizona Supreme Court noted that the mere inclusion of the office in the text of the constitution implies a requirement that it exist and function in some fashion reflecting the powers and duties traditionally associated with the office.

> Sections 1 and 9 of Article 5 of the State Constitution have been construed to mean that there is an implied mandate to the legislature to prescribe the powers and duties of the executive officers created by the Constitution in Section 1 of Article 5. [citation omitted] The mandate considered the grant of such powers and duties as would enable the auditor to perform the functions for which the office was created. Under the terms of the mandate the legislature has the power to enlarge or remove the duties and powers of the office as the future might require. But the language of the sections as construed [negates][4] the power to destroy the offices created by removing all of the duties it was mandated to confer.
>
> * * *
>
> By the very nature of the office in our scheme of government, the duties imposed by statute are comparable to the common-law duties of the office, added to and enlarged as the economies and necessities of this 20th Century demand.

[4] The opinion uses the word "negatives" as a verb here.

Id. at 263, 263 P.2d at 367.

This principle is repeated throughout the State Board's out of state authorites. For example, in considering whether certain legislation deprived the Illinois State Treasurer of powers or duties, the Illinois Supreme Court observed:

> The constitution, by section 1 of article 5 provides that public officers, including the State Treasurer, shall perform such duties as may be required by law. Nothing in the constitution further defines the duties of the State Treasurer. This court has held that those duties are such as are to be implied from the nature of the office and of them he may not be deprived or relieved.

Am. Legion Post No. 279 v. Barrett, 371 Ill. 78, 91, 20 N.E.2d 45, 51 (1939).

Applied to the present case, this principle reinforces that the Superintendent is a constitutional entity that exists as a co-equal with the State Board. It means that the People of North Carolina have chosen essentially a bicameral approach to the leadership of the State's public school system. Nowhere else in State Government does the Constitution provide for two entities to exercise powers and duties simultaneously within a single field of government activity. It is in the light of this dual arrangement that the wisdom of the provisos "subject to laws enacted"/"as provided by law" is most apparent.

Throughout this case the State Board has argued jealously that any grant of authority that might be defined as "supervision" or "administration" of the public schools is in derogation of the constitutional "mandate" contained in Article IX, § 5. As the Superintendent argued in his principal brief, "these words, - 'supervise' and 'administer' – cover essentially everything." Superintendent's Principal Brief at 7. To interpret those terms in Article IX, § 5 as *not* being "subject to laws enacted by the General Assembly," as the State Board contends, would invalidate the decision of the People to have an elected Superintendent possessed of that authority and those duties prescribed by law (N.C. CONST. Art. III, §7(2)). The citizens of North

Carolina have decreed a Superintendent and a State Board shall oversee the public school system, have granted the General Assembly the authority to allocate powers and duties among them, and have empowered the General Assembly to make changes to such allocations of power and duties to meet the changing priorities of the People over time.

II. THE STATE BOARD HAS MISCHARACTERIZED THE HOLDINGS IN THE CONTROLLING NORTH CAROLINA CASE LAW.

The State Board's position in this case also is at odds with the North Carolina Supreme Court's decisions interpreting the "subject to laws enacted by the General Assembly" language discussed at length in prior briefing. The State Board's attempt to shoe-horn the holdings in *Guthrie v. Taylor* and *State v. Whittle Communications* so as to be consistent with its argument is reductive and, ultimately, unavailing. It characterizes both cases as involving "legislation *repealing* the Board's decisions." State Board Response Brief at 5 (emphasis in original). This characterization, however, is at odds with any reasonable description of the disputed actions in these cases, and any reasonable definition of the word "repeal."

As discussed at length in the Superintendent's principal brief, *Guthrie* involved a challenge to the authority of the State Board to promulgate a regulation concerning teacher certification requirements. *Guthrie v. Taylor*, 279 N.C. 703, 185 S.E.2d 193 (1971). Our Supreme Court considered the "subject to such laws as may be enacted . . . by the General Assembly" sentence at the end of the predecessor provision to Article IX, § 5 and concluded that "[i]n the silence of the General Assembly (on the subject of teacher certification) the authority of the State Board to promulgate and administer regulations concerning the certification of teachers in the public schools is limited only by other provisions in the Constitution itself." *Id.* at 710, 185 S.E.2d at 198-99. Thus, there is no *repeal* of any State Board decision in *Guthrie*. Even if the General Assembly had not opted for "silence" on the certification requirements issue and had

assigned it to the Superintendent or to local educational authorities, the Court would not have been contemplating a *repeal* of anything.

Likewise, *Whittle Communications* involved Court scrutiny of the fact that the General Assembly had given the authority to select and procure supplementary instructional materials to local school boards rather than the State Board. *State v. Whittle Communications*, 328 N.C. 456, 402 S.E.2d 556 (1991). The General Assembly was not *repealing* any State Board decision in *Whittle*. If the decision to assign authority for selection and procurement of supplementary instructional materials to local school boards can be defined as a repeal of some State Board decision, then anything that the General Assembly might do that reallocates the relative authority between educational entities would amount to a repeal.

It appears the State Board's attempt to find a thread of consistency between its position and the holdings in *Guthrie* and *Whittle* is tied to language in the original provision in the Constitution of 1868 creating and empowering the State Board. The Superintendent argued this point at some length in his principal brief, and rather than re-argue would respectfully refer the Court to his principal brief at pages 13-14. In sum, the 1942 amendments to the original authorizing language in the 1868 Constitution clarified that the General Assembly's power to revise and limit the powers and duties of the State Board was far more than the authority simply to react to a State Board decision by repealing it, but included the power to limit and revise even the express powers and duties of the State Board. *Guthrie*, 279 N.C. at 710, 185 S.E.2d at 198.

The fragility of the State Board's argument is most apparent in its failure to address how the holding in *Whittle*, where the General Assembly had reassigned to a *non-constitutional entity* duties that clearly fall within the ambit of the constitutional mandate to "supervise and administer," can be squared with the outcome sought by the State Board. The Court in *Whittle*

held that the State Board "did not have authority" to take measures to prevent contracts between the defendant and local school boards because the General Assembly had placed the issue "in the exclusive domain of the local school boards." *Id.* at 466, 402 S.E.2d at 561-62. If the "subject to laws enacted by the General Assembly" language allows this transfer of powers from the State Board, without question it allows the reallocation of powers and duties that the General Assembly provided for in HB 17. *Whittle* and *Guthrie* (and the cases following those decisions cited in prior briefings) remain good law in North Carolina, and the State Board has failed to provide any cogent explanation for how those decisions might support any outcome other than summary judgment in favor of the Superintendent.

III. THE 1971 AMENDMENTS TO THE NORTH CAROLINA CONSTITUTION CONTEMPLATE AN INDEPENDENT, NOT SUBSERVIENT, ROLE FOR THE SUPERINTENDENT RELATIVE TO THE STATE BOARD.

The State Board correctly notes that the 1971 amendments to the North Carolina Constitution eliminated the voting role of the Superintendent on the State Board. State Board Response Brief at 10. This change did eliminate a source of potential conflict, in that the Superintendent, as the chief administrative officer of the State Board pursuant to Art. IX, § 4 *and* as a constitutional executive officer with such other duties as shall be prescribed by law pursuant to Art. III, § 7, could be viewed as having an interest separate from the State Board in voting on policy as a member of that Board.

The contention that the Superintendent's role as an elected constitutional officer is limited to "tak[ing] minutes of the Board's meetings and carr[ying] out various administrative functions at the direction of the Board" (*id.*) is distorted to the point of absurdity. Not only does such a contention misstate the role of the Superintendent under Article IX, but as discussed above, it completely ignores that as an Article III executive officer he has a co-equal role in the

leadership of North Carolina's public school system "of [which] he may not be deprived or relieved." *See discussion supra* at pp. 3-5.

Even assuming the Article IX language amounted only to authority to take minutes at meetings and perform odd jobs as the State Board argues, to treat that as an exhaustive description of the powers and duties of the Superintendent would mean that the words of Article III, § 7(2), "[the Superintendent's] duties shall be prescribed by law" have no meaning. This would violate what the State Board called "the first and most basic rule of constitutional construction, which requires giving effect to each and every word of the text." *See* State Board Principal Brief at 14 and cases cited. Clearly the phrase "duties shall be prescribed by law" in Article III, § 7 means more than "secretary and chief administrative officer" of the State Board as provided in Article IX, § 4. As argued by the plaintiff, under this canon of textual interpretation courts must "lean in favor of a construction which will render every word operative, rather than one which may make some words idle and nugatory." *Bd. of Educ. v. Bd. of Comm'rs*, 137 N.C. 310, 312, 49 S.E. 353, 354 (1904). Here, the canon requires the conclusion that if the framers had intended the language of Article IX, § 4 to be an exhaustive and limiting description of the duties of the elected office of Superintendent, they would have provided in Article III, § 7 that such duties "are as provided in Article IX, § 4" rather than "shall be as prescribed by law." By phrasing Article III, § 7(2) as they did, the framers clearly envisioned the Superintendent as more than what is described in Article IX, § 4.

This also is consistent with the general principle (observed in all of the out of state cases plaintiff cited in prior briefing) that state constitutional officers are inherently vested with a leadership role consistent with the nature of the office, as discussed above. This principle supports the conclusion that the People of North Carolina, in enacting a constitution providing

for two leadership entities, intended those entities to serve as complementary yet independent actors subject to the plenary authority of the General Assembly. As the supreme governing and policy-setting entity with regard to North Carolina's public schools, the General Assembly's reallocation of relative powers and duties among the Superintendent and the State Board in HB 17 is a legitimate exercise of its constitutional mandate.

IV. THE STATE BOARD HAS NOT MET ITS HEAVY BURDEN OF PROVING THAT EACH CHALLENGED PROVISION IS UNCONSTITUTIONAL.

"In challenging the constitutionality of a statute, the burden of proof is on the challenger, and the statute must be upheld unless its unconstitutionality clearly, positively, and unmistakably appears beyond a reasonable doubt or it cannot be upheld on any reasonable ground." *Guilford County Bd. of Educ. v. Guilford County Bd. of Elections*, 110 N.C. App. 506, 511, 430 S.E.2d 681, 684-85 (1993). "When examining the constitutional propriety of legislation, we presume that the statutes are constitutional, and resolve all doubts in favor of their constitutionality." *State v. Evans*, 73 N.C. App. 214, 217, 326 S.E.2d 303, 306 (1985).

As mentioned in prior briefing, the State Board has challenged sixty-two specific provisions of HB 17 as unconstitutional, but only has devoted specific discussion to four of them in prior briefs. In his response brief, the Superintendent provided detailed rebuttal concerning each of the four provisions, demonstrating that each was a proper exercise of legislative authority. But the sixty-two challenged provisions cover a wide spectrum of subject matter, and the State Board's arguments, such as they are, regarding the constitutionality of the four provisions actually discussed have little to no bearing on the constitutionality of many of the remaining fifty-eight.

For example, many of the challenged provisions relate to personnel matters, including hiring staff for the Department of Public Instruction. The State Board has failed even to attempt

to explain how these provisions amount to an unconstitutional infringement on its authority. To be sure, if the General Assembly is within its constitutional authority when it confers exclusive authority for selection and procurement of certain educational materials to local school boards, as was the case in *Whittle Communications*, it cannot offend the Constitution for it to grant certain hiring powers to the Superintendent. At a minimum, the State Board has a burden of demonstrating why such personnel matters fall within its claimed inviolable sphere of constitutional powers. The State Board has not even attempted to meet that burden.

The inclusion of some provisions in its amended verified complaint are inexplicable without further discussion. For example, the State Board challenges the following amendment to N.C. Gen. Stat. § 115C-21(b)(9), which is an item on a list of the Superintendent's duties as Secretary to the State Board:

> (9) To perform such other duties as may be necessary and appropriate for the Superintendent of Public Instruction in the role as secretary to the ~~Board may assign to him from time to time~~ Board.

S.L. 2016-126. Is the State Board complaining that the Superintendent's performance of duties "necessary and appropriate" in the role of secretary is an unconstitutional infringement of its inviolable powers? Is the State Board complaining that the removal of the words "Board may assign to him from time to time" renders the statute unconstitutional, as if the General Assembly, having added the provision in 1981 (S.L. 1981-423), is required to keep it on the books? Is it both? Is it something else?

The State Board has left it to this Court to pore over the remaining fifty-eight provisions and to adjudicate the constitutionality of each without the aid of briefing by the parties, and in so doing, has abdicated its legal burden. The State Board has not advanced any argument suggesting that, should this Court determine that one of the sixty-two challenged provisions is

unconstitutional, it follows that all the others must be invalidated. As discussed in prior briefing, the General Assembly included a severability clause in HB 17 providing that if any provision is held invalid, it is to be severed from the act and all other provisions shall remain intact. The State Board has failed to meet its burden, and the Superintendent is entitled to entry of summary judgment on each challenged provision.

V. THE PURPOSE OF THE SUPERINTENDENT'S AFFIDAVIT IS TO PROVIDE CONTEXT TO THE GENERAL ASSEMBLY'S CONCERN WITH CLARIFYING THE STATE BOARD'S CONTINUING ROLE IN THE OVERSIGHT AND SUPERVISION OF NORTH CAROLINA'S PUBLIC SCHOOLS AND EDUCATIONAL FUNDS.

The General Assembly's passage of HB 17 was an appropriate exercise of legislative policy-setting authority regarding management of North Carolina's public schools. The State Board's response brief criticized the affidavit submitted by the Superintendent as an irrelevant "litany of complaints." However, the details set forth in the Superintendent's affidavit were intended to bring attention to the challenges that have arisen in the day-to-day management of the Department of Public Instruction and to give light to the ongoing issues with the State Board's continuing role in the oversight and supervision of the Department. These challenges, many of which have persisted for years, may explain in part why the General Assembly, pursuant to Articles III and IX, restored the Superintendent's authority that had been subordinated by the 1995 legislation.

CONCLUSION

For the reasons stated and upon the authorities cited, the defendant, North Carolina Superintendent of Public Instruction Mark Johnson, respectfully prays that this panel enter an order declaring that the legislation challenged in plaintiff's Amended Verified Complaint is

constitutional, dissolving the preliminary injunction, and entering final judgment against plaintiff and in favor of the Superintendent and the State of North Carolina.

This the 9th day of June, 2017.

BLANCHARD, MILLER, LEWIS & ISLEY, P.A.

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The undersigned hereby certifies that a copy of the foregoing **Superintendent's Brief in Reply to Plaintiff's Response** was served upon the following attorneys by U.S. Mail and e-mail to the following:

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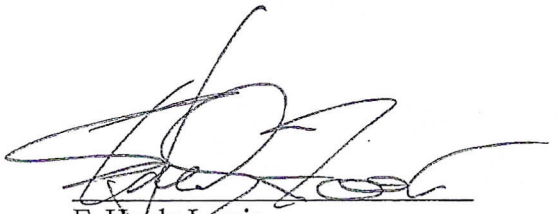

E. Hardy Lewis

STATE OF NORTH CAROLINA COUNTY OF WAKE	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 16-CVS-15607
NORTH CAROLINA STATE BOARD OF EDUCATION, Plaintiff, v. THE STATE OF NORTH CAROLINA, and MARK JOHNSON, in his official capacity, Defendants.	**PLAINTIFF'S NOTICE OF SUPPLEMENTAL EXHIBITS**

Plaintiff North Carolina State Board of Education gives notice of the following supplemental exhibits in connection with its motion for summary judgment and motion for preliminary injunction:

- Excerpts from the *Report and Recommendations of the Governor's Commission on Education*, at 28-32 (1938), attached as Exhibit A.
- Excerpts from the *Papers of Joseph Melville Broughton*, North Carolina Dep't of Archives and History, at 418-19 (1950), attached as Exhibit B.
- Excerpts from Governor Joseph Broughton's Inaugural Address to the North Carolina General Assembly, N.C. Senate Journal, 1941 Session at 17-18 (Jan. 9, 1941), attached as Exhibit C.

Respectfully submitted the 27th day of June, 2017.

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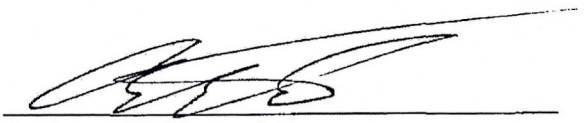
This the 27th day of June, 2017.



Andrew H. Erteschik

Exhibit A

REPORT AND RECOMMENDATIONS

of

THE GOVERNOR'S COMMISSION ON EDUCATION

Authorized by an Act of the General Assembly
March 22, 1937, and Appointed by
Governor Clyde R. Hoey

DECEMBER 1, 1938

State-wide basis could not provide $50 per child for public schools without more than average effort.

"We must deal, therefore, with a situation in which for American youth opportunity is a birthright attached to certain families and certain geographic areas. A child born in those favored places has opportunity plus; one born outside has opportunity minus.

"Finally, the Federal Government must to an increasing extent provide financial assistance for the educational enterprises of the States and localities, in order that opportunities may be greater and especially in order that they may be more equitably distributed."

The Commission recommends the consideration of this advisory report to the President as a basis for further consideration of Federal aid to education.

A. ADMINISTRATIVE CONTROL, SUPERVISION, AND PERSONNEL.

As has been pointed out, the act creating this Commission directed first an examination of problems of administrative control, supervision, and personnel. The Commission has considered under this heading the following items: (1) administration; (2) consolidation and transportation; (3) recodification of the school law; (4) adult education; (5) supervision; (6) problems of teacher welfare and certification.

1. Administration.

A review of the present educational administrative set-up reveals the following information:

"The State Board of Education, consisting of the Governor, Lieutenant Governor, Secretary of State, Treasurer, Auditor, Attorney General, and Superintendent of Public Instruction, is provided for by Article IX of the Constitution. This board has charge of the Literary and Special Building Funds and the public lands owned by the State. It also makes rules governing the certification of teachers, and adopts the textbooks used in the public schools. Originally, this board had authority to legislate and make all needful rules and regulations in relation to free public schools and the educational funds, but its duties in this respect in recent years have been transferred by legislative enactment to the State School Commission.

LEGISLATIVE AUTHORITY: The State School Commission was set up by the General Assembly of 1933 to succeed the State Board of Equaliza-

tion, a body created in 1927 to equalize values in the several counties as a basis of distributing the equalizing funds provided for schools. This commission is composed of the following: the Lieutenant Governor as chairman, the State Superintendent of Public Instruction as vice-chairman, the State Treasurer, and one member from each of the eleven Congressional districts appointed by the Governor.

The commission decides what schools are to be operated, has the power to consolidate districts and transfer children from one unit to another, and may suspend any school after six months, whenever the average daily attendance does not justify its continuance. It determines by districts and races the number of elementary and high school teachers to be paid from State funds, and sets the standard for operating the public schools for an eight months term in each county and city administrative unit.

The commission also provides for and supervises the transportation of pupils at public expense, makes rules and regulations governing the financial management and control of all administrative units, provides for auditing the school funds, approves the election of county and city superintendents, and jointly with the State Board of Education, determines and fixes a State standard salary schedule for teachers, principals, superintendents and other school employees.

It employs an executive secretary and staff to administer its rules and regulations.

The State Board for Vocational Education was created by the General Assembly of 1917 in order to meet the provisions of the Smith-Hughes Education bill enacted by Congress. This Board consists of the State Superintendent of Public Instruction and three other members appointed by the Governor—one to represent agriculture, one to represent home economics and one to represent trades and industries.

The duties of this board are to cooperate with the Federal authorities in the administration of the Federal Vocational Act, to administer legislation enacted by the Congress and the General Assembly of North Carolina pursuant to vocational education. It also formulates plans for the promotion of vocational education as a part of the public school system and cooperates with the local authorities in the establishment of vocational classes.

The State Superintendent with the advice and consent of the board designates the staff necessary to carry out properly the provisions of the law and the rules and regulations of the board. The State Superintendent is also required to prepare a report concerning the condition of vocational education.

The State Board of Commercial Education was created by the General Assembly of 1935 to regulate the establishment and operation of business schools teaching business subjects for compensation. This board consists of the State Superintendent as chairman and secretary, the Director of the Division of Instructional Service, the Director of the Division of Vocational Education, and two persons, appointed by the Governor, who are owners and

operators of licensed business or commercial schools that have been in operation within the State for five years.

The State Textbook Commission was also created by the General Assembly of 1935. This commission consists of five members; the State Superintendent of Public Instruction as ex-officio chairman, the Attorney General, the Director of the Division of Purchase and Contract, and two members, to be appointed by the Governor, for a term of two years each. It is the duty of this commission to purchase the necessary textbooks, operate a rental system of textbook distribution to the children in the public high schools of this State, and provide free basal textbooks to the children in the elementary grades.

This commission should not be confused with the (Elementary) Textbook Commission and the State Committee for high school textbooks, which are in fact sub-committees of the State Board of Education, composed of persons actually engaged in school work, whose duties are to examine the books and materials submitted for adoption and to prepare a multiple list from which the State Board makes the adoption."

There seems to be much duplication and some dual control in the workings of these various boards and unnecessary duplication in the work of school administrators. It is the opinion of the Commission that all these boards should be consolidated under one State Board of Education in Raleigh and that the direction of all activities of the teaching profession should come from this central board.

In the report of the North Carolina Constitutional Commission of 1932, there is a recommendation with reference to an amendment to the Constitution providing for the administration of the public school system by one central State Board of Education. We recommend that the General Assembly make provision to submit to a vote of the people an amendment to the Constitution as suggested by said Constitutional Commission, as follows:

"State Board of Education. The general supervision and administration of the free public school system, and of the educational funds provided for the support thereof, shall be vested in a State Board of Education, to consist of seven members. The State Superintendent of Public Instruction shall be a member of said board, and its chairman and chief executive officer. The other members of the board shall be appointed by the Governor, subject to confirmation by the General Assembly in joint session. The first appointment under this section shall be three members for two years, and three members for four years, and thereafter all appointments shall be made for a term of four years. All appointments to fill vacancies shall be made by the Governor for the unexpired term. The board shall elect a vice-chairman who shall preside in the absence of the chairman, and also shall elect a secretary, who need not be a member of the board. A majority of

the board shall constitute a quorum for the transaction of business. The per diem and expenses of the members of the board shall be provided by the General Assembly.

Powers and Duties of the Board. The State Board of Education shall have power to divide the State into a convenient number of school districts without regard to township or county lines; to regulate the grade, salary and qualifications of teachers; to provide for the selection and adoption of the text books to be used in the public schools; to apportion and equalize the public school funds over the State; and generally to supervise and administer the free public school system of the State and make all needful rules and regulations in relation thereto. All the powers enumerated in this Section shall be exercised in conformity with this Constitution and subject to such laws as may be enacted from time to time by the General Assembly."

We are of the opinion that if such amendment to the Constitution were submitted to the people, after a campaign of enlightenment as to the necessity for such amendment, and such amendment were submitted at an election, when it is not entangled with other amendments which might be less worthy, the people of the state will adopt the amendment.

The Commission, feeling that it is for the best interest of the public school system to have immediate relief from scattered administration rather than wait for the long time goal of the proposed constitutional amendment, recommends that the General Assembly of 1939 provide that for the present the administration of the public schools be placed under the State Board of Education and that there be provided an advisory commission to the State Board of Education to consist of seven members to be appointed by the Governor, and that the work of the various boards and agencies, referred to in this report, be consolidated and administered by the State Board of Education and that such advisory commission to be composed of the seven members appointed by the Governor become the advisory commission to the Board of Education.

It is suggested that the State Superintendent of Public Instruction, the Lieutenant Governor, and Treasurer become *ex-officio* members of the proposed Advisory Board.

It is noted that certain counties and cities have consolidated their administrative organizations. The Commission recommends this plan to those units which due to local conditions would find it economical and efficient.

The Commission desires to commend the work of the State

School Commission and other Boards responsible for various phases of the common education problem of North Carolina. It is confident that the work of the State School Commission in performing the duties committed to it has met with a large measure of public approval.

2. Local Participation in Support

Progress is usually made along a jagged front and seldom along a uniform line attack. Industrial development has been the result of the effort of pioneers who dared to move more rapidly than their neighbors. Good roads came first between two progressive communities unwilling to wait until a good road could be built everywhere. Social progress has been written around those wide awake areas in human society where response was quickly made to a need. Better schools came about during the past one-hundred years when individual communities, under the stimulus of individual leadership, caught the vision and established a new program. Any community or state which adopts the policy of waiting to bring all of its units up at the same time is doomed to slow progress if not to a static condition.

North Carolina Education is the result of progressive steps taken by local communities. The original four months constitutional term was lengthened because some communities were not satisfied with that amount of schooling for their children. The capstone of North Carolina education, the eight months school term, came about for the entire state because some had moved far in advance of this step. Since the entire state has been brought in line, achieved by some falling back to meet those stretching forward, there appears to be a desire on the part of the public for permission and encouragement of more advanced outposts of educational progress. At the present time only an administrative unit has the right to attempt more than the state allows within the restrictions set up by the state, which in the judgment of the Commission makes for the retardation of educational progress.

There are now communities very much awake to and interested in the necessity for longer terms and more adequate programs. The Commission heartily approves the principle of local participation for the 9th month and additional services within reasonable restrictions set up by the state for all communities alike.

Exhibit B

PUBLIC ADDRESSES, LETTERS, AND PAPERS

of

JOSEPH MELVILLE BROUGHTON

GOVERNOR OF NORTH CAROLINA

1941-1945

Edited by

DAVID LEROY CORBITT

Chief, Division of Publications

STATE DEPARTMENT OF ARCHIVES AND HISTORY

RALEIGH

COUNCIL OF STATE

STATE OF NORTH CAROLINA

1950

ods has been yielding approximately $200,000 per month more than the previous record, before the exemption became effective. Difficult times are ahead of us, and the State will wisely preserve its surpluses as a reserve for the future. This is not a time for extravagant expenditure, but rather for wise and prudent management.

In anticipation of the conditions which now are upon us, the General Assembly made provision for creating a state guard and for increase in the highway patrol. Both of these plans have been effectuated and the State is in position to meet such emergencies as may arise. In the program of civilian defense there has been set up a North Carolina Council of Defense, which has proceeded to organize in each county a county council. Our people are making magnificent response to every call that is being made upon them in these crucial and critical days.

During this eventful year of 1941 the Council of State has been called upon to consider many new and difficult problems. Complete harmony and coöperation have prevailed and every decision of the council has been by unanimous vote. A similar spirit of coöperation has prevailed on the part of the various departments of the state administration. While mistakes have been made and others will be made, there is the manifest purpose on the part of every agency of the state government at this time to coöperate with all other agencies and departments for the progress and advancement of our great State.

THE BOARD OF EDUCATION AMENDMENT

January 20, 1942

The General Assembly of 1941 by an almost unanimous vote of each branch of the Assembly has submitted to the electorate of North Carolina, for decision in the general election in the fall of 1942, an amendment to the Constitution which, if adopted, will set up an authoritative, all-inclusive and representative State Board of Education to administer every phase of the public school system in North Carolina.

It is my very definite opinion that the ratification of this constitutional amendment by the voters of the State will be decidedly for the best interest of our public school system and of the State as a whole. I sincerely hope that the people of North Carolina, regardless of political affiliation, will cast their votes in this fall's election in favor of this sound and wholesome amendment.

It is well recognized that unnecessary duplication exists at the

present in the administration of our public school system. On the whole there has been harmonious coördination on the part of these separate groups, but even with the best of administration it still remains that there is considerable duplication. Where duplication exists, there will always be confusion and sometimes friction. Under the present situation we now have dealing with the public school affairs the State Department of Public Instruction under the State Superintendent, the State School Commission created by act of the General Assembly, two textbook commissions, and the ex officio State Board of Education. We also have the Literary Fund of the State and certain other agencies, all of which are in some manner related to the public school system. It would seem clear that there are now entirely too many different agencies charged with responsibility with respect to matters relating to the public schools, and that one authoritative, inclusive Board of Education, as proposed in the new amendment, would administer these duties in a manner that would be much better for the interest of the children of the State.

This is not a partisan or factional proposal. In the General Assembly it had the affirmative votes of members of both political parties and of all groups or factions within these respective parties. It is in no sense a political proposition, but is submitted to the voters of the State as a proposal in the interest of better government and for the improvement of our most important state agency, the public school system of North Carolina.

HIGHWAY FATALITIES

January 22, 1942

Governor Broughton today issued a statement deploring the mounting number of highway fatalities and serious accidents in the State and calling upon the highway patrol, county and municipal law enforcement agencies, and all others charged with the administration of traffic laws to exercise the greatest diligence in preventing such occurrences. The Governor stated that while the records of other states likewise showed an alarming increase, there could be no comfort or satisfaction in merely comparing statistics in the face of the State's admittedly shocking record of fatal and serious accidents. A careful study of the accidents in North Carolina, the Governor stated, will disclose that high speed is the major factor in highway fatalities. As a step towards the solution of this phase of the problem the Governor announced the following action:

Exhibit C

JOURNAL

OF

THE SENATE

OF THE

GENERAL ASSEMBLY

OF THE

STATE of NORTH CAROLINA

SESSION 1941

OBSERVER PRINTING HOUSE
CHARLOTTE N. C.
1941

tive portions of the act, I do not recommend that there be any material or substantial additions or changes in the levies fixed by the 1939 Assembly. I shall later transmit to the General Assembly the report of the Advisory Budget Commission.

The sales tax has been a source of much controversy in our State. It was enacted as an emergency tax at a time when our agencies and institutions were threatened with disaster. Since that time increasing State service required and demanded by the people and additional burdens of a social and humanitarian nature have made the continuance of this tax inevitable. This condition still exists, and I therefore do not favor the repeal of the sales tax. However, in keeping with the declaration of the Democratic Party in its platform of 1936 and in compliance with a pledge made by me in my campaign for the nomination as Governor of North Carolina, I do recommend that the sales tax be removed from essential food for home consumption. The General Assembly of 1937, in pursuance of the Party declaration and of the earnest request made by my distinguished predecessor in office, carried out this injunction in part and removed the tax from a substantial portion of food for home consumption. I ask now that this task be completed. Estimates of increasing revenue and the report of the Advisory Budget Commission will disclose unquestionably that this exemption can be allowed without jeopardizing the balanced budget, curtailing the reasonable requirements of State institutions or necessitating any new or additional tax levies. Furthermore, in my opinion the removal of the sales tax from the home table will eliminate the most irritating feature of this tax.

Public Schools

Supreme in importance among all our State activities and agencies are the public schools. Remarkable progress has been made in the schools of this State, and in many vital particulars our school system is unique and unsurpassed by that of any state in the American Union. Considering the wealth of our State and its citizens and measuring the progress made during the last decade upon the basis of a foundation well laid in previous years, our school system will compare favorably with that of any state in the Nation. We have yet a long way to go, but our progress is forward and upward.

For your consideration in connection with the public schools of the State, I recommend, among other things, the following:

(1) That an adequate and fair teacher retirement bill be enacted at this Session of the General Assembly, including in its provisions likewise a provision for the retirement of State employees. I have been privileged to examine the report of the State Retirement Commission and I favor unqualifiedly the adoption at this Session of an act based upon the principles incorporated in this excellent report.

(2) Vocational training is much in the minds of our people and changing circumstances have given emphasis to the importance of a rational

program of vocational training and guidance in our public school system. I recommend increased appropriations for this phase of our public school work, and I also recommend that the General Assembly will through some existing agency or specially designated group provide for a thorough study of the whole subject of vocational training and guidance to the end that the next Session of the General Assembly may deal even more adequately with this important subject. In this connection I recommend that the teacher training institutions of our State should bend every effort toward making available to the high schools and other schools of our State an adequate number of teachers and instructors in the field of vocational education.

(3) Appropriate amendments to the School Machinery Act should be made of such a nature as to safeguard teachers against arbitrary, capricious or political dismissal from service, so as to give reasonable continuity of employment to the teacher based on merit and service.

(4) While full opportunity should be given to local units of school administration to supplement and expand school service and facilities within the area of such unit by vote of the people, we should keep constantly before us the fact that we now have a State system of schools and that logically under this system every child of school age in North Carolina is entitled to equal opportunities and benefits. To that end there should be set up as a goal at least for early attainment a nine-months term for all our schools and a twelfth grade for all high schools.

(5) In view of changes in our labor laws as to the minimum age for employment, consideration should be given to raising the age limit for compulsory school attendance from fourteen to sixteen years.

(6) Though great progress has been made and all agencies charged with the administration of our school system are entitled to the greatest praise, it is apparent that considerable duplication and overlapping of authority exist in the administration of the public school system of our State. If the General Assembly shall find that this exists to the extent of hampering our school development, consideration should be given to submitting to the voters of the State a constitutional amendment creating a representative and adequate State Board of Education, in which board will be vested all of the State's authority, power and responsibility for the administration of the State school system.

(7) Insofar as it may be possible within available revenue reasonable increase should be made in the salaries of public school teachers, who are performing a great public service upon admittedly inadequate pay.

(8) Some remarkable results have been attained under our program of adult education in coöperation with Federal agencies. This important work which broadens the horizon of thousands of our fellow citizens beyond the school age is entitled to the most favorable consideration.

There are many other features of our public school system which should claim the attention of the General Assembly and which I need not discuss in detail. I may only add that we shall not make any retreat on the public school front in North Carolina.

STATE OF NORTH CAROLINA	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION
COUNTY OF WAKE	16-CVS-15607
NORTH CAROLINA STATE BOARD OF EDUCATION, Plaintiff, v. THE STATE OF NORTH CAROLINA, and MARK JOHNSON, in his official capacity, Defendants.	**PLAINTIFF'S MOTION FOR TEMPORARY STAY**

Pursuant to Section 1-500 of the North Carolina General Statutes and Rules 8(a) and 23(c) of the North Carolina Rules of Appellate Procedure, the North Carolina State Board of Education respectfully moves this Court for a temporary stay of its July 14, 2017 decision pending the Board's appeal.

BACKGROUND

On July 14, 2017, this Court issued a decision denying the Board's motion for summary judgment and granting summary judgment to the State of North Carolina and the Superintendent of Public Instruction ("SPI"). The Court temporarily stayed its decision, however, "for a period of 60 days pending further orders of this court or any appellate court having jurisdiction over this matter so as to allow any motions by any of the parties herein requesting additional stays or dissolution of this stay pending appeal of this matter." July 14, 2017 Order at 2.

On July 20, 2017, the Board gave notice of appeal. The Board did not immediately seek a temporary stay pending the appeal, however, because within

hours of the Court's July 14, 2017 decision, counsel for both the Board and the SPI began a series of discussions about whether they could join in a motion to this Court for a temporary stay on agreed-upon terms that both parties could accept. In other words, before the Board brought the instant motion, it sought to resolve the issue without Court involvement.

The discussions between the Board's counsel and the SPI's counsel continued for over six weeks, from July 14, 2017 until August 29, 2017. These discussions involved dozens of lengthy telephone conferences, multiple face-to-face meetings, and virtually constant communication between both in-house counsel and outside litigation counsel for the Board and the SPI.[1] The parties could not have tried any harder to reach an agreement, and the Board commends the SPI, the SPI's in-house counsel, and the SPI's outside counsel for their diligence and professionalism throughout the course of these lengthy discussions.

Unfortunately, however, the parties were ultimately unable to come to an agreement on the terms of a temporary stay pending the Board's appeal. As a result, unless this Court extends the 60-day stay of its decision, Session Law 2016-126 will go into effect on September 12, 2017.

In advance of that September 12, 2017 deadline, the Board now seeks a temporary stay.

[1] The substance of those discussions, of course, is protected by Rule 408 of the North Carolina Rules of Evidence, and will not be disclosed here.

ARGUMENT

I. An extension of the July 14, 2017 temporary stay during the Board's appeal is necessary to preserve the North Carolina Constitution's nearly 150-year-old status quo.

A trial court has the discretion to temporarily stay its denial of an injunction on the merits when the "injunction is the principal relief sought by the plaintiff" and it appears that "denying said injunction will enable the defendant to consummate the threatened act, sought to be enjoined, before such appeal can be heard, so that the plaintiff will thereby be deprived of the benefits of any judgment of the appellate division, reversing the judgment of the lower court . . . ." N.C. Gen. Stat. § 1-500.[2]

Section 1-500 is essentially the trial-court version of the writ of supersedeas, the appellate writ aimed at "preserv[ing] the status quo pending the exercise of the appellate court's jurisdiction."[3] *City of New Bern v. Walker*, 255 N.C. 355, 356, 121 S.E.2d 544, 545-46 (1961). The focus of the Section 1-500 inquiry is not the *merits*; after all, in every Section 1-500 situation, the trial court has already ruled *against*

[2] As a matter of logistics, the statute provides that "the original restraining order granted in the case shall in the discretion of the trial judge be and remain in full force and effect until said appeal shall be finally disposed of." N.C. Gen. Stat. § 1-500. Here, the Court issued a temporary restraining order on December 29, 2016 that blocked the challenged provisions of Session Law 2016-126 from taking effect. *See* Exhibit A. Thus, as a logistical matter, the relief the Board seeks here (a temporary stay of the Court's July 14, 2017 decision) would simply involve keeping "the original restraining order granted in the case . . . in full force and effect until [the] appeal [is] finally disposed of." *Id.*

[3] Even beyond N.C. Gen. Stat. § 1-500, this Court has broad authority to enter a stay to protect the rights of the litigants during the pendency of the appeal. *See, e.g.*, N.C. R. App. P. 8(a); N.C. R. App. P. 23(c).

the plaintiff on the merits. *See* N.C. Gen. Stat. § 1-500. Instead, the focus of the Section 1-500 inquiry is on preserving the *status quo* during the pendency of an appeal. *See id.* (ensuring that the plaintiff will not "be deprived of the benefits of any judgment of the appellate division reversing the judgment of the lower court")

Section 1-500 is designed for precisely the situation here, as the North Carolina Supreme Court's decision in *GI Surplus Store, Inc. v. Hunter* illustrates. 257 N.C. 206, 125 S.E.2d 764 (1962). In *Hunter*, the trial court ruled against the plaintiff on the merits of its constitutional challenge, but the trial court temporarily stayed its decision and enjoined the challenged law under Section 1-500. The Supreme Court upheld the trial court's temporary stay as proper. *Id.* at 214, 125 S.E.2d at 770. In hindsight, the trial court's temporary stay was also prudent: the Supreme Court ultimately reversed the trial court on the merits and struck down the law as unconstitutional. *Id.*

Here, Section 1-500 applies in full force because a temporary stay of this Court's decision pending the Board's appeal is necessary to preserve the North Carolina Constitution's nearly 150-year-old status quo during the appeal.

Since the 1868 Constitution, the Board has supervised and administered the state's public schools. *See* Bd. Sum. J. Br. at 6-9 (detailing nearly 150-year history of managing the state's public school system). Throughout its history, the Board has exercised these powers and carried out these duties without disruption, regardless of the Board's or SPI's political affiliations at the time.

Without a temporary stay pending appeal, however, Session Law 2016-126 will move the entire $10 billion public school system under the control of a single individual for the first time in North Carolina history. *See* Exhibit B, 1/4/17 Cobey Affidavit ¶ 9. This seismic shift will generate enormous disruption for our State's public schools. *Id.* Worse, this seismic shift would occur overnight, without any transition period whatsoever. *Id.*

As part of this disruption, the SPI would be immediately empowered to take drastic actions that could not be undone. For example, the SPI takes the position that he would be immediately empowered to unilaterally fire over a *thousand* state employees, including key senior policymaking leaders. *See* Exhibit C, 9/1/17 Cobey Affidavit ¶¶ 5-11. These employees could not realistically be "unfired," of course, if this Court's decision is later reversed on appeal. *Id.*

The SPI would also be immediately empowered to unilaterally take other drastic actions. For example, the SPI could immediately decide whether certain state public school system positions should be exempt from state personnel laws, execute new statewide contracts for the public school system, and jeopardize the Board's ability to manage more than 150 existing contracts involving tens of millions of dollars. *See* Exhibit B, 1/4/17 Cobey Affidavit ¶ 10. These actions would be impossible to undo after the fact. *Id.*

As these examples illustrate, a temporary stay pending appeal is necessary to preserve the North Carolina Constitution's nearly one-and-a-half-century status quo.

These concerns are intensified, moreover, by the fact that the appellate courts may very well reach a different conclusion than this Court on the merits—especially given that the standard of review is *de novo*.

Indeed, notwithstanding this Court's ultimate decision, at the hearing on the parties' dispositive motions, Judge Bridges acknowledged that the General Assembly's cutting and pasting of the text of the North Carolina Constitution into Session Law 2016-126 and replacing the words "State Board of Education" with "Superintendent" was "very troubling."[4] Prior to this Court's decision, another Superior Court Judge expressed far greater concerns about the constitutionality of the challenged legislation.[5] As these comments show, it is certainly possible that the appellate courts could reach a different conclusion than this Court on *de novo* review.

Yet if the appellate courts reach a different conclusion and this Court's decision is not temporarily stayed during the pendency of the appeal, the appellate courts will be left with the challenges of having to "unring the bell." Sparing the litigants (and the appellate courts) from this situation is precisely why Section 1-

4 *Three judge panel hears arguments on education governance authority*, available at www.ednc.org/2017/06/29/three-judge-panel-hears-arguments-education-governance-authority/ (last visited September 5, 2017).

5 In addition to the conclusions Judge Donald W. Stephens reached in his temporary restraining order, he remarked at the TRO hearing that the Board's entitlement to relief was "straightforward," that he "[did not] see any ambiguity," and that the law is "significantly likely to be unconstitutional on its face." Exhibit D, TRO Hearing Transcript pp. 6, 13, 24.

500 provides for a temporary stay pending appeal in cases, like this one, that are aimed at injunctive relief. *See* N.C. Gen. Stat. § 1-500.

Lastly, a balancing of the equities weighs heavily in favor of a stay pending appeal. The State even conceded as much at the TRO hearing:

> [THE COURT]: And that [would be] a fairly easy balancing test, wouldn't it? A theoretical harm to the State and a real, practical harm to an agency that's constitutionally mandated to care for the public school children of the state.
>
> [THE STATE'S COUNSEL]: Yes, sir.

Bd. Sum. J. Br., Ex. D at 34.

This concession makes sense, because a temporary stay pending the Board's appeal would not harm Defendants at all. The Board has exercised its constitutional powers and fulfilled its constitutional duties for nearly a century and a half. Surely Defendants would not be harmed by maintaining this longstanding status quo during the comparatively brief period of months that it will take for the appellate courts to resolve this dispute.

For all of these reasons, the Court should temporarily stay its July 14, 2017 decision pending the Board's appeal.

II. At a minimum, a brief extension of the temporary stay is necessary to allow the appellate courts a sufficient opportunity to issue a temporary stay or writ of supersedeas.

If the Court is inclined to deny the Board's request above, then the Board will seek the same relief from the appellate courts in the form of a motion for temporary stay and petition for writ of supersedeas. *See* N.C. R. App. P. 8(a) ("After a stay order or entry has been denied or vacated by a trial court, an appellant may apply

to the appropriate appellate court for a temporary stay and a writ of supersedeas in accordance with Rule 23."); *see also* N.C. R. App. P. 23 (stating procedure for petitions for writs of supersedeas). Thus, at a minimum, the Court should extend the temporary stay to afford the appellate courts the opportunity to rule on the Board's request.

As described above, 46 days of the 60-day stay elapsed during the course of the Board's and the SPI's attempt to reach an agreement that would have obviated the need for this Court to resolve the instant motion. To deny even a brief extension of the original 60-day temporary stay under these circumstances would be to punish the Board for its efforts to promote judicial economy by obtaining a resolution of these issues by consent. Under these circumstances, allowing the clock to simply run out would be unjust, particularly given the speed with which the Board is filing this motion—a mere four business days after the discussions between the Board and the SPI resulted in an impasse.

For these reasons, the Court should, at a minimum, extend its temporary stay until the appellate courts have had an opportunity to rule on the Board's motion for temporary stay and petition for writ of supersedeas.

CONCLUSION

The Board respectfully requests that the Court temporarily stay its July 14, 2017 decision during the pendency of the Board's appeal.

In the alternative, the Board respectfully requests that the Court temporarily stay its July 14, 217 decision until the appellate courts have had an opportunity to rule on the Board's motion for temporary stay and petition for writ of supersedeas.

Respectfully submitted the 5th day of September, 2017.

ROBERT F. ORR, PLLC

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing document was served by e-mail and U.S. Mail to the following:

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1117 Hillsborough Street
Raleigh, NC 27603
Counsel for The Honorable Mark Johnson, Superintendent of Public Instruction

This the 5th day of September, 2017.

Andrew H. Erteschik

- Doc. Ex. 409 -

FILED
2016 DEC 29 PM 3:54
WAKE COUNTY, C.S.C.
BY

NORTH CAROLINA

WAKE COUNTY

GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
16-CVS-15607

NORTH CAROLINA STATE BOARD OF EDUCATION,

Plaintiff,

v.

THE STATE OF NORTH CAROLINA,

Defendant.

TEMPORARY RESTRAINING ORDER

THIS MATTER is before the Court on the Plaintiff North Carolina State Board of Education's motion for temporary restraining order.

The Court has considered the verified complaint and the arguments and submissions of counsel in attendance at the hearing on this motion. The Board's counsel were present at the hearing, and advised the Court that they had given the Defendant, the State of North Carolina, notice of the Board's intent to seek a temporary restraining order. The State's counsel were present at the hearing.

IT APPEARS to the Court that good cause exists to grant the motion.

First, the Board has shown that it is likely to succeed on the merits. It is well-settled that when a constitution expressly confers certain powers and duties on an entity, those powers and duties cannot be transferred to someone else without a constitutional amendment. Article IX, Section 5 of the North Carolina Constitution expressly confers certain "powers and duties" on the Board. Those constitutional powers and duties include:

- the power and duty to "supervise . . . the free public school system";
- the power and duty to "administer the free public school system";

- the power and duty to "supervise . . . the educational funds provided for [the free public school system's] support"; and
- the power and duty to "administer . . . the educational funds provided for [the free public school system's] support."

The provisions of Session Law 2016-126 challenged in the verified complaint (hereinafter "the Transfer Legislation") attempt to transfer these constitutional powers and duties, however, from the Board to the Superintendent of Public Instruction. Thus, the Board is likely to succeed on the merits of its claims that the Transfer Legislation is unconstitutional.

Second, the Transfer Legislation will cause irreparable harm if not immediately enjoined. As a matter of law, violations of the North Carolina Constitution constitute *per se* irreparable harm. As described above, the Board is likely to succeed on the merits of its claims that the Transfer Legislation is unconstitutional. Therefore, no further showing of irreparable harm is required. Even if a further showing of irreparable harm were required, moreover, the Transfer Legislation threatens to cause irreparable harm to the Board, the employees of the public school system, and—most importantly—North Carolina's 1.5 million public school students unless the status quo is preserved. Thus, there is sufficient irreparable harm to warrant immediate injunctive relief.

Third, the balance of equities also favors granting immediate injunctive relief. As described above, without immediate injunctive relief, the Transfer Legislation will cause irreparable harm. Conversely, immediate injunctive relief will not result in any harm. The Board has exercised its constitutional powers and fulfilled its constitutional duties for the past 148 years. Allowing the Board to continue doing so while this case is resolved only preserves this longstanding status quo.

WHEREFORE, the Board's motion for temporary restraining order is **GRANTED**.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that until a decision on the Board's motion for preliminary injunction:

(a) The State is restrained and enjoined from taking any action to implement or enforce the Transfer Legislation.

(b) Under Rule 65(d) of the North Carolina Rules of Civil Procedure, the State's "officers, agents, servants, employees, and attorneys, and . . . those persons in active concert or participation with them who receive actual notice in any manner of [this] order by personal service or otherwise" are likewise enjoined from taking any action to implement or enforce the Transfer Legislation.

Counsel for the Board shall serve copies of this order on the Chief Deputy Attorney General, the President Pro Tempore of the North Carolina Senate, the Speaker of the North Carolina House of Representatives, and the Superintendent of Public Instruction-Elect.

Unless the State consents to an extension of this temporary restraining order, the Board's motion for preliminary injunction shall be heard before the undersigned Superior Court Judge ~~within ten days from the date of this order, or as soon thereafter as the Court may hear this matter.~~ Friday January 6, 2017 at 9:30 Courtroom 10C.

So ordered the 29th day of December at 4:20 p.m.

Donald W. Stephens

The Honorable Donald W. Stephens
Senior Resident Superior Court Judge
Wake County Superior Court

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing document was served by hand-delivery to the following:

State of North Carolina
c/o Grayson G. Kelley
Chief Deputy Attorney General
North Carolina Attorney General's Office
114 W Edenton Street
Raleigh, North Carolina 27603

The Honorable Philip E. Berger
President Pro Tempore of the North Carolina Senate
Legislative Building
16 W. Jones Street, Room 2007
Raleigh, North Carolina 27601

The Honorable Timothy K. Moore
Speaker of the North Carolina House of Representatives
Legislative Building
16 W. Jones Street, Room 2304
Raleigh, North Carolina 27601

Mark Johnson
2680 Arbor Place Ct.
Winston-Salem, North Carolina 27104

This the 30th day of December, 2016.

Andrew H. Erteschik

NORTH CAROLINA WAKE COUNTY	GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 16-CVS-15607
NORTH CAROLINA STATE BOARD OF EDUCATION, Plaintiff, v. THE STATE OF NORTH CAROLINA, Defendant.	**AFFIDAVIT OF WILLIAM W. COBEY, JR.**

I, William W. Cobey, Jr., declare under penalty of perjury as follows:

1. I have personal knowledge of the matters set forth in this affidavit.

2. I currently serve as the Chairman of the North Carolina State Board of Education. I have served in this capacity since 2013, when Governor Pat McCrory appointed me to the Board and I was confirmed by the General Assembly.

3. Prior to serving as Chairman, I served as a member of the U.S. House of Representatives, as the Deputy Secretary of the North Carolina Department of Transportation, as the Secretary of the North Carolina Department of Environment, Health and Natural Resources, and for two terms as the Chairman of the North Carolina Republican Party.

4. I hold a bachelor of arts in chemistry from Emory University, a masters in business administration from the University of Pennsylvania's Wharton School of Business, and a masters in education from the University of Pittsburgh.

5. Under Article IX, Section 4 of the North Carolina Constitution, 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." Article IX,

Section 4 requires that these Board members serve "overlapping terms of eight years." These lengthy, overlapping terms ensures that, at all times, Board has at least a half century of combined experience supervising and administering North Carolina's public school system and the funds provided for its support. This constitutional structure also maintains the Board's institutional knowledge and expertise in education, enables smooth transitions between Board memberships, provides ample training opportunities for incoming members by experienced members, and insulates the Board from political cycles.

6. In addition, Article IX, Section 4 requires that eight of the Governor's eleven appointments must be made from each of the eight educational districts. This geographic diversity ensures that the Board is representative of the people.

7. On December 14, 2016, the General Assembly introduced House Bill 17. Within 48 hours, it passed both the House of Representatives and the Senate. Three days later, on December 19, 2016, House Bill 17 was signed into law as Session Law 2016-126.

8. Session Law 2016-126 contains provisions that attempt to transfer the Board's constitutional powers and duties to the Superintendent of Public Instruction ("SPI"). Those provisions appear in Part I, Sections 1-12, 14-16, 24-15, and 28-30 ("the Transfer Legislation").

9. For the past 148 years, the Board has been in charge of the public school system. The Transfer Legislation attempts to strip the Board of its constitutional powers and duties, however, and makes the SPI in charge of the public school system instead. Thus, without a preliminary injunction to preserve the status quo, the Transfer Legislation would reduce a 148-year-old constitutional entity to an empty shell, and would put the entire $10 billion public

school system under the control of a single individual. Without a preliminary injunction to preserve the status quo, the Transfer Legislation would accomplish this seismic shift overnight.

10. Furthermore, without a preliminary injunction to preserve the status quo, the SPI would be immediately empowered to take drastic actions that could not be undone. For example, the SPI would immediately be empowered to unilaterally hire and fire public school system employees, fire members of the Board's staff, determine whether certain public school system positions should be exempt from state personnel laws, execute new contracts for the public school system, and jeopardize the Board's ability to manage more than 150 existing contracts for tens of millions of dollars. These actions would be impossible to undo after the fact, even if this declaratory judgment action were ultimately resolved in favor of the Board.

11. I am unaware of any non-political justifications for dismantling North Carolina's 148-year-old constitutional structure for managing public education. Under Article I, Section 15 of the North Carolina Constitution, "[t]he people have a right to the privilege of education, and it is the duty of the State to guard and maintain that right." I personally believe that guarding and maintaining that right should always be above politics.

William W. Cobey, Jr.

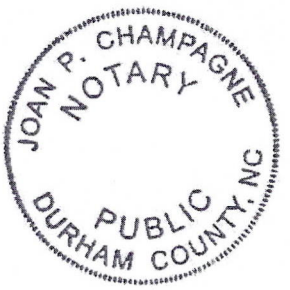
WAKE COUNTY, NORTH CAROLINA

Sworn to and subscribed before me this the 4 day of January, 2017.

Joan P. Champagne
Notary Public

My commission expires: Jan 9, 2018

[SEAL]



NORTH CAROLINA WAKE COUNTY NORTH CAROLINA STATE BOARD OF EDUCATION, Plaintiff, v. THE STATE OF NORTH CAROLINA, Defendant.	GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 16-CVS-15607 **AFFIDAVIT OF WILLIAM W. COBEY, JR.**

I, William W. Cobey, Jr., being first duly sworn, testify as follows:

1. I have personal knowledge of the matters set forth in this affidavit.

2. I currently serve as the Chairman of the North Carolina State Board of Education. I have served in this capacity since 2013, when I was appointed by Governor Pat McCrory and confirmed by the General Assembly.

3. Prior to serving as Chairman of the Board, I served as a member of the U.S. House of Representatives, as the Deputy Secretary of the North Carolina Department of Transportation, as the Secretary of the North Carolina Department of Environment, Health and Natural Resources, and for two terms as the Chairman of the North Carolina Republican Party. I hold a bachelor of arts in chemistry from Emory University, a masters in business administration from the University of Pennsylvania's Wharton School of Business, and a masters in education from the University of Pittsburgh.

4. In its July 14, 2017 decision, this Court concluded that it is "the clear intent of the Constitution that the State Board shall have the primary authority to supervise and administer the free public school system." July 14, 2017 Order at 4. The Court further concluded that Session Law 2016-126 "places a limit on the Superintendent's power, leaving the ultimate authority to supervise and administer the public school system with the State Board." *Id.* at 6.

5. Unless the Court's July 14, 2017 decision is stayed, Session Law 2016-126 will go into effect on September 12, 2017. The Superintendent has taken the position that, if Session Law 2016-126 is allowed to take effect, he will immediately possess the sole hiring, firing, and supervisory authority over more than a *thousand* state employees.

6. These affected employees include senior employees who, before Session Law 2016-126, were known as "dual reports"—that is, they were accountable to both the Board and the Superintendent. Under Session Law 2016-126, however, these and other critical education policymaking leaders for the agency would report exclusively to the Superintendent. The Superintendent has also taken the position that these employees would serve at his pleasure. The affected senior employees include senior policymaking leaders such as the Deputy State Superintendent, the Chief Financial Officer, the Chief Academic Officer, the Director of Communications, the Director of Human Resources, the Chief Information

Technology Officer, the Internal Auditor, the Executive Director of the Office of Charter Schools, and the Superintendent of Innovative School Districts.

7. These senior policymaking leaders form the core team that enables the Board to effectively set policy for the public school system. Thus, without hiring authority, firing authority, or at least supervisory authority over the senior policymaking leaders noted above, the Board would be unable to exercise (in this Court's words) "the ultimate authority to supervise and administer the public school system."

8. For example, the Board needs specialized expertise from its Chief Information Technology Officer to develop information technology policies for the state's public schools. Similarly, the Board relies on the Internal Auditor's subject matter knowledge and experience to evaluate Board policies on investments and expenditures. The Board likewise relies on the Human Resources Director's expertise to advise the Board on personnel procedures. As these examples illustrate, the Board will be unable to exercise (in this Court's words) "the ultimate authority to supervise and administer the public school system" if it has no authority whatsoever over the hiring, firing, and supervisions of these senior policymaking positions.

9. In addition, if the continued employment of these senior policymaking leaders were to depend entirely on whether the Superintendent is pleased with them, they will be unable to effectively implement the Board's policies—particularly

when there is a conflict between what the Superintendent believes is effective education policy and what the Board has decided is effective education policy. Indeed, the Superintendent has already communicated his disapproval of one or more of these senior policymaking leaders. *See, e.g.*, April 12, 2017 Mark Johnson Affidavit ¶ 12-14 (describing disapproval with Chief Financial Officer).

10. Moreover, if fired by the Superintendent, the key senior policymaking employees described above cannot be "unfired"—at least not without serious consequences to both the Board and the employees themselves. In addition, if these employees are fired and replaced by the Superintendent, the Board will have no means to discipline the new, replacement senior policymaking employees who fail to adhere to the Board's policy directives.

11. Above and beyond the harm described above, the Superintendent's dismissal of long-term, senior policymaking employees would also result in the loss of significant cumulative institutional expertise. Between them, the long-term senior policymaking employees offer a pool of accumulated experience and specialized knowledge that is an invaluable asset to the Board. This experience and knowledge, built up over years of service, will be lost in short order with their removal. This loss, by itself, will inflict irreparable harm on the Board and the public school system.

[signature on next page]

William W. Cobey, Jr.

WAKE COUNTY, NORTH CAROLINA

Sworn to and subscribed before me this the 1st day of September, 2017.

Notary Public KIMBERLY K. SIMON

My commission expires: 2/6/22

[SEAL]

KIMBERLY K. SIMON NOTARY PUBLIC JOHNSTON COUNTY, NC

STATE OF NORTH CAROLINA — IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
COUNTY OF WAKE — 16-CVS-15607

NORTH CAROLINA STATE BOARD OF EDUCATION,

Plaintiffs,

vs.

THE STATE OF NORTH CAROLINA,

Defendant.

BEFORE: THE HONORABLE DONALD STEPHENS

TRANSCRIPT OF HEARING

TRANSCRIBED FROM A VIDEOTAPED PROCEEDING

DECEMBER 29, 2016

RALEIGH, NORTH CAROLINA

Reported in Stenotype by
Lauren M. McIntee, RPR
Transcript produced by computer-aided transcription

MS. VYSOTSKAYA: That is fine.

THE COURT: I apologize. That's not something that I would normally do. At least we'll know who I'm talking to. Otherwise, it might be confusing.

All right. I read the complaint. Looks kind of straightforward to me. So I don't know, I kind of had more questions about the specific injunctive relief that the Plaintiffs seek today, and whether or not this Court has jurisdiction to do anything in view of the past legislation that sort of gives the senior resident judge in the county of which an action like this is filed, the administrative use of notifying the Chief Justice that such a lawsuit is filed, that it is a claim that facially challenges the constitutionality of an act of the General Assembly, and to request the Chief Justice to appoint three judges to a panel of superior court to hear and consider the constitutional challenge.

The law is unclear as to what the presiding or senior resident judge in the county in which the action is filed has the authority to do beyond that. However, the law does not specifically say the court shall not, may not, cannot restrain legislation of the General Assembly that's challenged as

statute that may be, significantly likely to be, unconstitutional on its face.

I mean what happens in the middle of all that void? And why -- and that's, well, the first question. The second question is in terms of the immediacy of this law taking effect. What is the immediacy of this law needing to take effect from the interest of the people of North Carolina and the State of North Carolina? What is it about that, this law?

It will change dramatically the whole concept of how education is handled. And if it turns out the legislature got it wrong and we find out 6, 8, 9, 10, 12 months later, just think about the disruption that that would cause. What is it that is so important about having this law put into effect on January the 1st of 2017?

MR. MAJMUNDAR: As to your first question, the General Assembly was silent as to what to do in these circumstance of -- situation, factual situation.

THE COURT: Sure.

MR. MAJMUNDAR: And so we can only infer from what the General Assembly did say and what they meant and who, which court would be responsible for

MR. ORR: -- the irreparable harm when you're ready.

THE COURT: Let me talk about, let me see, let me talk -- just a moment. Still got to decide you're right.

MR. ORR: Sure.

THE COURT: I see a lot of these challenges, alleged unconstitutional passages. Most of them, when you look at them it's clear on their face there's no basis to it at all, period. Period. Someone just trying to make a statement, trying to make a point, trying to show objection, but they don't have any place in a, in a court.

I don't see any ambiguity here. I don't know why all of a sudden one arose, and I don't know how it arose or where in the constitution that something would suggest that it arose. Can you help me understand this?

MR. MAJMUNDAR: I'll try, your Honor. The, the constitution does vest the Board of Education with authority, but the extent of the authority is subject to the laws in the General Assembly. The General Assembly has its own constitution.

THE COURT: Where?

MR. MAJMUNDAR: In Article IX, Section 5.

THE COURT: Okay. And that's a fairly easy balancing test, wouldn't it? A theoretical harm to the State and a real, practical harm to an agency that's constitutionally mandated to care for, care for the public school children of the state.

MR. MAJMUNDAR: Yes, sir.

THE COURT: So we're going to balance the harm to the public school children of this state based upon potential harm to them or the theoretical harm that the, would be caused by a declaration that, a potential declaration that the legislature built a bridge too far.

MR. MAJMUNDAR: That is the balancing test, your Honor. I would draw your attention to Page 12 of the complaint.

THE COURT: All right.

MR. MAJMUNDAR: The damages cited by Plaintiffs on Page 12 relate to uncertainties associated with the making this portion of the statutes effective. There is no firm, fixed identifiable harm, but what might happen. And the Court of Appeals has said, you know, illusory-type damages are not sufficient with the TRO standards.

THE COURT: Well, sometimes when you close down an agency, it is almost impossible to quantify

STATE OF NORTH CAROLINA

COUNTY OF WAKE

REPORTER'S CERTIFICATE

I, LAUREN M. MCINTEE, Registered Professional Reporter and Notary Public for the State of North Carolina, certify that I was authorized to and did stenographically transcribe the foregoing proceeding from a video recording, and that the transcript is a true and accurate record of the testimony to the best of my ability.

I further certify that I am not a relative, employee, attorney, or counsel of any of the parties, nor am I a relative or employee of any of the parties' attorneys or counsels connected with the action, nor am I financially interested in the action.

Dated this 3rd day of January, 2017.

Lauren M. McIntee

LAUREN McINTEE, RPR, Notary Public
Notary Number: 201616600044

NORTH CAROLINA

WAKE COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
16 CVS 15607

NORTH CAROLINA STATE BOARD OF EDUCATION,

Plaintiff,

v.

STATE OF NORTH CAROLINA and MARK JOHNSON, in his official capacity,

Defendants.

SECOND AFFIDAVIT OF NORTH CAROLINA SUPERINTENDENT OF PUBLIC INSTRUCTION MARK JOHNSON

Mark Johnson, after being duly sworn, deposes and states the following:

1. I likewise compliment the State Board of Education's in-house and outside counsel for their professionalism throughout conversations to try and advance a joint motion for a temporary stay on agreed-upon terms. These conversations began in earnest on 10 August 2017 and had concluded by 29 August 2017. While I wish we could have reached an agreement, I strongly disagree with the need to extend the stay, as well as the unsupported and exaggerated representations made by Plaintiff in its motion.

2. Citing only Chairman Cobey's Affidavit filed on 5 September 2017, Plaintiff asserts that if Session Law 2016-126 is allowed to go into effect "the entire $10 billion public school system" will be "under the control of a single individual for the first time in North Carolina history." (See Plaintiff's Motion for Temporary Stay, p. 5). This is false for several reasons. Most importantly, this statement in no way reflects the reality of how our public schools are run in North Carolina. While it is true that the State of North Carolina spends over $9 billion on K-12 education annually, decision-making for our public schools is, and has been for

many years, divided among the General Assembly, the State Board of Education, Superintendent of Public Instruction, local school boards, charter school boards, local superintendents, and principals. Session Law 2016-126 does not fundamentally alter the day-to-day administration of our public schools in North Carolina, nor does it strip the State Board of Education of all or even most of its authority over the public school system. Pursuant to Session Law 2016-126, sec. 2, Plaintiff maintains the authority "to establish all needed rules and regulations for the system of free public schools, subject to laws enacted by the General Assembly," among a multitude of other statutory powers and duties. Contrary to Plaintiff's claim, there simply will not be a "seismic shift."

3. Plaintiff also claims based on Chairman Cobey's Affidavit that "the SPI takes the position that he would be immediately empowered to unilaterally fire over a *thousand* state employees." (See Plaintiff's Motion for Temporary Stay, p. 5). This falsehood could not be further from the truth. Such a hysterical claim unnecessarily strikes fear into the staff of the department. I have *never* taken such a position, nor does Session Law 2016-126 contemplate such a power. By default, Department of Public Instruction ("DPI") employees are subject to Chapter 126 of the General Statutes and therefore cannot be fired without just cause. Only a fraction of DPI employees could be designated exempt and subject to removal at-will under Session Law 2016-126. Although some senior policymaking leaders at DPI could be designated exempt, this currently is a common practice in both Cabinet and Council of State agencies. Many of the senior policymaking leaders at DPI have already been designated exempt by the Plaintiff and could be removed at-will by the Plaintiff today.

4. Again citing only Chairman Cobey's Affidavit filed on 5 September 2017, Plaintiff also warns against the Superintendent having authority to execute new statewide

contracts and to manage more than 150 existing contracts involving tens of millions of dollars. (See Plaintiff's Motion for Temporary Stay, p. 5). However, the State Board of Education's current delegation in CNTR-002 *already* largely grants the Superintendent the authority to sign and manage contracts on behalf of DPI, subject to certain reporting requirements to the Plaintiff. Therefore, granting the Superintendent the power "to enter into contracts for the operations of the Department" under Session Law 2016-126 does not even represent a radical departure from current practice at DPI.

5. Despite the consistent representations by Plaintiff that it wishes to preserve the status quo, on 7 September 2017, the Plaintiff voted to fill an existing vacancy for Chief Academic Officer over my multiple objections. Even though the Chief Academic Officer position was vacant for over four (4) months, Plaintiff acted to fill the vacancy merely five (5) calendar days before the stay which maintains the authority of Plaintiff to hire for this position was set to expire. Session Law 2016-126 confers authority on the Superintendent to hire for this position.

6. Plaintiff argues that the temporary stay is prudent to preserve the North Carolina Constitution's nearly 150-year-old status quo during the appeal. However, any claim that the powers and duties of the State Board of Education and Superintendent of Public Instruction have not changed in 150-years is simply wrong and ignores the facts and legislative history that is well-known to Plaintiff. This issue was thoroughly briefed in prior submissions. The General Assembly has adjusted the powers and duties of both entities on many occasions – most notably in 1995. Many of the powers and duties granted to the Superintendent of Public Instruction by Session Law 2016-126 also belonged to the Superintendent prior to 1995.

7. Based upon the outrageous and exaggerated "facts" asserted in Plaintiff's Motion for Temporary Stay, Plaintiff has failed to meet its burden for the relief sought in its motion.

FURTHER, Affiant sayeth not.

This the 6 day of September, 2017.

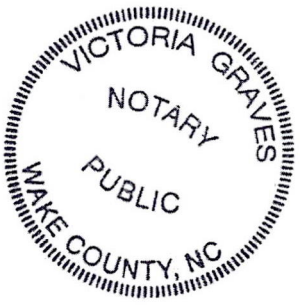
Mark Johnson
North Carolina Superintendent of Public Instruction

Sworn to and subscribed before me,
this the 8 day of September, 2017.

Victoria Graves
NOTARY PUBLIC

My Commission Expires: Nov. 23, 2018

[Notary Seal]



CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing **Affidavit of North Carolina Superintendent of Public Instruction Mark Johnson** was served upon the following attorneys by U.S. Mail and e-mail to the following:

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This the 8th day of September, 2017.

Philip R. Isley

No. _____ TENTH DISTRICT

NORTH CAROLINA COURT OF APPEALS

****

NORTH CAROLINA STATE BOARD OF EDUCATION, Plaintiff, v. THE STATE OF NORTH CAROLINA, and MARK JOHNSON, in his official capacity, Defendants.	)	From Wake County No. 16-CVS-15607

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****

PLAINTIFF'S MOTION FOR TEMPORARY STAY AND PETITION FOR WRIT OF SUPERSEDEAS

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Pursuant to Rules 8 and 23 of the North Carolina Rules of Appellate Procedure, Plaintiff respectfully moves the Court for a temporary stay and writ of supersedeas during the pendency of its appeal.

INTRODUCTION

For nearly 150 years, the State Board of Education has supervised and administered the State's public schools, as the North Carolina Constitution expressly requires. In December 2016, however, the General Assembly passed a law stating that the Board would no longer supervise and

administer the public schools, and that the Superintendent of Public Instruction would do so instead.

This law used essentially the same language from the North Carolina Constitution stating that the Board must supervise and administer the public schools, only it replaced the words "State Board of Education" with "Superintendent of Public Instruction," as this comparison shows:

Article IX, Section 5 of the North Carolina Constitution	**N.C. Sess. Law 2016-126 § 4**
It shall be the "duty" 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."

The Board immediately challenged the law, and the trial court issued a temporary restraining order preventing the law from going into effect.

Months later, a three-judge panel was appointed to hear the case. At a hearing on the merits, at least one member of the three-judge panel recognized that the text of the law was "very troubling." Nevertheless, the three-judge panel upheld the law, concluding that it was unnecessary to consider the Board's primary argument: that when a constitution expressly

confers powers and duties on a specific entity, those powers and duties cannot be transferred to someone else without a constitutional amendment.

The Board immediately appealed and, shortly thereafter, moved for a stay of the decision during the pendency of the appeal. At the hearing on the motion, at least one member of the three-judge panel acknowledged that the law represented a "sea change," and that allowing the law to take effect before the appeal is resolved would be akin to "cutting down trees"—in other words, it would be exceptionally difficult to restore the status quo if the appellate courts reversed on the merits. The State did not even oppose the Board's request for a stay.

Nevertheless, the three-judge panel declined to issue a stay, and it gave the Board 30 days to seek a stay in the appellate courts before the law goes into effect.

The Board now seeks a temporary stay and writ of supersedeas from this Court while the Board's appeal is pending. For the reasons that follow, the Court should issue a temporary stay and writ of supersedeas to preserve the North Carolina Constitution's nearly 150-year old status quo while the appeal is pending.

FACTUAL AND PROCEDURAL BACKGROUND[1]

This constitutional challenge involves a bedrock principle of constitutional law: that when a constitution expressly confers powers and duties on a specific entity, those powers and duties cannot be transferred to someone else without a constitutional amendment.

Article IX, Section 5 of the North Carolina Constitution expressly confers certain "powers and duties" on the Board. Those constitutional powers and duties include:

- the power and duty to "supervise . . . the free public school system";
- the power and duty to "administer the free public school system";
- the power and duty to "supervise . . . the educational funds provided for [the free public school system's] support"; and
- the power and duty to "administer . . . the educational funds provided for [the free public school system's] support."

The Board has exercised those powers and fulfilled those duties since its creation in 1868. For the first time in North Carolina history, however,

[1] For brevity, the Board has provided only the most relevant facts in this filing, which includes a verification by the Board's counsel as required by Rule 23. In addition, the Board incorporates by reference the verified factual allegations of the amended complaint. Ex. A, Amended Complaint (without exhibits) ¶¶ 11-26.

the General Assembly passed legislation in December 2016 that attempted to transfer the Board's constitutional powers and duties to a single individual: the Superintendent of Public Instruction ("SPI").

Without an opportunity for input from the Board, the education community, or the public, the General Assembly introduced this legislation (hereinafter "the Transfer Legislation") in a special legislative session intended to address disaster relief. Less than 48 hours after the Transfer Legislation was first introduced, it passed both the House and the Senate. Three days later, it was signed into law. Ex. B, Session Law 2016-126.

On 29 December 2016, the Board brought this constitutional challenge. Ex. A. The Board sought a temporary restraining order, a preliminary injunction, and a permanent injunction. *Id.*

The Trial Court's Decisions

On the same day that the Board filed the complaint, Judge Donald W. Stephens held a hearing on the Board's TRO motion. At the hearing, Judge Stephens remarked that the Board's entitlement to relief was "straightforward," that he "[did not] see any ambiguity," and that the law is "significantly likely to be unconstitutional on its face." Ex. C, TRO Hearing Transcript at 6, 13, 24. That same day, Judge Stephens issued a TRO enjoining the Transfer Legislation. Ex. D, Temporary Restraining Order.

After the TRO was entered, a three-judge panel was appointed to hear the parties' cross-dispositive motions. At the hearing on those motions, one member of the panel acknowledged that the General Assembly's cutting and pasting of the text of the North Carolina Constitution into legislation and replacing the words "State Board of Education" with "Superintendent" was "very troubling."[2]

Nevertheless, the three-judge panel issued a decision on 24 July 2017 upholding the Transfer Legislation. Ex. E, 14 July 2017 Order and Memorandum Opinion. The decision did not address the majority of the Board's arguments—most notably, the Board's primary contention that the legislature cannot transfer express constitutional powers and duties without a constitutional amendment. *Id.* Instead, the three-judge panel concluded that the Transfer Legislation—including the copied-and-pasted language above—"does not transfer the State Board's power." *Id.* at 5.

The Board on 20 July 2017 gave notice of appeal. Ex. F, Notice of Appeal.

[2] *Three judge panel hears arguments on education governance authority*, available at www.ednc.org/2017/06/29/three-judge-panel-hears-arguments-education-governance-authority/ (last visited September 18, 2017).

The Trial Court's Decisions on a Temporary Stay

In its 14 July 2017 order, the trial court temporarily stayed its decision "for a period of 60 days pending further orders of this court or any appellate court having jurisdiction over this matter so as to allow any motions by any of the parties herein requesting additional stays or dissolution of this stay pending appeal of this matter." Ex. E at 1.

The Board did not immediately seek a temporary stay pending the appeal, however, because within hours of the Court's July 14, 2017 decision, counsel for both the Board and the SPI began a series of discussions about whether they could join in a motion to this Court for a temporary stay on agreed-upon terms that both parties could accept. By August 29, 2017, however, the parties had determined that they would not be able to come to an agreement on the terms of a temporary stay pending the Board's appeal.

Immediately thereafter, the Board filed a motion for temporary stay with the trial court. Ex. G, Board's Motion for Temporary Stay (without exhibits). Notably, the State did not oppose the Board's motion at all. Ex. H, Email from State's Counsel. Only the SPI opposed the Board's motion. *Id.*

On 14 September 2017, the trial court issued an order staying its decision for another 30 days to allow the Board the opportunity to pursue a temporary stay and writ of supersedeas from the appellate courts. Ex. I, Order on Motion for Temporary Stay.

The Board now seeks a temporary stay and writ of supersedeas to stay the trial court's decision during the pendency of the Board's appeal.

ARGUMENT

I. A stay of the trial court's decision during the Board's appeal is necessary to preserve the North Carolina Constitution's nearly 150-year-old status quo.

The purpose of a temporary stay and writ of supersedeas is to preserve the status quo while cases are on appeal. *See Craver v. Craver*, 298 N.C. 231, 237–38, 258 S.E.2d 357, 362 (1979) (explaining that the purpose of the writ of supersedeas "is to preserve the *status quo* pending the exercise of appellate jurisdiction") (citing *New Bern v. Walker*, 255 N.C. 355, 121 S.E.2d 544 (1961) (per curiam)).

The standard for issuing a temporary stay and writ of supersedeas is flexible: The Rule asks only whether "the writ should issue *in justice* to the applicant," and, therefore, confers broad discretion on the appellate courts to protect the rights of litigants while a case is on appeal. N.C. R. App. P. 23(c) (emphasis added).

Here, a stay of the trial court's decision during the appeal is warranted because it is necessary to preserve the Board's constitutional power and duty to supervise and administer the State's public schools—a nearly 150-year-old responsibility.

A. The Board has managed North Carolina's public schools for nearly 150 years.

In 1868, the North Carolina Constitution proclaimed that "[t]he people have a right to the privilege of education, and it is the duty of the State to guard and maintain that right." 1868 N.C. Const. art. I, § 15. These words have remained unchanged in the North Carolina Constitution since 1868, and they are unique to North Carolina. No other state constitution includes these words or includes any right to education in its citizens' bill of rights.

To ensure that the State lived up to this promise to "guard and maintain" the right to public education, the people of North Carolina in their 1868 Constitution established the public school system and created the Board.

Article IX, Section 2 of the 1868 Constitution required the General Assembly to "provide by taxation and otherwise for a general and uniform system of Public Schools, wherein tuition shall be free of charge to all the children of the State." Ex. J, 1868 N.C. Const. art. IX. In turn, Article IX, Section 7 conferred broad, sweeping power on a State Board of Education composed of "[t]he Governor, Lieutenant Governor, Secretary of State, Treasurer, Auditor, Superintendent of Public Works, Superintendent of Public Instruction and Attorney General." Under Article IX, Section 9, the people conferred on the Board the "full power to legislate and make all

needful rules and regulations in relation to Free Public Schools, and the Educational Fund of the State."

In sum, the people of North Carolina in their 1868 Constitution "establishe[d] the public school system," then required that the "General Assembly provid[e] for it" and "the State Board of Education . . . manage it." *Lane v. Stanly*, 65 N.C. 153, 157 (1871). For the past 148 years, this constitutional structure has remained unchanged. Since 1868, the Board has supervised and administered all facets of public education in North Carolina.

Today, the North Carolina Constitution continues to confer these broad, sweeping powers and duties on the Board. The current North Carolina Constitution was ratified by the voters in 1971. Article IX, Section 5 of the current North Carolina Constitution states:

> The State Board of Education shall supervise and administer the free public school system and the educational funds provided for its support, except the funds mentioned in Section 7 of this Article, and shall make all needed rules and regulations in relation thereto, subject to laws enacted by the General Assembly.

Ex. K, 1971 N.C. Const. art. IX.

That constitutional provision means exactly what it says: "The State Board of Education is in charge of the public school system." John V. Orth and Justice Paul M. Newby, *The North Carolina State Constitution*, at 180 (2d ed. 2013).

The weight of this constitutional responsibility to the people is reflected in the Board's composition. Under Article IX, Section 4 of the North Carolina Constitution, 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." Article IX, Section 4 requires that these Board members serve "overlapping terms of eight years." These lengthy, overlapping terms ensure that the Board maintains its institutional knowledge and expertise in public education.

In addition, Article IX, Section 4 requires that eight of the Governor's eleven appointments must be made from each of the eight educational districts. This geographic diversity ensures that the Board is representative of the people.

In stark contrast to the broad, sweeping powers and duties that the North Carolina Constitution confers on the Board, the North Carolina Constitution has always confined the SPI to a limited role. Article IX, Section 8 of the 1868 Constitution established the SPI as a member "*of* the Board" who served as the Board's "Secretary." 1868 N.C. Const. art. IX, § 8 (emphasis added). Today, Article IX, Section 4 of the North Carolina Constitution clarifies that the SPI is not even a voting member of the Board, and serves only as the "secretary and chief administrative officer *of* the State Board of Education." N.C. Const. art. IX, § 4(2) (emphasis added).

Despite this clear delineation, however, the Transfer Legislation attempts to flip flop the Board's and the SPI's constitutionally mandated roles, as described below.

B. The Transfer Legislation unconstitutionally transfers the Board's constitutional powers and duties to the SPI.

It is a bedrock principle of constitutional law that when a constitution expressly confers certain powers and duties on an entity, those powers and duties cannot be transferred to a different entity without a constitutional amendment. *See, e.g.*, *Guthrie v. Taylor*, 279 N.C. 703, 712-13, 185 S.E.2d 193, 200 (1971) (explaining that Article IX, Section 5 is "a direct delegation by the people, themselves, in the Constitution of the State, of [a] portion of their power," and, therefore, "we look only to the Constitution to determine what power has been delegated"); *State v. Camacho*, 329 N.C. 589, 597, 406 S.E.2d 868, 871 (1991) (holding that when the North Carolina Constitution expressly confers powers and duties on a constitutional officer, any "encroachment" by the other branches "invade[s] the province of an independent constitutional officer" and violates the North Carolina Constitution); *Wilmington, C. & A. R. Co. v. Board of Comm'rs*, 72 N.C. 10, 13 (1875) (holding that the General Assembly could not legislatively transfer local officers' constitutional powers to Governor, Auditor and Treasurer because "[s]uch power is by the Constitution vested in the [local officers]

alone, and cannot be taken away from them"); *King v. Hunter*, 65 N.C. 603, 612 (1871) (holding that the General Assembly could not legislatively transfer sheriff's constitutional powers).[3] In short, constitutional powers and duties cannot be transferred by statute.

As described in the amended complaint, however, the Transfer Legislation transfers the Board's constitutional powers and duties to the SPI. The Transfer Legislation does so in two ways:

First, the Transfer Legislation attempts to transfer the powers and duties of the Board to supervise and administer the public schools. Ex. A ¶¶ 25(a)-(b). Most notably, Section 4 of the Transfer Legislation states: "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

[3] Secondary authority also supports the voluminous case law on this point. *See* 1995 Op. N.C. Att'y Gen. 32 at 5 (quoting Thomas M. Cooley, *A Treatise on Constitutional Limitations* 215 (8th ed. 1927) ("[I]f powers are specifically conferred by the constitution upon [a] specified officer [or authority], the legislature cannot require or authorize [those powers] to be performed by any other officer or authority."); Patrick C. McGinley, *Separation of Powers, State Constitutions & the Attorney General: Who Represents the State?*, 99 W. VA. L. REV. 721, 760 (1997) (stating the "fundamental proposition that when a state constitution creates a constitutional office, the legislature may not by mere statute alter the core functions of that office"); Thomas M. Cooley, *A Treatise on Constitutional Limitations* 136 (5th ed. 1883) (stating that when "powers . . . are specially conferred by the constitution upon . . . [a] specified officer, the legislature cannot require or authorize [those powers] to be performed by any other officer or authority").

supervision and administration of the public school system." Ex. B § 4 (amending N.C. Gen. Stat. § 115C-21(a)(5)). Thus, the Transfer Legislation attempts to transfer to the SPI the same powers and duties that the people expressly conferred on the Board in their Constitution.

Second, the Transfer Legislation attempts to transfer the powers and duties of the Board to supervise and administer the educational funds provided for the public school system's support. Ex. A ¶¶ 25(c)-(d). Most notably, the Transfer Legislation states that "it shall be the duty of the Superintendent of Public Instruction to . . . administer funds appropriated for the operations of the State Board of Education and for aid to local school administrative units." Ex. B § 4 (amending N.C. Gen. Stat. § 115C-21(b)(1b)). Likewise, Sections 3 and 4 state that the SPI, as the head of the Department of Public Instruction, will "administer the funds appropriated for [the Department's] operation." *Id.* § 3 (amending N.C. Gen. Stat. § 115C-19); *id.* § 4 (amending N.C. Gen. Stat. § 115C-21(a)(1)). Thus, the Transfer Legislation attempts to transfer to the SPI the same powers and duties that the people expressly conferred on the Board in their Constitution.

These constitutional conflicts are readily apparent. As described above, the General Assembly essentially copied and pasted the constitutional text into the Transfer Legislation, then replaced the words "State Board of Education" with "Superintendent of Public Instruction." *See supra* at 2.

As Judge Stephens noted at the TRO hearing, this constitutional flaw makes this case "straightforward." Ex. C, TRO Hearing Transcript at 6. After all, "'[i]f there is a conflict between a statute and the Constitution, [the] Court must determine the rights and liabilities or duties of the litigants before it in accordance with the Constitution, because the Constitution is the superior rule of law in that situation.'" *City of Asheville v. North Carolina*, No. 391PA15, 794 S.E.2d 759, 766 (N.C. Dec. 21, 2016).

Yet the trial court upheld the Transfer Legislation, as described above. Then the trial court declined to grant a stay of its decision pending the Board's appeal, even after one member of the three-judge panel (correctly) noted that allowing the law to take effect before the appeal is resolved would be akin to "cutting down trees," and would amount to a "sea change."

This Court, however, has broad discretion under Rules 8 and 23 to preserve the status quo for the State's $10 billion public school system and its 1.5 million children while the appeal is pending. *See, e.g.*, *Craver v. Craver*, 298 N.C. at 237–38, 258 S.E.2d at 362 (explaining that the purpose of the writ of supersedeas "is to preserve the *status quo* pending the exercise of appellate jurisdiction"). As described below, the circumstances here warrant such a stay.

C. The need to preserve the status quo pending appeal warrants a temporary stay and writ of supersedeas.

As described above, the Board has supervised and administered the state's public schools since 1868. While the General Assembly has attempted in the past to delineate the relationship between the Board and the SPI—in ways that were unconstitutional, but went unchallenged—never has the Board been completely written out of the constitutional governance of the public schools, as the Transfer Legislation attempts to do here.

Without a stay of the trial court's decision pending appeal, however, the Transfer Legislation will move the entire $10 billion public school system under the control of a single individual for the first time in North Carolina history. Ex. L, 1/4/17 Cobey Affidavit ¶ 9. This seismic shift will generate enormous disruption for our State's public schools. *Id.* Worse, this seismic shift would occur overnight, without any transition period whatsoever. *Id.*

As part of this disruption, the SPI would be immediately empowered to take drastic actions that could not be undone. Under the new law, the SPI could immediately and unilaterally designate up to 140 of the public school system's key senior policymaking and managerial leaders as "exempt" from the State Personnel Act, then fire them at will. Ex. B §§ 3-4, 7-8; Ex. M, 9/1/17 Cobey Affidavit ¶¶ 5-11. The affected policymaking and managerial leaders include the Deputy State Superintendent, the Chief Financial Officer,

the Chief Academic Officer, the Director of Communications, the Director of Human Resources, the Chief Information Technology Officer, the Internal Auditor, the Executive Director of the Office of Charter Schools, and the Superintendent of Innovative School Districts. Ex. M ¶¶ 5-11. These senior policymaking and managerial leaders could not realistically be "unfired," of course, if this Court's decision is later reversed on appeal. *Id.*

The SPI would also be immediately empowered to unilaterally take other drastic actions. For example, the SPI could immediately and unilaterally reorganize the Department of Public Instruction. Ex. § 4. The SPI could also execute new statewide contracts for the public school system, and jeopardize the Board's ability to manage more than 150 existing contracts involving tens of millions of dollars. Ex. L, 1/4/17 Cobey Affidavit ¶ 10. These actions would be impossible to undo after the fact. *Id.*

Simply put, if the trial court's decision is reversed on appeal but is not stayed during the appeal, it will be virtually impossible in the instances described above to "unring the bell." Sparing the litigants—and here, the 1.5 million public school children—from this situation is precisely why the appellate rules provide for a temporary stay and writ of supersedeas to stay trial court decisions pending appeal. N.C. R. App. P. 8, 23.

Lastly, a balancing of the equities weighs heavily in favor of a stay pending appeal. The State even conceded as much at the TRO hearing:

> [THE COURT]: And that [would be] a fairly easy balancing test, wouldn't it? A theoretical harm to the State and a real, practical harm to an agency that's constitutionally mandated to care for the public school children of the state.
>
> [THE STATE'S COUNSEL]: Yes, sir.

Ex. C at 34.

This concession makes sense, because a temporary stay pending the Board's appeal would not harm Defendants at all. The Board has exercised its constitutional powers and fulfilled its constitutional duties for nearly a century and a half. Surely Defendants would not be harmed by maintaining this longstanding status quo during the comparatively brief period of months that it will take for the appellate courts to resolve this dispute.

Notably, the State did not even oppose the Board's request for a stay. Ex. H. Presumably, the State does not oppose this motion and petition either.

For all of these reasons, the need to preserve the status quo pending appeal warrants a temporary stay and writ of supersedeas.

CONCLUSION

The Board respectfully requests that the Court issue a temporary stay and writ of supersedeas staying the trial court's 14 July 2017 decision during the pendency of the Board's appeal.

Respectfully submitted the 19th day of September, 2017.

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This the 19th day of September, 2017.

s/ Andrew H. Erteschik
Andrew H. Erteschik

VERIFICATION

The undersigned attorney for Plaintiff, after being duly sworn, says that the material allegations of this motion and petition are true to his personal knowledge, except those matters stated upon information and belief and, as to those matters, I believe them to be true.

Saad Gul

Saad Gul

Wake County, North Carolina

Sworn to and subscribed before me:

MELISSA T. HILL
NOTARY PUBLIC
WAKE COUNTY, N.C.
My Commission Expires 7-16-2019.

Date: 9/19/2017

Melissa T. Hill, Notary Public

My Commission Expires: 7/16/2019

No. P17-687 TENTH DISTRICT

NORTH CAROLINA COURT OF APPEALS

****

NORTH CAROLINA STATE BOARD OF EDUCATION, Plaintiff, v. THE STATE OF NORTH CAROLINA, and MARK JOHNSON, in his official capacity as North Carolina Superintendent of Public Instruction, Defendants.	)	From Wake County No. 16-CVS-15607

****

DEFENDANT MARK JOHNSON'S RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION FOR TEMPORARY STAY AND PETITION FOR WRIT OF *SUPERSEDEAS*

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No. P17-687 TENTH DISTRICT

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DEFENDANT MARK JOHNSON'S RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION FOR TEMPORARY STAY AND PETITION FOR WRIT OF *SUPERSEDEAS*

****

TO THE HONORABLE NORTH CAROLINA COURT OF APPEALS:

Defendant Mark Johnson, North Carolina Superintendent of Public Instruction ("Superintendent"), respectfully submits this response in opposition to the motion of plaintiff North Carolina State Board of Education ("State Board") for temporary stay pending appeal and its petition for writ of *supersedeas*.

PRELIMINARY STATEMENT

Just over a week ago, in a case featuring the very same plaintiff as the current case, a panel of this Court observed:

> [W]e must abide by the long established presumption that statutes . . . are constitutional both facially and as applied to any party. *Baker v. Martin*, 330 N.C. 331, 334, 410 S.E.2d 887, 889 (1991) ("Every presumption favors the validity of a statute. It will not be declared invalid unless its unconstitutionality be determined beyond a reasonable doubt." (internal citations and quotation marks omitted)). "[T]he constitutional violation must be plain and clear." *State ex rel. McCrory v. Berger*, 368 N.C. 633, 639, 781 S.E.2d 248, 252 (2016) (citation omitted). Any doubt as to the constitutionality of a statute must be resolved in favor of the legislature. *Baker*, 330 N.C. at 338, 410 S.E.2d at 891.

N.C. State Board of Education v. State of North Carolina, ___ N.C. ___, ___ S.E.2d ___ (No. COA 15-1229, filed 19 September 2017, slip op. pp. 17-18 (hereinafter *"Rules Review"*)).[1] Like the *Rules Review* case, this case involves a State Board constitutional challenge to legislation enacted by the North Carolina General Assembly. Although the legislation in the current case, House Bill 17 ("H.B. 17"), passed and received the Governor's signature in December of 2016, it never has been allowed to take effect. The will of the Legislature expressed in H.B. 17 has been frustrated for nine months based on the inertia created by the trial court's temporary restraining order from 29 December 2016, rendered in a hearing on the afternoon of the filing of the original complaint; a hearing in which

[1] A copy of the Court of Appeals slip opinion is attached to this response as Exhibit A.

defendant State of North Carolina's counsel told the court "we've only had the complaint a few hours." *See* Plaintiff's Motion for Temporary Stay and Petition for Writ of *Supersedeas* ("Appellate Motion to Stay"), Exhibit C (TRO Hearing Transcript) at 11. For his part, the Superintendent had not yet taken the oath of office and was neither named as a party nor present in the courtroom.

A great deal has happened in this case since that hearing. In keeping with the policy expressed in N.C. Gen. Stat. § 1-267.1 requiring heightened judicial scrutiny of facial constitutional challenges to acts of the General Assembly, the Chief Justice appointed a three judge panel to hear all further matters. The panel established a pleading and briefing schedule that generated nine briefs, totaling roughly 150 pages. For several hours on 29 June 2017, the three judge panel conducted a hearing on the parties' cross-motions for summary judgment. On 14 July 2017 the three judge panel filed an Order and a Memorandum of Opinion[2] unanimously upholding the constitutionality of H.B. 17 and entering summary judgment in favor of the State and the Superintendent and against the State Board.

The State Board appealed and, now having been unanimously denied a stay pending appeal in the Superior Court, turns to this Court seeking to block the will of the General Assembly yet again. At some point, the "long established

[2] Although filed on 14 July, the Order granting summary judgment had been signed by the panel on the day after the hearing – 30 June 2017. The Memorandum of Opinion was dated 6 July 2017.

presumption" that acts of the General Assembly are constitutional must mean something. At some point, the unanimous decision of a three judge panel, rendered after exhaustive briefing and hours of argument, should be given its proper weight compared to the outcome of a hastily convened, unbriefed hearing effectively featuring only one side of the argument. The Superintendent respectfully submits that point is now.

STATEMENT OF THE CASE

As discussed above, the plaintiff State Board filed a Verified Complaint for Declaratory Judgment and Injunctive Relief and Motion for Preliminary Injunctive Relief on 29 December 2016, naming the State of North Carolina as the sole defendant. In an emergency TRO hearing held the same day, the trial judge entered an order enjoining the implementation and enforcement of H.B. 17. By order of the Chief Justice of the North Carolina Supreme Court, a three judge panel of Superior Court judges obtained this case on 3 January 2017. The three judge panel issued a case management order on 16 February 2017. The parties agreed to leave the terms suspending implementation and enforcement of H.B. 17 in place until the Superior Court entered judgment. On 10 March 2017, plaintiff filed an amended verified complaint naming the Superintendent as an additional defendant.

The Superior Court conducted a hearing on cross-motions for summary judgment on 29 June 2017. On 14 July 2017, the three judge panel filed an Order

and Memorandum of Opinion declaring H.B. 17 constitutional, and granting summary judgment in favor of defendants State of North Carolina and the Superintendent. The State Board filed notice of appeal to this Court on 20 July 2017. On 5 September 2017, the State Board filed a Motion for Temporary Stay pending appeal pursuant to N.C. Gen. Stat. § 1-500 in Superior Court. On 14 September 2017, after a hearing on the State Board's motion for stay, the three judge panel entered an order providing, in pertinent part:

> Pursuant to G.S. § 1-500, requests for stay pending appeal are addressed to the discretion of the trial judge. In the exercise of that discretion, this Court has determined that a stay of its Order throughout the pendency of the appeal should not be granted.

The three judge panel extended the existing stay an additional thirty days to allow the parties a reasonable opportunity to petition the appellate division to overturn the trial court's exercise of its discretion and to impose a stay of the three judge panel's judgment pending appeal. On 19 September 2017, the State Board filed a Motion for Temporary Stay and Petition for Writ of *Supersedeas*, which is before the Court.

ARGUMENT

I. The State Board has failed to demonstrate that it is entitled to a stay pending appeal.

State Board's principal argument, as expressed in its motion, is that "a stay of the trial court's decision during the appeal is warranted because it is necessary

to preserve the Board's constitutional power and duty to supervise and administer the State's public schools[.]" Appellate Motion to Stay, p. 8. In other words, the State Board argues that if a stay pending appeal is not granted, it would be as if the three judge panel had ruled against it. Of course, the three judge panel *did* rule against it, holding that the Board's claims to a "constitutional power and duty to supervise and administer" are in fact *"subject to laws enacted by the General Assembly."* N.C. CONST., Art. IX, § 5 (emphasis supplied).

The State Board's argument in its motion to stay, like all of its arguments in the case going back to the beginning, fails to account for those eight words at the end of Article IX, Section 5. Indeed, it is striking that the graphic table inserted in the State Board's "Introduction"[3] to its motion for stay actually misquotes the constitutional provision at issue, first by placing quotation marks around the word "duty," which is not in the provision, but more importantly by placing a period in the quoted passage at the end of "free public school system." The only period in Article IX, Section 5 comes after the words *"subject to laws enacted by the General Assembly."* As much as the State Board would have it otherwise, it is those words that drive the result in this case.

The three judge panel, having had the benefit of nine briefs and hours of argument, unanimously recognized this. Two months later the panel reinforced its

[3] See Appellate Motion to Stay, p. 2.

confidence in the judgment by unanimously holding that in the exercise of its discretion it would deny the State Board's motion for stay pending appeal and allow the law to take effect. At this point, then, granting the State Board's motion to stay would amount to a conclusion that 1) the three judge panel likely was wrong in holding that H.B. 17 is constitutional; 2) the three judge panel abused its discretion in denying the State Board's motion to stay pending appeal; and 3) the presumption that acts of the General Assembly are constitutional has no application in this context. The fact that North Carolina law provides for three judges instead of one at the trial level of a case such as this strongly suggests that trial court rulings should be entitled to more deference pending appellate review than rulings from a single judge. Otherwise, the three judge panel statute arguably would be pointless. The State Board's motion to stay fails to make a compelling case that either the three judge panel erred, or that the interests of justice otherwise require continued frustration of the will of the General Assembly. The State Board's motion/petition should be denied, and H.B. 17 should be allowed to take effect.

There is nothing new in the State Board's argument that it is right on the law and the trial court is wrong. The State Board fails in its motion to address the controlling eight words – "subject to laws enacted by the General Assembly" – discussed above. It also fails to distinguish, or even discuss, the Supreme Court's

rulings in *Guthrie v. Taylor*, or *State v. Whittle Communications*,[4] which are the most authoritative judicial examinations of the constitutional provision at issue in this case.

Although *Guthrie* and *Whittle Communications* are, by virtue of their rendering court, most authoritative on the application of "subject to laws enacted by the General Assembly" to the entirety of the provision, this Court's decision in the *Rules Review* case, filed on the same day as the State Board's motion to stay, contains the most complete analysis of Article IX, Section 5 since it first appeared in the Constitution of 1868. Although the mandate has not yet issued, unless the opinion is withdrawn it will serve as solid support for the ruling of the three judge panel in this case. In *Rules Review* the State Board challenged the constitutionality of legislation that created a state agency – the Rules Review Commission – and authorized it to review and approve rules made by the State Board. *Rules Review*, slip op. at 1-2. The State Board, represented by counsel of record in this case, argued, as it has in this case, that the challenged statute unconstitutionally transfers the State Board's constitutional powers and duties to a third party. In *Rules Review*, the "powers and duties" consisted of the authority to "make all needed rules and regulations" related to the school system, and the "third party" was the statutorily created Rules Review Commission. *Id.*, slip op. at 5. In the present case, the

[4] *Guthrie v. Taylor*, 279 N.C. 703, 185 S.E.2d 193 (1971); *State v. Whittle Communications*, 328 N.C. 456, 402 S.E.2d 556 (1991).

"powers and duties" are the authority to "supervise and administer" the school system, and the "third party" is the constitutional office of the Superintendent of Public Instruction.[5]

The *Rules Review* opinion analyzes and relies upon *Whittle Communications* and *Guthrie* concerning the meaning of "subject to laws enacted by the General Assembly," quoting the latter's holding that the eight words are "designed to make, and did make, the powers so conferred upon the State Board of Education subject to limitation and revision by acts of the General Assembly." *Rules Review*, slip op. at 29 (quoting *Guthrie*, 279 N.C. at 710, 185 S.E.2d at 198). The *Rules Review* opinion observed that the facts of *Guthrie*, in which the General Assembly had not acted to preempt the State Board's authority, contrasted with the facts under consideration: "Here, the General Assembly has not been silent, but rather has exercised its authority to limit the Board's rulemaking powers." *Id.*, slip op. p. 30. Similarly, through H.B. 17 the General Assembly has acted to reallocate[6] the powers and duties regarding the operation of the State's public school system. The

[5] The Superintendent of Public Instruction is an office of constitutional moment, elected by the People, and vested with duties as "shall be prescribed by law." N.C. CONST., Art. III, §§ 7(1) & 7(2).

[6] From the opening paragraphs of the complaint all the way to its latest filing, the State Board has hyperventilated about losing power "for the first time in the State Board's 148 year history." Amended Complaint, ¶ 3. This is simply false, and extensive briefing in the trial court has demonstrated that it is false. The great majority of H.B. 17 is directed at restoring the relative duties and powers among the constitutional entities responsible for public education to the *status quo* that existed prior to major legislation that effectively reduced the role of the Superintendent to that of a spokesperson. Session Laws 1995-72 and 1995-393. Again, this was discussed at length in the briefings of both defendants, as well as at the hearing before the three judge panel.

three judge panel's ruling that H.B. 17 is constitutional is consistent with the holdings in *Guthrie*, *Whittle Communications*, and, now, *Rules Review*. There simply is no basis for the entry of a stay pending appeal.

Although the State Board is correct in describing the *purpose* of a temporary stay and writ of *supersedeas* as being the maintenance of the *status quo*, it offers no convincing, or even persuasive, reason why the *status quo* in the current case *should* be maintained. The rule upon which the State Board relies in seeking this relief requires that the petition contain, among other things, "a statement of reasons why the writ should issue in justice to the applicant." N.C. R. App. P. 23(c). The State Board spends the great majority of its energy in its motion arguing that the three judge panel erred in ruling unanimously that H.B. 17 is constitutional. It devoted none of its motion to arguing that the three judge panel abused its discretion in denying the very relief the State Board seeks here.

The final two and a half pages of the State Board's motion appear to argue that a denial of the stay would trigger irreparable harm to the State's public school system because certain powers currently exercised by an unelected board that meets one and a half days a month would then be exercised by a person elected statewide by the citizens of North Carolina who is on the job 365 days a year. The

State Board, relying solely on the affidavit testimony of its Chairman,[7] repeats its false claims to an unbroken 150 years of sole responsibility for administration of the public schools, when in fact there have been no fewer than seven substantial revisions to the allocations of such powers since the enactment of the Constitution of 1971 (*see, e.g.*, Session Laws 1971-864 (An Act to Reorganize State Government); 1981-423 (An act to Recodify Chapter 115 of the General Statutes, Elementary and Secondary Education); 1987-1025 (An Act to Provide Governance Structure for the Department of Public Education); 1993-522 (An Act to Delete the References to the Department of Education); 1995-72 (An Act to Clarify the Statutes so as to Streamline the Operations of the State Education Agency); 1995-393 (An Act to Further Streamline the Statutes so as to Clarify the Constitutional Role of the State Board of Education); 2016-126 (An Act to Clarify the Superintendent of Public Instruction's Role as the Administrative Head of the Department of Public Instruction [and other unrelated purposes])).

In this brief section of its motion, the State Board also wildly exaggerates the "control" that H.B. 17 gives to the Superintendent, omitting that nearly all authority transferred to the Superintendent under the statute is tethered to State Board oversight through the oft-repeated phrase "in accordance with all needed

[7] The Superintendent filed an affidavit for the Superior Court's consideration in considering – and eventually denying – the State Board's motion for stay. In it, the Superintendent takes issue with several of the claims in the Chairman's affidavits. The Superintendent's affidavit is attached as Exhibit B.

rules and regulations adopted by the State Board of Education." For two of many examples of this in H.B. 17, see amendments to N.C. Gen. Stat. §§ 115C-408(a) and 115C-410. As a general matter, the addition of this phrase throughout the legislation was a restoration of language that had been added in 1989 legislation and later removed. See Session Law 1989-752. Thus, even if he had any intention of triggering the "seismic shift" forecast by the State Board at the close of its petition, many of the Superintendent's actions under the new law must comport with policy established by the State Board.

At its core, the State Board's "irreparable harm" argument is one hundred percent speculation and zero percent evidence. This is clear from the State Board's own words: "[T]he SPI would be immediately empowered to take drastic actions that could not be undone." Appellate Motion to Stay, p. 16. The State Board offers no evidence that the Superintendent intends to take any "drastic actions." Even the Chairman of the State Board does not allege in his affidavit that the Superintendent has expressed some intention or desire to take "drastic actions." Instead of evidence, the State Board only suggests a caricature. The ideal that the writ should be granted "in justice" to the applicant is not served in any fashion by such an argument.

The bankruptcy of the State Board's argument is further underscored by its reliance on an exchange between counsel for the State and the court that occurred

at the TRO hearing on the day the case was filed. The State Board's contention that counsel's concession, made only hours after learning of the existence of this case, might in some way be persuasive nine months later, after all that has happened, is astonishing. As this Court commented on one of the State Board's arguments in Rules Review, it "fails the test of common sense." *Rules Review*, slip op. at 24.

In contrast to the persona implied by the State Board in its arguments, the Superintendent has approached this case with thoughtfulness and equanimity. Upon being recognized by the three judge panel as a stakeholder in January and, later as a named defendant, the Superintendent did not storm the barricades seeking a reconsideration of the original temporary restraining order. Rather, he agreed to wait until a ruling from the three judge panel before revisiting the issue. In the meantime, he performed his job and attempted to reach common ground with the State Board. The State Board recently went so far as to commend the Superintendent for negotiating in good faith in the ultimately unsuccessful attempt to craft a consent order that would have made the current exercise unnecessary.[8] Had the three judge panel ruled for the State Board instead of unanimously in favor of the Superintendent, it is safe to surmise that he would not be arguing in opposition to a motion to stay on appeal. But that is not what happened.

[8] See Appellate Motion to Stay, Exhibit G, p. 2.

Each day the original TRO is allowed to remain effective, there is irreparable harm, not only to the Superintendent and General Assembly, but to the citizens of North Carolina who elected them. The Superintendent has served nearly one quarter of his term. The General Assembly's will expressed in H.B. 17 has been subverted to a TRO for nine months. The statutory process for the appointment of and ruling by a three judge panel has produced a unanimous ruling based on exhaustive briefing and argument. The citizens of North Carolina have a right to expect that their exercise of the franchise will be respected, and their choices allowed to exercise their duties and rights as provided by law. The State Board's motion to stay pending appeal should be denied.

CONCLUSION

For the reasons stated and upon the authorities cited, the defendant, North Carolina Superintendent of Public Instruction Mark Johnson, respectfully prays that this Court deny the plaintiff's motion for stay, and dismiss plaintiff's petition for writ of *supersedeas*.

This the 29th day of September, 2017.

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The undersigned hereby certifies that a copy of the foregoing **Defendant Mark Johnson's Response in Opposition to Plaintiff's Motion for Temporary Stay and Petition for Writ of *Supersedeas*** was served upon the following attorneys by U.S. Mail and e-mail to the following:

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This the 29th day of September, 2017.

/s/ E. Hardy Lewis
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No. ___P17 TENTH JUDICIAL DISTRICT

SUPREME COURT OF NORTH CAROLINA

****

NORTH CAROLINA STATE BOARD OF EDUCATION, Plaintiff,	)	
v.	)	From Wake County 16-CVS-15607 COA P17-687
THE STATE OF NORTH CAROLINA, and MARK JOHNSON, in his official capacity, Defendants.	)	

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PLAINTIFF'S MOTION FOR TEMPORARY STAY AND PETITION FOR WRIT OF SUPERSEDEAS

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THE STATE OF NORTH CAROLINA, and MARK JOHNSON, in his official capacity, Defendants.	)	

****

PLAINTIFF'S MOTION FOR TEMPORARY STAY AND PETITION FOR WRIT OF SUPERSEDEAS

****

Pursuant to Rules 8 and 23 of the North Carolina Rules of Appellate Procedure, Plaintiff respectfully moves the Court for a temporary stay and writ of supersedeas during the pendency of its appeal.

INTRODUCTION

For nearly 150 years, the State Board of Education has supervised and administered the State's public schools, as the North Carolina Constitution expressly requires. In December 2016, however, the General Assembly passed a law stating that the Board would no longer supervise and

administer the public schools, and that the Superintendent of Public Instruction would do so instead.

This law used essentially the same language from the North Carolina Constitution stating that the Board must supervise and administer the public schools, only it replaced the words "State Board of Education" with "Superintendent of Public Instruction," as this comparison shows:

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."

The Board immediately challenged the law, and the trial court issued a temporary restraining order preventing the law from going into effect.

A three-judge panel was later appointed to hear the case. At a hearing on the merits, at least one member of the three-judge panel recognized that the text of the law was "very troubling." Nevertheless, the three-judge panel upheld the law, concluding that it was unnecessary to consider the Board's primary argument: that when a constitution expressly confers powers and

duties on a specific entity, those powers and duties cannot be transferred to someone else without a constitutional amendment.

The Board immediately appealed and, shortly thereafter, moved for a stay of the decision during the pendency of the appeal. At the hearing on the motion, at least one member of the three-judge panel acknowledged that the law represented a "sea change," and that allowing the law to take effect before the appeal is resolved would be akin to "cutting down trees"—in other words, it would be exceptionally difficult to restore the status quo if the appellate courts reversed on the merits. Indeed, the State did not even oppose the Board's request for a stay.

Nevertheless, the three-judge panel declined to issue a stay, and it gave the Board 30 days to seek a stay in the appellate courts before the law goes into effect.

The Board then sought a temporary stay and writ of supersedeas from the Court of Appeals, which granted a partial stay on a narrow, limited issue: the Board's power and duty to execute contracts for the public schools.

The Board now seeks a temporary stay and writ of supersedeas from this Court. For the reasons that follow, the Court should issue a temporary stay and writ of supersedeas to preserve the North Carolina Constitution's nearly 150-year old status quo while the Board's appeal is pending.

FACTUAL AND PROCEDURAL BACKGROUND[1]

This constitutional challenge involves a bedrock principle of constitutional law: that when a constitution expressly confers powers and duties on a specific entity, those powers and duties cannot be transferred to someone else without a constitutional amendment.

Article IX, Section 5 of the North Carolina Constitution expressly confers certain "powers and duties" on the Board. Those constitutional powers and duties include:

- the power and duty to "supervise . . . the free public school system";
- the power and duty to "administer the free public school system";
- the power and duty to "supervise . . . the educational funds provided for [the free public school system's] support"; and
- the power and duty to "administer . . . the educational funds provided for [the free public school system's] support."

The Board has exercised those powers and fulfilled those duties since its creation in 1868. For the first time in North Carolina history, however,

[1] For brevity, the Board has provided only the most relevant facts in this filing, which includes a verification by the Board's counsel as required by Rule 23. In addition, the Board incorporates by reference the verified factual allegations of the amended complaint. Ex. A, Amended Complaint (without exhibits) ¶¶ 11-26.

the General Assembly passed legislation in December 2016 that attempted to transfer the Board's constitutional powers and duties to a single individual: the Superintendent of Public Instruction ("SPI").

Without an opportunity for input from the Board, the education community, or the public, the General Assembly introduced this legislation (hereinafter "the Transfer Legislation") in a special legislative session intended to address disaster relief. Less than 48 hours after the Transfer Legislation was first introduced, it passed both the House and the Senate. Three days later, it was signed into law. Ex. B, Session Law 2016-126.

On 29 December 2016, the Board brought this constitutional challenge. Ex. A. The Board sought a temporary restraining order, a preliminary injunction, and a permanent injunction. *Id.*

The Trial Court's Decisions

On the same day that the Board filed the complaint, Judge Donald W. Stephens held a hearing on the Board's TRO motion. At the hearing, Judge Stephens remarked that the Board's entitlement to relief was "straightforward," that he "[did not] see any ambiguity," and that the law is "significantly likely to be unconstitutional on its face." Ex. C, TRO Hearing Transcript at 6, 13, 24. That same day, Judge Stephens issued a TRO enjoining the Transfer Legislation. Ex. D, Temporary Restraining Order.

After the TRO was entered, a three-judge panel was appointed to hear the parties' cross-dispositive motions. At the hearing on those motions, one member of the panel acknowledged that the General Assembly's cutting and pasting of the text of the North Carolina Constitution into legislation and replacing the words "State Board of Education" with "Superintendent" was "very troubling."[2]

Nevertheless, the three-judge panel issued a decision on 24 July 2017 upholding the Transfer Legislation. Ex. E, 14 July 2017 Order and Memorandum Opinion. The decision did not address the majority of the Board's arguments—most notably, the Board's primary argument that the legislature cannot transfer express constitutional powers and duties without a constitutional amendment. *Id.* Instead, the three-judge panel concluded that the Transfer Legislation—including the copied-and-pasted language shown in the comparison above—"does not transfer the State Board's power." *Id.* at 5.

The Board on 20 July 2017 gave notice of appeal. Ex. F, Notice of Appeal. Although the three-judge panel's decision contained some determinations that would seem to favor the Board, its overall decision—and

[2] *Three judge panel hears arguments on education governance authority*, available at www.ednc.org/2017/06/29/three-judge-panel-hears-arguments-education-governance-authority/ (last visited September 18, 2017).

its determination that the Transfer Legislation "does not transfer the State Board's power"—simply cannot be squared with the legislation itself:

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[.]"[3]	"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."

[3] In the SPI's filing with the Court of Appeals, and for the first time in this litigation, the SPI accused the Board of "misquot[ing]" Article IX, Section 5 in the comparison above by including the word "duty." Def. Res. at 6. The SPI's accusation was unfounded. Article IX, Section 5 is entitled "Powers and *duties* of Board." N.C. Const. art. IX, § 5 (emphasis added).

Also for the first time in this litigation, the SPI criticized the Board for adding a period at the end of this sentence—an odd criticism given that the obvious purpose of the comparison was to show the copied-and-pasted language in the statute, not to compare the entire constitutional provision with the entire statute. Similarly, the SPI also told the Court of Appeals that the Board had "fail[ed] to account" for the entire language of Article IX, Section 5 ("subject to laws enacted by the General Assembly") throughout "all of its arguments in the case going back to the beginning." Def. Res. at 7. Again, the SPI's accusation was unfounded: The Board supplied 13 pages of briefing to the three-judge panel on this very issue. Ex. G, Excerpts from Board's Summary Judgment Memoranda. For an in-depth discussion of why the phrase "subject to laws" in Article IX, Section 5 does not support the SPI's view that the General Assembly can do whatever it wants, the Board commends its prior briefing to the Court for further review. *See id.*

The Trial Court's Decisions on a Temporary Stay

In its 14 July 2017 order, the trial court temporarily stayed its decision "for a period of 60 days pending further orders of this court or any appellate court having jurisdiction over this matter so as to allow any motions by any of the parties herein requesting additional stays or dissolution of this stay pending appeal of this matter." Ex. E at 1.

The Board did not immediately seek a temporary stay pending the appeal, however, because within hours of the Court's July 14, 2017 decision, counsel for both the Board and the SPI began a series of discussions about whether they could join in a motion to this Court for a temporary stay on agreed-upon terms that both parties could accept. By August 29, 2017, however, the parties had determined that they would not be able to come to an agreement on the terms of a temporary stay pending the Board's appeal.

Immediately thereafter, the Board filed a motion for temporary stay with the trial court. Ex. H, Board's Motion for Temporary Stay (without exhibits). Notably, the State did not oppose the Board's motion at all. Ex. I, Email from State's Counsel. Only the SPI opposed the Board's motion. *Id.*

On 14 September 2017, the trial court issued an order staying its decision for another 30 days to allow the Board the opportunity to pursue a

temporary stay and writ of supersedeas from the appellate courts. Ex. J, Order on Motion for Temporary Stay.

The Board then sought a temporary stay and writ of supersedeas from the Court of Appeals, which granted a narrow, partial stay on a limited issue. Ex. K, Court of Appeals' 5 October 2017 Order. The Court of Appeals' order reads as follows:

> The petition filed in this cause by petitioner on 20 September 2017 and designated 'Petition for Writ of Supersedeas' is allowed, in part, to the extent that the challenged provisions of S.L. 2016-126 empower the Superintendent of Public Instruction to enter into statewide contracts for the public school system which could not be terminated by the Board immediately upon any decision by our Court in this matter which determines that the Board has the authority under our State Constitution to enter into such contracts. The petition is otherwise denied.

Id.

The Board now seeks a temporary stay and writ of supersedeas from this Court to stay the trial court's decision during the pendency of the Board's appeal.

ARGUMENT

I. A stay of the trial court's decision during the Board's appeal is necessary to preserve the North Carolina Constitution's nearly 150-year-old status quo.

This Court has held that the purpose of a temporary stay and writ of supersedeas is to preserve the status quo while cases are on appeal. *See Craver v. Craver*, 298 N.C. 231, 237–38, 258 S.E.2d 357, 362 (1979)

(explaining that the purpose of the writ of supersedeas "is to preserve the *status quo* pending the exercise of appellate jurisdiction") (citing *New Bern v. Walker*, 255 N.C. 355, 121 S.E.2d 544 (1961) (per curiam)).

The standard for issuing a temporary stay and writ of supersedeas is flexible: The Rule asks only whether "the writ should issue *in justice* to the applicant," and, therefore, confers broad discretion on the appellate courts to protect the rights of litigants while a case is on appeal. N.C. R. App. P. 23(c) (emphasis added).

Here, a stay of the trial court's decision during the appeal is warranted because it is necessary to preserve the Board's constitutional power and duty to supervise and administer the State's public schools—a nearly 150-year-old responsibility.

A. The Board has managed North Carolina's public schools for nearly 150 years.

In 1868, the North Carolina Constitution proclaimed that "[t]he people have a right to the privilege of education, and it is the duty of the State to guard and maintain that right." 1868 N.C. Const. art. I, § 15. These words have remained unchanged in the North Carolina Constitution since 1868, and they are unique to North Carolina. No other state constitution includes these words or includes any right to education in its citizens' bill of rights.

To ensure that the State lived up to this promise to "guard and maintain" the right to public education, the people of North Carolina in their 1868 Constitution established the public school system and created the Board.

Article IX, Section 2 of the 1868 Constitution required the General Assembly to "provide by taxation and otherwise for a general and uniform system of Public Schools, wherein tuition shall be free of charge to all the children of the State." Ex. L, 1868 N.C. Const. art. IX. In turn, Article IX, Section 7 conferred broad, sweeping power on a State Board of Education composed of "[t]he Governor, Lieutenant Governor, Secretary of State, Treasurer, Auditor, Superintendent of Public Works, Superintendent of Public Instruction and Attorney General." Under Article IX, Section 9, the people conferred on the Board the "full power to legislate and make all needful rules and regulations in relation to Free Public Schools, and the Educational Fund of the State."

In sum, the people of North Carolina in their 1868 Constitution "establishe[d] the public school system," then required that the "General Assembly provid[e] for it" and "the State Board of Education . . . manage it." *Lane v. Stanly*, 65 N.C. 153, 157 (1871). For the past 148 years, this constitutional structure has remained unchanged. Since 1868, the Board has supervised and administered all facets of public education in North Carolina.

Today, the North Carolina Constitution continues to confer these broad, sweeping powers and duties on the Board. The current North Carolina Constitution was ratified by the voters in 1971. Article IX, Section 5 of the current North Carolina Constitution states:

> The State Board of Education shall supervise and administer the free public school system and the educational funds provided for its support, except the funds mentioned in Section 7 of this Article, and shall make all needed rules and regulations in relation thereto, subject to laws enacted by the General Assembly.

Ex. M, 1971 N.C. Const. art. IX.

That constitutional provision means exactly what it says: "The State Board of Education is in charge of the public school system." John V. Orth and Justice Paul M. Newby, *The North Carolina State Constitution*, at 180 (2d ed. 2013).

The weight of this constitutional responsibility to the people is reflected in the Board's composition. Under Article IX, Section 4 of the North Carolina Constitution, 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." Article IX, Section 4 requires that these Board members serve "overlapping terms of eight years." These lengthy, overlapping terms ensure that the Board maintains its institutional knowledge and expertise in public education.

In addition, Article IX, Section 4 requires that eight of the Governor's eleven appointments must be made from each of the eight educational districts. This geographic diversity ensures that the Board is representative of the people.

In stark contrast to the broad, sweeping powers and duties that the North Carolina Constitution confers on the Board, the North Carolina Constitution has always confined the SPI to a limited role. Article IX, Section 8 of the 1868 Constitution established the SPI as a member "*of* the Board" who served as the Board's "Secretary." 1868 N.C. Const. art. IX, § 8 (emphasis added). Today, Article IX, Section 4 of the North Carolina Constitution clarifies that the SPI is not even a voting member of the Board, and serves only as the "secretary and chief administrative officer *of* the State Board of Education." N.C. Const. art. IX, § 4(2) (emphasis added).

Despite this clear delineation, however, the Transfer Legislation attempts to flip flop the Board's and the SPI's constitutionally mandated roles, as described below.

B. The Transfer Legislation unconstitutionally transfers the Board's constitutional powers and duties to the SPI.

It is a bedrock principle of constitutional law that when a constitution expressly confers certain powers and duties on an entity, those powers and duties cannot be transferred to a different entity without a constitutional

amendment. *See, e.g.*, *Guthrie v. Taylor*, 279 N.C. 703, 712-13, 185 S.E.2d 193, 200 (1971) (explaining that Article IX, Section 5 is "a direct delegation by the people, themselves, in the Constitution of the State, of [a] portion of their power," and, therefore, "we look only to the Constitution to determine what power has been delegated"); *State v. Camacho*, 329 N.C. 589, 597, 406 S.E.2d 868, 871 (1991) (holding that when the North Carolina Constitution expressly confers powers and duties on a constitutional officer, any "encroachment" by the other branches "invade[s] the province of an independent constitutional officer" and violates the North Carolina Constitution); *Wilmington, C. & A. R. Co. v. Board of Comm'rs*, 72 N.C. 10, 13 (1875) (holding that the General Assembly could not legislatively transfer local officers' constitutional powers to Governor, Auditor and Treasurer because "[s]uch power is by the Constitution vested in the [local officers] alone, and cannot be taken away from them"); *King v. Hunter*, 65 N.C. 603, 612 (1871) (holding that the General Assembly could not legislatively

transfer sheriff's constitutional powers).[4] In short, constitutional powers and duties cannot be transferred by statute.

As described in the amended complaint, however, the Transfer Legislation transfers the Board's constitutional powers and duties to the SPI. The Transfer Legislation does so in two ways:

First, the Transfer Legislation attempts to transfer the powers and duties of the Board to supervise and administer the public schools. Ex. A ¶¶ 25(a)-(b). Most notably, Section 4 of the Transfer Legislation states: "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." Ex. B § 4 (amending N.C. Gen. Stat. § 115C-21(a)(5)). Thus, the Transfer Legislation

[4] Secondary authority also supports the voluminous case law on this point. See 1995 Op. N.C. Att'y Gen. 32 at 5 (quoting Thomas M. Cooley, A Treatise on Constitutional Limitations 215 (8th ed. 1927) ("[I]f powers are specifically conferred by the constitution upon [a] specified officer [or authority], the legislature cannot require or authorize [those powers] to be performed by any other officer or authority."); Patrick C. McGinley, Separation of Powers, State Constitutions & the Attorney General: Who Represents the State?, 99 W. VA. L. REV. 721, 760 (1997) (stating the "fundamental proposition that when a state constitution creates a constitutional office, the legislature may not by mere statute alter the core functions of that office"); Thomas M. Cooley, A Treatise on Constitutional Limitations 136 (5th ed. 1883) (stating that when "powers . . . are specially conferred by the constitution upon . . . [a] specified officer, the legislature cannot require or authorize [those powers] to be performed by any other officer or authority").

attempts to transfer to the SPI the same powers and duties that the people expressly conferred on the Board in their Constitution.

Second, the Transfer Legislation attempts to transfer the powers and duties of the Board to supervise and administer the educational funds provided for the public school system's support. Ex. A ¶¶ 25(c)-(d). Most notably, the Transfer Legislation states that "it shall be the duty of the Superintendent of Public Instruction to . . . administer funds appropriated for the operations of the State Board of Education and for aid to local school administrative units." Ex. B § 4 (amending N.C. Gen. Stat. § 115C-21(b)(1b)). Likewise, Sections 3 and 4 state that the SPI, as the head of the Department of Public Instruction, will "administer the funds appropriated for [the Department's] operation." *Id.* § 3 (amending N.C. Gen. Stat. § 115C-19); *id.* § 4 (amending N.C. Gen. Stat. § 115C-21(a)(1)). Thus, the Transfer Legislation attempts to transfer to the SPI the same powers and duties that the people expressly conferred on the Board in their Constitution.

These constitutional conflicts are readily apparent. As described above, the General Assembly essentially copied and pasted the constitutional text into the Transfer Legislation, then replaced the words "State Board of Education" with "Superintendent of Public Instruction." *See supra* at 2.

As Judge Stephens noted at the TRO hearing, this constitutional flaw makes this case "straightforward." Ex. C, TRO Hearing Transcript at 6.

After all, "'[i]f there is a conflict between a statute and the Constitution, [the] Court must determine the rights and liabilities or duties of the litigants before it in accordance with the Constitution, because the Constitution is the superior rule of law in that situation.'" *City of Asheville v. North Carolina*, No. 391PA15, 794 S.E.2d 759, 766 (N.C. Dec. 21, 2016).

Yet the trial court upheld the Transfer Legislation, as described above. Then the trial court declined to grant a stay of its decision pending the Board's appeal, even after one member of the three-judge panel (correctly) noted that allowing the law to take effect before the appeal is resolved would be akin to "cutting down trees," and would amount to a "sea change."

This Court, however, has broad discretion under Rules 8 and 23 to preserve the status quo for the State's $10 billion public school system and its 1.5 million children while the appeal is pending. *See, e.g.*, *Craver*, 298 N.C. at 237–38, 258 S.E.2d at 362 (explaining that the purpose of the writ of supersedeas "is to preserve the *status quo* pending the exercise of appellate jurisdiction").

As described below, the circumstances here warrant such a stay.

C. The need to preserve the status quo pending appeal warrants a temporary stay and writ of supersedeas.

As described above, the Board has supervised and administered the state's public schools since 1868. While the General Assembly has attempted

in the past to delineate the relationship between the Board and the SPI—in ways that were unconstitutional, but went unchallenged—never has the Board been completely written out of the constitutional governance of the public schools, as the Transfer Legislation attempts to do here.

Without a stay of the trial court's decision pending appeal, however, the Transfer Legislation will move the entire $10 billion public school system under the control of a single individual for the first time in North Carolina history. Ex. N, 1/4/17 Cobey Affidavit ¶ 9. This seismic shift will generate enormous disruption for our State's public schools. *Id.* Worse, this seismic shift would occur overnight, without any transition period whatsoever. *Id.*

As part of this disruption, the SPI would be immediately empowered to take drastic actions that could not be undone. Under the new law, the SPI could immediately and unilaterally designate up to 140 of the public school system's key senior policymaking and managerial leaders as "exempt" from the State Personnel Act, then fire them at will. Ex. B §§ 3-4, 7-8; Ex. O, 9/1/17 Cobey Affidavit ¶¶ 5-11. The affected policymaking and managerial leaders include the Deputy State Superintendent, the Chief Financial Officer, the Chief Academic Officer, the Director of Communications, the Director of Human Resources, the Chief Information Technology Officer, the Internal Auditor, the Executive Director of the Office of Charter Schools, and the Superintendent of Innovative School Districts. Ex. O ¶¶ 5-11. These senior

policymaking and managerial leaders could not realistically be "unfired," of course, if the trial court's decision is ultimately reversed on appeal. *Id.*

The SPI would also be immediately empowered to unilaterally take other drastic actions. For example, the SPI could immediately and unilaterally reorganize the Department of Public Instruction. Ex. § 4. The SPI could also execute new statewide contracts for the public school system, and jeopardize the Board's ability to manage more than 150 existing contracts involving tens of millions of dollars. Ex. N, 1/4/17 Cobey Affidavit ¶ 10. These actions would be impossible to undo after the fact. *Id.*

Simply put, if the trial court's decision is reversed on appeal but is not stayed during the appeal, it will be virtually impossible in the instances described above to "unring the bell." Sparing the litigants—and here, the 1.5 million public school children—from this situation is precisely why the appellate rules provide for a temporary stay and writ of supersedeas to stay trial court decisions pending appeal. N.C. R. App. P. 8, 23.

Lastly, a balancing of the equities weighs heavily in favor of a stay pending appeal. The State even conceded as much at the TRO hearing:

> [THE COURT]: And that [would be] a fairly easy balancing test, wouldn't it? A theoretical harm to the State and a real, practical harm to an agency that's constitutionally mandated to care for the public school children of the state.

[THE STATE'S COUNSEL]: Yes, sir.

Ex. C at 34.

This concession makes sense, because a temporary stay pending the Board's appeal would not harm Defendants at all. The Board has exercised its constitutional powers and fulfilled its constitutional duties for nearly a century and a half. Surely Defendants would not be harmed by maintaining this longstanding status quo during the comparatively brief period of months that it will take for the appellate courts to resolve this dispute.

Notably, the State did not even oppose the Board's request for a stay—either before the three-judge panel or before the Court of Appeals. Presumably, the State does not oppose the Board's requested stay before this Court either.

For all of these reasons, the need to preserve the status quo pending appeal warrants a temporary stay and writ of supersedeas.

CONCLUSION

The Board respectfully requests that the Court issue a temporary stay and writ of supersedeas staying the trial court's 14 July 2017 decision during the pendency of the Board's appeal.

Respectfully submitted the 5th day of October, 2017.

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N.C. R. App. P. 33(b) Certification: I certify that all of the attorneys listed below have authorized me to list their names on this document as if they had personally signed it.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing document was served by e-mail and U.S. Mail to the following:

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This the 5th day of October, 2017.

s/ Andrew H. Erteschik
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VERIFICATION

The undersigned attorney for Plaintiff, after being duly sworn, says that the material allegations of this motion and petition are true to his personal knowledge, except those matters stated upon information and belief and, as to those matters, I believe them to be true.

Saad Gul

Saad Gul

Wake County, North Carolina

Sworn to and subscribed before me:

MELISSA T. HILL
NOTARY PUBLIC
WAKE COUNTY, N.C.
My Commission Expires 7-16-2019.

Date: 9/19/2017

Melissa T. Hill, Notary Public

My Commission Expires: 7/16/2019

No. 333-P17 TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

****

NORTH CAROLINA STATE BOARD OF EDUCATION, Plaintiff, v. THE STATE OF NORTH CAROLINA, and MARK JOHNSON, in his official capacity as North Carolina Superintendent of Public Instruction, Defendants.	)	From Wake County No. 16-CVS-15607 COA P17-687

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DEFENDANT MARK JOHNSON'S RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION FOR TEMPORARY STAY AND PETITION FOR WRIT OF *SUPERSEDEAS*

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No. 333-P17 TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

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NORTH CAROLINA STATE BOARD OF EDUCATION, Plaintiff, v. THE STATE OF NORTH CAROLINA, and MARK JOHNSON, in his official capacity as North Carolina Superintendent of Public Instruction, Defendants.	)	From Wake

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DEFENDANT MARK JOHNSON'S RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION FOR TEMPORARY STAY AND PETITION FOR WRIT OF *SUPERSEDEAS*

****

TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

Defendant Mark Johnson, North Carolina Superintendent of Public Instruction ("Superintendent"), respectfully submits this response in opposition to the motion of plaintiff North Carolina State Board of Education ("State Board") for temporary stay pending appeal and its petition for writ of *supersedeas*.

PRELIMINARY STATEMENT

Just over a week ago, in a case featuring the very same plaintiff as the current case, a panel of the North Carolina Court of Appeals observed:

> [W]e must abide by the long established presumption that statutes . . . are constitutional both facially and as applied to any party. *Baker v. Martin*, 330 N.C. 331, 334, 410 S.E.2d 887, 889 (1991) ("Every presumption favors the validity of a statute. It will not be declared invalid unless its unconstitutionality be determined beyond a reasonable doubt." (internal citations and quotation marks omitted)). "[T]he constitutional violation must be plain and clear." *State ex rel. McCrory v. Berger*, 368 N.C. 633, 639, 781 S.E.2d 248, 252 (2016) (citation omitted). Any doubt as to the constitutionality of a statute must be resolved in favor of the legislature. *Baker*, 330 N.C. at 338, 410 S.E.2d at 891.

N.C. State Board of Education v. State of North Carolina, ___ N.C. ___, ___ S.E.2d ___ (No. COA 15-1229, filed 19 September 2017, slip op. pp. 17-18 (hereinafter *"Rules Review"*)).[1] Like the *Rules Review* case, this case involves a State Board constitutional challenge to legislation enacted by the North Carolina General Assembly. Although the legislation in the current case, House Bill 17 ("H.B. 17"), passed and received the Governor's signature in December of 2016, it never has been allowed to take effect. The will of the Legislature expressed in H.B. 17 has been frustrated for nine months based on the inertia created by the trial court's temporary restraining order from 29 December 2016, rendered in a hearing on the afternoon of the filing of the original complaint; a hearing in which

[1] A copy of the Court of Appeals slip opinion is attached to this response as Exhibit A.

defendant State of North Carolina's counsel told the court "we've only had the complaint a few hours." *See* Plaintiff's Motion for Temporary Stay and Petition for Writ of *Supersedeas* ("Appellate Motion to Stay"), Exhibit C (TRO Hearing Transcript) at 11. For his part, the Superintendent had not yet taken the oath of office and was neither named as a party nor present in the courtroom.

A great deal has happened in this case since that hearing. In keeping with the policy expressed in N.C. Gen. Stat. § 1-267.1 requiring heightened judicial scrutiny of facial constitutional challenges to acts of the General Assembly, the Chief Justice appointed a three judge panel to hear all further matters. The panel established a pleading and briefing schedule that generated nine briefs, totaling roughly 150 pages. For several hours on 29 June 2017, the three judge panel conducted a hearing on the parties' cross-motions for summary judgment. On 14 July 2017 the three judge panel filed an Order and a Memorandum of Opinion[2] unanimously upholding the constitutionality of H.B. 17 and entering summary judgment in favor of the State and the Superintendent and against the State Board.

The State Board appealed and sought a stay pending appeal from the Superior Court three judge panel. That panel issued an order unanimously denying the motion, stating: "In the exercise of [the Court's] discretion, this Court has

[2] Although filed on 14 July, the Order granting summary judgment had been signed by the panel on the day after the hearing – 30 June 2017. The Memorandum of Opinion was dated 6 July 2017.

determined that a stay of its Order throughout the pendency of the appeal should not be granted." The State Board then turned to the Court of Appeals, filing nearly the same motion and argument it presented yesterday to this Court. That motion was largely denied in an order entered yesterday by the Court of Appeals. Last night the State Board turned to this Court seeking to block the will of the General Assembly yet again. At some point, the "long established presumption" that acts of the General Assembly are constitutional must mean something. At some point, the unanimous decision of a three judge panel, rendered after exhaustive briefing and hours of argument, should be given its proper weight compared to the outcome of a hastily convened, unbriefed hearing effectively featuring only one side of the argument. The Superintendent respectfully submits that point is now.

STATEMENT OF THE CASE

As discussed above, the plaintiff State Board filed a Verified Complaint for Declaratory Judgment and Injunctive Relief and Motion for Preliminary Injunctive Relief on 29 December 2016, naming the State of North Carolina as the sole defendant. In an emergency TRO hearing held the same day, the trial judge entered an order enjoining the implementation and enforcement of H.B. 17. By order of the Chief Justice of the North Carolina Supreme Court, a three judge panel of Superior Court judges obtained this case on 3 January 2017. The three judge panel issued a case management order on 16 February 2017. The parties agreed to leave the terms

suspending implementation and enforcement of H.B. 17 in place until the Superior Court entered judgment. On 10 March 2017, plaintiff filed an amended verified complaint naming the Superintendent as an additional defendant.

The Superior Court conducted a hearing on cross-motions for summary judgment on 29 June 2017. On 14 July 2017, the three judge panel filed an Order and Memorandum of Opinion declaring H.B. 17 constitutional, and granting summary judgment in favor of defendants State of North Carolina and the Superintendent. The State Board filed notice of appeal to the Court of Appeals on 20 July 2017. On 5 September 2017, the State Board filed a Motion for Temporary Stay pending appeal pursuant to N.C. Gen. Stat. § 1-500 in Superior Court. On 14 September 2017, after a hearing on the State Board's motion for stay, the three judge panel entered an order providing, in pertinent part:

> Pursuant to G.S. § 1-500, requests for stay pending appeal are addressed to the discretion of the trial judge. In the exercise of that discretion, this Court has determined that a stay of its Order throughout the pendency of the appeal should not be granted.

The three judge panel extended the existing stay an additional thirty days to allow the parties a reasonable opportunity to petition the appellate division to overturn the trial court's exercise of its discretion and to impose a stay of the three judge panel's judgment pending appeal. On 19 September 2017, the State Board filed a Motion for Temporary Stay and Petition for Writ of *Supersedeas*, to which the Superintendent responded on 29 September 2017. On 5 October 2017, the Court of

Appeals filed an order largely denying the State Board's motion (the State Board itself characterized the ruling as the grant of "a narrow, partial stay on a limited issue." (Plaintiff's Motion for Temporary Stay and Petition for Writ of *Supersedeas*, at 9)). Hours later, the State Board filed the motion that is before this Court.

ARGUMENT

I. The State Board has failed to demonstrate that it is entitled to a stay pending appeal.

State Board's principal argument, as expressed in its motion, is that "a stay of the trial court's decision during the appeal is warranted because it is necessary to preserve the Board's constitutional power and duty to supervise and administer the State's public schools[.]" Appellate Motion to Stay, p. 8. In other words, the State Board argues that if a stay pending appeal is not granted, it would be as if the three judge panel had ruled against it. Of course, the three judge panel *did* rule against it, holding that the Board's claims to a "constitutional power and duty to supervise and administer" are in fact *"subject to laws enacted by the General Assembly."* N.C. CONST., Art. IX, § 5 (emphasis supplied).

The State Board's argument in its motion to stay, like all of its arguments in the case going back to the beginning, fails to account for those eight words at the end of Article IX, Section 5. Indeed, it is striking that the graphic table inserted in

the State Board's "Introduction"[3] to its motion for stay in the Court of Appeals[4] actually misquotes the constitutional provision at issue, first by placing quotation marks around the word "duty," which is not in the provision, but more importantly by placing a period in the quoted passage at the end of "free public school system." The only period in Article IX, Section 5 comes after the words *"subject to laws enacted by the General Assembly."* As much as the State Board would have it otherwise, it is those words that drive the result in this case.

The three judge panel, having had the benefit of nine briefs and hours of argument, unanimously recognized this. Two months later the panel reinforced its confidence in the judgment by unanimously holding that in the exercise of its discretion it would deny the State Board's motion for stay pending appeal and allow the law to take effect. At this point, then, granting the State Board's motion to stay would amount to a conclusion that 1) the three judge panel likely was wrong in holding that H.B. 17 is constitutional; 2) the three judge panel abused its discretion in denying the State Board's motion to stay pending appeal; 3) the Court

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[3] See Appellate Motion to Stay, p. 2.

[4] In a footnote in its motion before this Court, the State Board expressed pique at having been challenged for taking editorial liberties that, in the interest of creating a graphic point, omitted the most important constitutional passage in this case. As if to brush off the criticism, the State Board's motion in this Court has bracketed the period. While this indeed corrects the editorial miscue, it does nothing to cleanse the substantive failure of omitting the eight words that wholly qualify the passage in their box: "subject to laws enacted by the General Assembly." In fact, the State Board does not mention the phrase at all in its current motion until page 12 of a 20 page document.

of Appeals erroneously failed to find an abuse of discretion on the part of the three judge panel; and 4) the presumption that acts of the General Assembly are constitutional has no application in this context. The fact that North Carolina law provides for three judges instead of one at the trial level of a case such as this strongly suggests that trial court rulings should be entitled to more deference pending appellate review than rulings from a single judge. Otherwise, the three judge panel statute arguably would be pointless. The State Board's motion to stay fails to make a compelling case that either the three judge panel erred, or that the interests of justice otherwise require continued frustration of the will of the General Assembly. The State Board's motion/petition should be denied, and H.B. 17 should be allowed to take effect.

There is nothing new in the State Board's argument that it is right on the law and the trial court is wrong. The State Board fails in its motion to address the controlling eight words – "subject to laws enacted by the General Assembly" – discussed above. It also fails to distinguish, or even discuss, the Supreme Court's rulings in *Guthrie v. Taylor*, or *State v. Whittle Communications*,[5] which are the most authoritative judicial examinations of the constitutional provision at issue in this case.

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[5] *Guthrie v. Taylor*, 279 N.C. 703, 185 S.E.2d 193 (1971); *State v. Whittle Communications*, 328 N.C. 456, 402 S.E.2d 556 (1991).

Although *Guthrie* and *Whittle Communications* are, by virtue of their rendering court, most authoritative on the application of "subject to laws enacted by the General Assembly" to the entirety of the provision, the decision of the Court of Appeals in the *Rules Review* case, filed on the same day as the State Board's motion to stay in that Court, contains the most complete analysis of Article IX, Section 5 since it first appeared in the Constitution of 1868. Although the mandate has not yet issued, unless the opinion is withdrawn it will serve as solid support for the ruling of the three judge panel in this case. In *Rules Review* the State Board challenged the constitutionality of legislation that created a state agency – the Rules Review Commission – and authorized it to review and approve rules made by the State Board. *Rules Review*, slip op. at 1-2. The State Board, represented by counsel of record in this case, argued, as it has in this case, that the challenged statute unconstitutionally transfers the State Board's constitutional powers and duties to a third party. In *Rules Review*, the "powers and duties" consisted of the authority to "make all needed rules and regulations" related to the school system, and the "third party" was the statutorily created Rules Review Commission. *Id.*, slip op. at 5. In the present case, the "powers and duties" are the authority to "supervise and administer" the school system, and the "third party" is the constitutional office of the Superintendent of Public Instruction.[6]

[6] The Superintendent of Public Instruction is an office of constitutional moment, elected by the

The *Rules Review* opinion analyzes and relies upon *Whittle Communications* and *Guthrie* concerning the meaning of "subject to laws enacted by the General Assembly," quoting the latter's holding that the eight words are "designed to make, and did make, the powers so conferred upon the State Board of Education subject to limitation and revision by acts of the General Assembly." *Rules Review*, slip op. at 29 (quoting *Guthrie*, 279 N.C. at 710, 185 S.E.2d at 198). The *Rules Review* opinion observed that the facts of *Guthrie*, in which the General Assembly had not acted to preempt the State Board's authority, contrasted with the facts under consideration: "Here, the General Assembly has not been silent, but rather has exercised its authority to limit the Board's rulemaking powers." *Id.*, slip op. p. 30. Similarly, through H.B. 17 the General Assembly has acted to reallocate[7] the powers and duties regarding the operation of the State's public school system. The three judge panel's ruling that H.B. 17 is constitutional is consistent with the holdings in *Guthrie*, *Whittle Communications*, and, now, *Rules Review*. There simply is no basis for the entry of a stay pending appeal.

People, and vested with duties as "shall be prescribed by law." N.C. CONST., Art. III, §§ 7(1) & 7(2).

[7] From the opening paragraphs of the complaint all the way to its latest filing, the State Board has hyperventilated about losing power "for the first time in the State Board's 148 year history." Amended Complaint, ¶ 3. This is simply false, and extensive briefing in the trial court has demonstrated that it is false. The great majority of H.B. 17 is directed at restoring the relative duties and powers among the constitutional entities responsible for public education to the *status quo* that existed prior to major legislation that effectively reduced the role of the Superintendent to that of a spokesperson. Session Laws 1995-72 and 1995-393. Again, this was discussed at length in the briefings of both defendants, as well as at the hearing before the three judge panel.

Although the State Board is correct in describing the *purpose* of a temporary stay and writ of *supersedeas* as being the maintenance of the *status quo*, it offers no convincing, or even persuasive, reason why the *status quo* in the current case *should* be maintained. The rule upon which the State Board relies in seeking this relief requires that the petition contain, among other things, "a statement of reasons why the writ should issue in justice to the applicant." N.C. R. App. P. 23(c). The State Board spends the great majority of its energy in its motion arguing that the three judge panel erred in ruling unanimously that H.B. 17 is constitutional. It devoted none of its motion to arguing that the three judge panel abused its discretion in denying the very relief the State Board seeks here.

The final two and a half pages of the State Board's motion appear to argue that a denial of the stay would trigger irreparable harm to the State's public school system because certain powers currently exercised by an unelected board that meets one and a half days a month then would be exercised by a person elected statewide by the citizens of North Carolina who is on the job 365 days a year. The State Board, relying solely on the affidavit testimony of its Chairman,[8] repeats its false claims to an unbroken 150 years of sole responsibility for administration of the public schools, when in fact there have been no fewer than seven substantial

[8] The Superintendent filed an affidavit for the Superior Court's consideration in considering – and eventually denying – the State Board's motion for stay. In it, the Superintendent takes issue with several of the claims in the Chairman's affidavits. The Superintendent's affidavit is attached as Exhibit B.

revisions to the allocations of such powers since the enactment of the Constitution of 1971 (*see, e.g.*, Session Laws 1971-864 (An Act to Reorganize State Government); 1981-423 (An act to Recodify Chapter 115 of the General Statutes, Elementary and Secondary Education); 1987-1025 (An Act to Provide Governance Structure for the Department of Public Education); 1993-522 (An Act to Delete the References to the Department of Education); 1995-72 (An Act to Clarify the Statutes so as to Streamline the Operations of the State Education Agency); 1995-393 (An Act to Further Streamline the Statutes so as to Clarify the Constitutional Role of the State Board of Education); 2016-126 (An Act to Clarify the Superintendent of Public Instruction's Role as the Administrative Head of the Department of Public Instruction [and other unrelated purposes])).

In this brief section of its motion, the State Board also wildly exaggerates the "control" that H.B. 17 gives to the Superintendent, omitting that nearly all authority transferred to the Superintendent under the statute is tethered to State Board oversight through the oft-repeated phrase "in accordance with all needed rules and regulations adopted by the State Board of Education." For two of many examples of this in H.B. 17, see amendments to N.C. Gen. Stat. §§ 115C-408(a) and 115C-410. As a general matter, the addition of this phrase throughout the legislation was a restoration of language that had been added in 1989 legislation and later removed. See Session Law 1989-752. Thus, even if he had any intention

of triggering the "seismic shift" forecast by the State Board at the close of its petition, many of the Superintendent's actions under the new law must comport with policy established by the State Board.

At its core, the State Board's "irreparable harm" argument is one hundred percent speculation and zero percent evidence. This is clear from the State Board's own words: "[T]he SPI would be immediately empowered to take drastic actions that could not be undone." Appellate Motion to Stay, p. 16. The State Board offers no evidence that the Superintendent intends to take any "drastic actions." Even the Chairman of the State Board does not allege in his affidavit that the Superintendent has expressed some intention or desire to take "drastic actions." Instead of evidence, the State Board only suggests a caricature. The ideal that the writ should be granted "in justice" to the applicant is not served in any fashion by such an argument.

The bankruptcy of the State Board's argument is further underscored by its reliance on an exchange between counsel for the State and the court that occurred at the TRO hearing on the day the case was filed. The State Board's contention that counsel's concession, made only hours after learning of the existence of this case, might in some way be persuasive nine months later, after all that has happened, is astonishing. As the Court of Appeals commented on one of the State Board's

arguments in Rules Review, it "fails the test of common sense." *Rules Review*, slip op. at 24.

In contrast to the persona implied by the State Board in its arguments, the Superintendent has approached this case with thoughtfulness and equanimity. Upon being recognized by the three judge panel as a stakeholder in January and, later as a named defendant, the Superintendent did not storm the barricades seeking a reconsideration of the original temporary restraining order. Rather, he agreed to wait until a ruling from the three judge panel before revisiting the issue. In the meantime, he performed his job and attempted to reach common ground with the State Board. The State Board recently went so far as to commend the Superintendent for negotiating in good faith in the ultimately unsuccessful attempt to craft a consent order that would have made the current exercise unnecessary.[9] Had the three judge panel ruled for the State Board instead of unanimously in favor of the Superintendent, it is safe to surmise that he would not be arguing in opposition to a motion to stay on appeal. But that is not what happened.

Each day the original TRO is allowed to remain effective, there is irreparable harm, not only to the Superintendent and General Assembly, but to the citizens of North Carolina who elected them. The Superintendent has served nearly one quarter of his term. The General Assembly's will expressed in H.B. 17 has

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[9] See Appellate Motion to Stay, Exhibit G, p. 2.

been subverted to a TRO for nine months. The statutory process for the appointment of and ruling by a three judge panel has produced a unanimous ruling based on exhaustive briefing and argument. The citizens of North Carolina have a right to expect that their exercise of the franchise will be respected, and their choices allowed to exercise their duties and rights as provided by law. The State Board's motion to stay pending appeal should be denied.

CONCLUSION

For the reasons stated and upon the authorities cited, the defendant, North Carolina Superintendent of Public Instruction Mark Johnson, respectfully prays that this Court deny the plaintiff's motion for stay, and dismiss plaintiff's petition for writ of *supersedeas*.

This the 6th day of October, 2017.

BLANCHARD, MILLER, LEWIS & ISLEY, P.A.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing **Defendant Mark Johnson's Response in Opposition to Plaintiff's Motion for Temporary Stay and Petition for Writ of *Supersedeas*** was served upon the following attorneys by U.S. Mail and e-mail to the following:

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