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 REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT AND MOTION FOR PRELIMINARY INJUNCTION**

Pursuant to the Court's March 1, 2017 case management order, the North Carolina State Board of Education respectfully submits the following reply in support of its motion for summary judgment and motion for preliminary injunction.

ARGUMENT

I. THE SPI'S ARGUMENTS ARE UNAVAILING.

A. The SPI's dismissive treatment of both North Carolina and out-of-state authority reveals the weaknesses in the SPI's position.

In the SPI's response, he implies that the Board lacks authority for a bedrock principle of constitutional law: that a constitutional body's powers and duties cannot be transferred to someone else without a constitutional amendment. The SPI chides the Board for citing cases from other state supreme courts, treatises, and law review articles rather than citing more North Carolina law. SPI Res. Br. at 1-3.

As the Board has repeatedly pointed out, however, no North Carolina court has ever addressed this precise issue because the General Assembly has never been so bold. Regardless, the SPI's criticism is unwarranted for multiple reasons.

First, Defendants overlook the Board's citation of *State v. Camacho*, a decision of the North Carolina Supreme Court. 329 N.C. 589, 594, 406 S.E.2d 868, 871 (1991). *Camacho* held that when the North Carolina Constitution confers powers and duties on a constitutional officer, any "encroachment" by other officers "invade[s] the province of an independent constitutional officer" and violates the North Carolina Constitution. Board Br. at 5 (citing *Camacho*).

In *Camacho*, the trial court determined that it was impermissible for a district attorney to employ a former public defender, and it directed the Attorney General's office to take over a prosecution. 329 N.C. at 591-93, 406 S.E.2d at 869-70. The Supreme Court reversed. *Id.* The Court held that because district attorneys are independent constitutional officers, the trial court could not transfer the district attorney's constitutional powers to another constitutional officer. *Id.*

The same legal principle applied in *Camacho* applies here. Despite this, the SPI ignores *Camacho* in his response.

Second, even the State's brief reveals North Carolina authority that undermines the SPI's arguments. State Res. Br. at 3 (citing *King v. Hunter*, 65 N.C. 603 (1871)). In *King*, the North Carolina Supreme Court considered whether the legislature could strip a local sheriff of his tax-collection duties and transfer them to a tax collector. 65 N.C. at 609. The 1868 Constitution had established the office of County Sheriff, with each sheriff's salary, fees and emoluments to be "prescribed by law." *Id.* In special legislation, however, the General Assembly attempted to

empower one county to strip its sheriff of his tax-collection duties and transfer those duties to a newly appointed tax collector. *Id.* at 609-10.

The Supreme Court struck down the legislation as unconstitutional. *Id.* at 612. The Court's "serious objection" to the law was that the attempted "division of the duties and emoluments of the Sheriff . . . [broke] faith with the people" who had chosen the Sheriff to perform the duty of tax collection. *Id.* As the Court noted, if a constitutional officer's duties could be transferred without a constitutional amendment, then "every other [constitutional] office in the State may be cut up." *Id.* Even the Governor would not be immune. *Id.*

In other words, the Supreme Court in *King* exposed the same constitutional flaws that the Board has pointed out here. *Compare id.* at 612*, with* Board Br. at 12-14 (explaining that the State's position has no limiting principle).

Finally, in view of the dozens of decisions from state supreme courts across the country that reject the SPI's position, the SPI's dismissive response is revealing.[1] The SPI's response brief does not confront *any* of these decisions.

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[1] The Board cited seven out-of-state decisions as illustrative, using a "*see, e.g.*" cite to signal to the Court that there are many other similar decisions. Board Br. at 12-13. There are, in fact, at least dozens more. *See, e.g.*, *Powers v. State*, 318 P.3d 300, 308 (Wyo. 2014); *State ex rel. Discover Fin. Servs. v. Nibert*, 744 S.E.2d 625, 645 (W. Va. 2013); *State v. Hagerty*, 580 N.W.2d 139, 147 (N.D. 1998); *Murphy v. Yates*, 348 A.2d 837, 846 (Md. 1975); *Allen v. Rampton*, 463 P.2d 7, 13 (Utah 1969); *Thompson v. Legislative Audit Comm'n*, 448 P.2d 799, 801-02 (N.M. 1968); *Irishman's Lot, Inc. v. Sec. of State*, 62 N.W.2d 668, 670 (Mich. 1954); *Tucker v. State*, 35 N.E.2d 270, 292 (Ind. 1941); *Wright v. Callahan*, 99 P.2d 961, 966 (Idaho 1940); *State ex rel. Josephs v. Douglass*, 110 P. 177, 180 (Nev. 1910); *In re House Resolution*, 21 P. 486, 487 (Colo. 1888); *Blair v. Marye*, 80 Va. 485, 486 (Va. 1885); *State ex rel. Kennedy v. Brunst*, 26 Wis. 412, 414 (Wis. 1870); *Commonwealth v. Gamble*, 62 Pa. 343, 349 (Pa. 1869).

Instead, the SPI simply acts as though these decisions do not exist. The SPI apparently believes that even though other courts have "uniformly denounced" his argument, *Hudson v. Kelly*, 263 P.2d 362, 368 (Ariz. 1953), no North Carolina court has done so yet, so he should win.

That argument needs no rebuttal.

B. The SPI fails to grasp the critical distinction between a "limitation" and *elimination*.

The SPI acknowledges that no North Carolina decision has ever sustained a legislative maneuver like the one at issue here. SPI Res. Br. at 2 (citing decisions but concluding that "it is not the results of these cases that dictate the result in the present case"). Instead, the SPI points to general language in *Guthrie* and *Whittle* acknowledging that, under the phrase "subject to laws" in Article IX, Section 5, the General Assembly may impose certain "limitations" on the Board.[2]

But the SPI asks the Court to push that concept of "limitation" a giant step further—a step that no North Carolina court has sustained, and which other state supreme courts have "uniformly denounced." *Hudson*, 263 P.2d at 368. According to the SPI, the General Assembly can *eliminate* the Board's powers and duties

[2] As the Board has explained, the narrow decisions in *Guthrie* and *Whittle* addressed specific instances in which the General Assembly merely "checked" the Board under Article IX, Section 5's built-in, constitutional checks-and-balances mechanism. Bd. Res. Br. at 5-6. Those fact-specific holdings offer no authority for the SPI's broad, sweeping perspective, which has no limiting principle—a point that the SPI's response leave unrebutted. Bd. Br. at 12-14.

altogether, as it has attempted to do here.[3] In other words, the SPI sees no difference between a "limitation" and *elimination*.

To its credit, the State attempts to distance itself from the SPI, acknowledging that for Article IX, Section 5 purposes, there is a critical distinction between a "limitation" and "elimination."[4] The State's response brief makes the following concessions:

- "It is accurate to note that the authority of a constitutional office cannot be transferred to another entity through the auspice of legislative enactments." State Res. Br. at 3.
- "Naturally, the State does not contend that the General Assembly maintains unbridled authority to enact laws pertaining to the role of the Board." State Res. Br. at 6, n.2.
- "It is certainly true that the legislature could not reduce [a] constitutional office to an empty shell." State Res. Br. at 6.
- The State "agrees" that "[the Board's] constitutionally accorded authority cannot be usurped by legislation." State Res. Br. at 1.

The State was correct to concede these points, and the SPI should have done the same.

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[3] The SPI has no authority for this proposition. Again, neither *Guthrie* nor *Whittle* even remotely support the SPI's view.

[4] While the State concedes this point, it goes on to contend—without elaborating—that the Transfer Legislation "does not strip away the Board's constitutional powers." State Res. Br. at 5. That argument is untenable. The General Assembly copied and pasted the Board's constitutional powers and duties from the text of the North Carolina Constitution into the Transfer Legislation, then replaced the words "State Board of Education" with "Superintendent of Public Instruction." Board Br. at 2-3. If that does not constitute stripping the Board of its constitutional powers, it is difficult to imagine what would. Moreover, the State has already conceded in open court that the Transfer Legislation would reduce the Board to an empty shell. *Id.*, Ex. D at 29.

After all, *eliminating* a constitutional entity's powers and duties—that is, eviscerating them to the point that the constitutional body is unable to discharge its constitutional functions—is never permissible without a constitutional amendment. *See, e.g.*, *Powers v. State*, 318 P.3d 300, 322 (Wyo. 2014) ("We recognize that the 2013 Act does not 'eliminate' the office of Superintendent. It has, however, effectively marginalized the office and has left it 'an empty shell.'"); *Hudson*, 263 P.2d at 368 (holding that even when all of a constitutional body's powers are legislatively prescribed, the legislature cannot reallocate the body's powers and "leave the office as an empty shell," and that "[s]uch attempts have uniformly been denounced by courts of last resort"); *Wright v. Callahan*, 99 P.2d 961, 966 (Id. 1940) (holding that transferring powers, as opposed to limiting powers, "would be to permit the legislature to nullify the Constitution and reduce it to a mere scrap of paper"); *State ex rel. Mattson v. Kiedrowski*, 391 N.W.2d 777, 782 (Minn. 1986) ("By statutorily abolishing all of the independent core functions of a state executive office, the legislature, in effect, abolishes that office, and the will of the drafters, as expressed in Article IX, is thereby thwarted."); *Thompson*, 448 P.2d at 801 ("Of course the legislature cannot abolish a constitutional office nor deprive the office of a single prescribed constitutional duty. Nor can this be done by indirection, such as depriving him of all statutory duties, thereby leaving the office in name only, an empty shell.").

It is not difficult to tell the difference between a permissible "limitation" and impermissible *elimination*. A 1994 North Carolina Attorney General's Opinion applying Article IX, Section 5 illustrates the point.

That Attorney General's Opinion applied the common-sense distinction between a "limitation" and elimination to proposed legislation that attempted a similar (though far less egregious) transfer of the Board's constitutional powers and duties. 1994 Op. N.C. Att'y Gen. 41. The proposed legislation at issue there would have created a Professional Teaching Standards Board. *Id.* The Standards Board would have been charged with setting standards for licensing teachers and issuing, renewing, and revoking licenses—responsibilities that fell within the State Board of Education's constitutional powers and duties. *Id.* The question before the Attorney General was whether the legislation was constitutional.

The Attorney General correctly explained that the answer "depends on whether the transfer of the State Board's constitutional duty . . . to another body to exercise independently of the State Board is only a *limitation or revision* of State Board's constitutional duty," or whether it went further and effectively amounted to an *elimination* of that duty—an attempted legislative transfer of constitutional power without a constitutional amendment. *Id.* (emphasis added.) In a holding that is directly on point here, the Opinion answered that question as follows:

> [A] legislative act transferring the State Board's constitutional power regarding teacher licensing to another agency to be exercised by that agency independently of the State Board would amount to more than a limitation or revision of the constitutional powers of the State Board. It would amount to the *denial* to the State Board of a power conferred on the State Board by the people.

> While the General Assembly has the power to limit and revise the manner in which the State Board exercises its constitutional powers, the General Assembly in our opinion likely does not have the power to take away completely a constitutionally specified power of the State Board and give it to another agency.

Id. (emphasis added).

This critical distinction between a "limitation" and *elimination* dictates the same result here.

In sum, the decisions describing "limitations" on the Board do not support the SPI's view that the General Assembly may *eliminate* the Board's constitutional powers and duties. This notion has been "uniformly denounced" by state supreme courts, debunked by a North Carolina Attorney General's Opinion, and prompted the SPI's co-defendant, the State, to distance itself from the SPI's aggressive claim. This Court should reject it here as well.

C. The SPI's attempt at a severability argument fails.

In response to the Board's motion for summary judgment, the SPI has raised the issue of severability. A severability analysis, however, has no application here.

Session Law 2016-126 is a single piece of legislation with 43 separate sections and thousands of lines of text, some of which comprise the Transfer Legislation. If the Board were challenging Session Law 2016-126 in its entirety, then perhaps the SPI's proposed severability analysis would be appropriate.

The Board is not challenging the entire session law, however. Instead, the Board intentionally challenged no more of the legislation than necessary to safeguard the people of North Carolina's express delegation of constitutional powers and duties to the Board.

The Board did so by only challenging those select provisions of Session Law 2016-126 in which the General Assembly attempted to transfer the Board's constitutional powers and duties to the SPI. Am. Compl. ¶¶ 24-25. The Board identified those provisions of Session Law 2016-126 in the complaint at a granular level, listing each of them individually, setting forth the statutes that they attempt to amend, and categorizing which of the Board's constitutional powers and duties they sought to transfer. Am. Compl. at 6-10. Then, in its briefs, the Board repeated this delineation, appropriately referring to and incorporating those portions of the complaint that targeted certain provisions of Session Law 2016-126 with precision.

Put simply, the Board appropriately used a scalpel, not a sledgehammer, to challenge the law. As a result, the remaining portions of Session Law 2016-126—namely, Sections 13, 18-23, 26-27, and 31-43—are not at issue in this litigation.

Given the nature of the Board's narrow challenge, the SPI's discussion of a "severability defense" is misguided. As the Board has explained in its complaint, opening brief, and response brief, the people of North Carolina in their constitution mandated that the SPI would be subservient to the Board, not the other way around. Yet on the face of each of the specifically challenged provisions of Session Law 2016-126, the General Assembly attempted to flip that constitutional structure on its head. Each of these specifically challenged provisions attempts to make the SPI—instead of the Board—in charge of either: (1) various duties relating to the general supervision and administration of the public schools, *compare* N.C. Const. art. IX, § 5, *with* Am. Compl. at 6-9 (specifying the specific sections of Session Law

2016-126 and the statutes they amend); and (2) various duties relating to the management of statewide public school budgets and finances, *compare* N.C. Const. art. IX, § 5, *with* Am. Compl. at 9-10 (specifying the specific sections of Session Law 2016-126 and the statutes they amend).

Notably, in the face of the Board's specific, targeted challenge, neither Defendant has attempted to rebut the points above. Nor has either Defendant offered a reason why any of the challenged provisions could or should be treated differently from the rest. Instead, the State and the SPI have focused their efforts on defending this case based on the phrase "subject to laws," or with other procedural defenses like the State's sovereign immunity defense. Unless and until the SPI attempts to distinguish a challenged provision from the rest, and unless and until the SPI attempts to offer a plausible rationale for why that provision does not invert the roles of the Board and the SPI, the Board is not obligated to anticipatorily concoct and refute potential rebuttal points for the SPI.

Even if this were the case, moreover, the SPI's attempt at a severability argument would still fail. When the State attempts to mitigate a constitutional challenge by clinging to a boilerplate severability clause, the Court must strike down the law as a whole if it is "a carefully meshed system" of legislation, "the cornerstones of which" are unconstitutional. *Flippin v. Jarrell*, 301 N.C. 108, 116, 270 S.E.2d 482, 489 (1980); *see also, e.g.*, *G.I. Surplus Store, Inc. v. Hunter*, 257 N.C. 206, 214, 125 S.E.2d 764, 769-70 (1962).

Here, the constitutional flaws in the "cornerstones" of the Transfer Legislation—discussed exhaustively in the complaint and the briefs[5]—are so broad and sweeping that, if upheld, they would effectively subsume all of the other provisions of the Transfer Legislation, rendering the remaining provisions superfluous.

Conversely, if the Court were to strike down only the cornerstones of the Transfer Legislation and leave other remnants of the unconstitutional transfer in place, it would result in dysfunction.[6] After all, if the Board has the constitutional power and duty to direct the SPI and determine what authority it chooses to *delegate* to the SPI, that power and duty cannot exist alongside statutory provisions dictating what the SPI *shall administer* in the absence of Board input, direction, and approval. The Transfer Legislation must therefore "fall as a whole." *Flippin*, 301 N.C. at 118, 270 S.E.2d at 488-89.

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[5] Those cornerstones of the Transfer Legislation are in Section 3 (amending N.C. Gen. Stat. § 115C-19) and Section 4 (amending N.C. Gen. Stat. §§ 115C-21(a)(1), 115C-21(a)(5), and 115C-21(b)(1b)).

[6] *See, e.g.*, N.C. Sess. Law 2016-126 § 4 (amending N.C. Gen. Stat. § 115C-21(a)(1)) (mandating that the Board's staff "shall be under the control and management of the [SPI]"); N.C. Sess. Law 2016-126 § 4 (creating N.C. Gen. Stat. § 115C-21(a)(9)) ("It shall be the duty of the [SPI] . . . [t]o have under his or her direction and control all matters relating to the provision of staff services . . ."); N.C. Sess. Law 2016-126 § 6 (amending N.C. Gen. Stat. § 115C-410) ("[T]he [SPI] is authorized to create and administer such special funds . . . ."); N.C. Sess. Law 2016-126 § 10 (amending N.C. Gen. Stat. § 143A-44.1) ("The head of the Department of Public Instruction is the . . . [SPI].").

In sum, no severability analysis is necessary or appropriate. Moreover, even if the Court were to apply a severability analysis, the Transfer Legislation must fall as a whole. Thus, the SPI's attempted severability argument fails.

D. The SPI has failed to explain away the State's concessions.

The Board's opening brief identifies several concessions by the State that warrant summary judgment in the Board's favor—for example, the State's concession that "the General Assembly cannot take away [the Board's] constitutional mandates." Board Br. at 11.

In response, the State was silent. The SPI, meanwhile, offers several different excuses for the State's concessions. Each of them fails.

First, the SPI argues that the State's concessions are in the eye of the beholder, because it depends on "what [the State] meant by phrases like 'take away' and 'constitutional mandates.'" SPI Res. Br. at 9. The phrase "the General Assembly cannot *take away* [the Board's] *constitutional mandates*" has only one meaning: its plain meaning. Further proving that point, the SPI fails to offer any other possible meaning.

Second, the SPI questions whether the Attorney General's office had authority to make the concessions that it did. SPI Res. Br. at 10. The SPI quotes a 1994 Court of Appeals decision for the proposition that attorneys cannot "waive or surrender the substantial legal rights" of clients "[i]n the absence of express authority." *Id.* That assertion is odd given that a North Carolina Deputy Attorney General has express authority to make binding concessions on the State. *See* N.C. Gen. Stat. § 114-4.4 (recognizing authority of deputy attorneys general); *see also,*

e.g., *City of Asheville v. North Carolina*, No. 391PA15, 794 S.E.2d 759, 772 (N.C. Dec. 21, 2016) (binding the State with concessions made by deputy attorney general during oral argument). The State, like everyone else, does not get a mulligan.

Finally, the SPI argues that because the State's concessions were about the *law*, they should not count. SPI Res. Br. at 10. While it is true that concessions about the law cannot bind the Court, when opposing parties agree on a legal proposition that is outcome-determinative, it is a strong indication of what the law actually is. *See, e.g.*, *Dickson v. Rucho*, 366 N.C. 332, 342, 737 S.E.2d 362, 370 (2013) (applying party's requested legal interpretation of a statute in light of opposing counsel's concessions).

In sum, Defendants are left with the State's concession that the legislature "cannot take away [the Board's] constitutional mandates." Board Br. at 11.

II. DEFENDANTS' REMAINING ARGUMENTS ARE ADDRESSED IN THE BOARD'S EARLIER BRIEFS.

Defendants' remaining arguments not addressed above have been fully addressed by the Board's earlier briefs. Rather than belabor these issues or engage in repetition, the Board directs the Court's attention to the following points:

- Older statutes, such as the 1995 legislation involving the Board, are irrelevant to this Court's enforcement of the North Carolina Constitution. Board Res. Br. at 11-13.
- The Transfer Legislation is not a "codification" of the SPI's limited constitutional role. Board Res. Br. at 9-11.

III. DEFENDANTS HAVE EFFECTIVELY CONCEDED THAT A PRELIMINARY INJUNCTION IS APPROPRIATE.

While the SPI raises little opposition to the Board's request for a preliminary injunction, the State attempts to put up a fight. Two points, however, undercut the State's arguments.

First and foremost, as the Board's opening brief showed, constitutional violations amount to *per se* irreparable harm as a matter of law. Board Br. at 16-18. Thus, in a constitutional challenge like this one, the traditional "irreparable-harm analysis" for purposes of a preliminary injunction simply collapses into a merits analysis, making this Court's task simple. *Id.*

In both of its briefs on the requested preliminary injunction, the State leaves this point of law unrebutted. Likewise, so does the SPI. Thus, all the parties apparently agree that the law requires no further showing of irreparable harm.

Second, the Board's opening brief and accompanying affidavit of the Board's Chairman, William W. Cobey, Jr., described in great detail the irreparable harm that would occur immediately without a preliminary injunction to preserve the status quo. Specifically, Chairman Cobey's affidavit describes how the Transfer Legislation would reduce a nearly 150-year-old constitutional entity to an empty shell, and would immediately move the entire $10 billion public school system under the control of a single individual for the first time in North Carolina's history. Board Br. at 17-18 (citing Cobey Aff. ¶¶ 9-10).

The State makes light of these real, tangible dangers to our public school system, accusing the Board of offering "speculative negative repercussions," State

Br. at 21, and "unfounded predictions of constitutional ruination." State Res. Br. at 9. Yet the State has not offered a factual rebuttal—much less a counteraffidavit—suggesting that the serious harm forecast by the Board will not come to pass. In view of this oversight, there is no support for the State's hyperbole.

Finally, the State closes its preliminary injunction arguments with the idea that "the Board['s] attempt to block the enforcement of a duly elected law . . . potentially . . . violate[s] the separation of powers doctrine" because it would get in the General Assembly's way and offend our "tripartite structure of . . . government." State Br. at 23. The State seems to have overlooked one of the oldest and most critical functions of the judiciary: that when the legislature enacts laws that are unconstitutional, our courts have a *duty* to declare those laws unconstitutional. *Bayard v. Singleton*, 3 N.C. 42 (1787); *see also, e.g.*, *City of Asheville*, No. 391PA15, 794 S.E.2d at 766.

For all the reasons above and in the Board's prior briefs, the Court should discharge that duty here.

CONCLUSION

The Board respectfully requests that the Court grant its motion for summary judgment and grant its motion for a preliminary injunction while the Court considers the Board's motion for summary judgment.

Respectfully submitted the 9th day of June, 2017.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing document was served by e-mail and hand delivery prior to 5:00 p.m. to the following:

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This the 9th day of June, 2017.

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