NOW COMES the North Carolina Superintendent of Public Instruction Mark Johnson (hereinafter referred to as the “Superintendent”), by and through the undersigned counsel, and hereby submits the following Brief in Support of Motion for Summary Judgment.

**STATEMENT OF THE CASE**

Plaintiff filed a Verified Complaint for Declaratory and Injunctive Relief and Motion for Preliminary Injunctive Relief on 29 December 2016. By order of the Chief Justice of the North Carolina Supreme Court, the three judge panel obtained this case on 3 January 2017. Plaintiff filed its motion for summary judgment on 30 January 2017. The three judge panel issued a case management order on 16 February 2017. Plaintiff filed its Amended Verified Complaint for Declaratory and Injunctive Relief and Motion for Preliminary Injunctive Relief on 10 March 2017. The Superintendent filed his Answer and Defenses, Motion for Summary Judgment and his Affidavit on 12 April 2017. This case is ripe for hearing upon all motions for summary judgment. Summary judgment will resolve all claims for relief in the pleadings.

**UNDISPUTED FACTS**

Instruction’s Role as the Administrative Head of the Department of Public Instruction, To Change the Appointments Process for the Boards of Trustees for the Constituent Institutions of the University of North Carolina, To Modify the Appointment of Heads of Principal State Departments, and to Implement the Statewide Classification and Compensation System” in the North Carolina General Assembly. The North Carolina House and Senate ratified HB 17 on 16 December 2016. On 19 December 2017, the Governor signed HB 17 into law as Session Law 2016-126, a copy of which is attached hereto as Exhibit “A.”

Article IX, Section 5 of the North Carolina Constitution states as follows:

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.

N.C. CONST., Art. IX, § 5 (Emphasis supplied).

As it is plainly stated in the above-referenced provision of the North Carolina Constitution, the General Assembly is the definitive promulgator of powers and duties of the State Board of Education (“State Board”). Since the People ratified the 1971 North Carolina Constitution, there have been numerous amendments and modifications to the powers and duties of the State Board as well as the Superintendent by the General Assembly. Examples of the shifting roles and duties of the State Board and the Superintendent through specific legislation passed by the General Assembly may be seen by examining a number of Session Laws from 1971 through 2016, portions of which are attached hereto as Exhibit “B”:

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1The Ratified Bill title changed to, “An Act to Clarify the Superintendent of Public Instruction’s Role as the Administrative Head of the Department of Public Instruction, To Change the Appointments Process for the Boards of Trustees for the Constituent Institutions of the University of North Carolina, To Modify the Appointment of Heads of Principal State Departments, and to Establish Task Force for Safer Schools.”
1. Session Law 1971-864 – An Act to Reorganize State Government (Creation of Department of Public Education and defining roles of State Board and Superintendent);

2. Session Law 1981-423 – An Act to Recodify Chapter 115 of the General Statutes, Elementary and Secondary Education (Recodifies N.C.G.S. §115 as N.C.G.S. §115C and confers additional powers granted to the Superintendent, e.g., N.C.G.S. §115C-21(a)(5) amended an administrative duty of the Superintendent by adding the following language, “To have under his direction, in his capacity as the constitutional administrative head of the public school system, all those matters relating to the supervision and administration of the public school system, except the supervision and management of the fiscal affairs of the State Board.”);

3. Session Law 1987-1025 – An Act to Provide a Governance Structure for the Department of Public Education (Continued expansion of powers to the Superintendent, e.g., N.C.G.S. §115C-21(a)(1) deleted language referring to the State Board and read as amended, “To organize and establish a Department of Public Instruction which shall include such divisions and departments as are necessary for supervision and administration of the public school system.” For the second time since 1981, N.C.G.S. §115C-21(a)(5) was amended again to read as follows, “To have under his direction, in his capacity as the constitutional head of the public school system, all those matters relating to the supervision and administration of the public school system.”);

4. Session Law 1993-522 – An Act to Delete the References to the Department of Public Education; (Portions of the preamble in this session law are notable: “... Whereas, the functions of the Department of Public Education have been and continue to be performed by the Department of Public Instruction under the supervision of the Superintendent of Public Instruction, and Whereas, the current references in the General Statutes to the Department of
Public Education and the Department of Public Instruction have resulted in confusion about the respective roles of the State Board of Education and the Superintendent that resulted in litigation between them; and Whereas, the General Assembly is authorized under Article IX, Sections 2 and 5, and Article III, Section 7(1) and (2), of the Constitution to enact legislation defining the respective roles of the State Board of Education and the Superintendent of Public Instruction under the Constitution.”;

5. Session Law 1995-72 – An Act to Clarity the Statutes so as to Streamline the Operations of the State Education Agency (This session law removed a great deal of duties from the Superintendent);

6. Session Law 1995-393 – An Act to Further Streamline the Statutes so as to Clarify the Constitutional Role of the State Board of Education (This session law removed a great deal of duties from the Superintendent); and

7. Session Law 2016-126 – An Act to Clarify the Superintendent of Public Instruction’s Role as the Administrative Head of the Department of Public Instruction, To Change the Appointments Process for the Boards of Trustees for the Constituent Institutions of the University of North Carolina, To Modify the Appointment of Heads of Principal State Departments, and to Establish Task Force for Safer Schools. (This session law is attached as Exhibit “A” and will be discussed in further detail in the Superintendent’s Argument).

LEGAL STANDARD

unconstitutional unless the Constitution clearly prohibits the statute.” *Id.* at 167, 594 S.E.2d at 7. Thus, there is a strong presumption that HB 17 is constitutional. *Id.* at 168, 594 S.E.2d at 8.

Summary judgment is proper when “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.” N.C. Gen. Stat. § 1A-1, Rule 56(c). Summary judgment is designed to eliminate the necessity of a formal trial where only questions of law are involved and a fatal weakness in the claim of a party is exposed. *Lawyers Title Ins. Corp. v. Zogreo*, 208 N.C. App. 88, 100, 702 S.E.2d 222, 230 (2010). As will be shown below, the Superintendent is entitled to summary judgment based upon the clear language of Article IX, Section 5 of the North Carolina Constitution.

**ARGUMENT**

**I. THE CONSTITUTIONAL GRANT OF POWERS TO THE NORTH CAROLINA STATE BOARD OF EDUCATION MAY BE LIMITED AND DEFINED BY “LAWS ENACTED BY THE GENERAL ASSEMBLY.”**

In its amended complaint the State Board stakes an aggressive claim to inviolable authority over essentially every aspect of the operation of North Carolina’s public schools. This claim, however, is based upon a misinterpretation of Article IX, § 5 of the Constitution of North Carolina, because it ignores that the People, in creating the State Board, made it wholly subservient and auxiliary to the General Assembly. North Carolina courts have recognized the primacy of the General Assembly time and again in cases involving questions about the powers and duties of the State Board. In the current case, the challenged legislation is to a great degree directed toward restoring the balance of powers that existed between the parties in 1995 prior to substantial revisions to Chapters 115C, 126, and 143. A ruling that such legislation amounts to
an unconstitutional intrusion upon the powers of the State Board, aside from reversing decades-old Supreme Court precedent, would invert the hierarchy of authority established by the citizens of this State, enshrining the State Board above the elected General Assembly as the supreme policy-setting entity for the public schools. Such a ruling also would bar the Legislature from prescribing duties for the elected Superintendent, in violation of Article III, § 7. The motions for summary judgment of the State of North Carolina and the Superintendent should be granted, and the motion of the plaintiff State Board denied.

A. North Carolina Courts Uniformly Have Recognized the Supremacy of the General Assembly in Regulating the Authority of the State Board and the Superintendent.

The outcome of the present case will turn on the Court’s analysis of a simple eight word phrase: “subject to laws enacted by the General Assembly.” These words are at the end of, and qualify the entirety of, the constitutional provision conferring powers and duties to the State Board of Education:

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.


A few months after the effective date of the 1971 revisions to Article IX (Education) of the Constitution, the Supreme Court considered a challenge to the State Board’s constitutional authority and rendered what remains today the most important interpretation of the “subject to” phrase, holding:

Where, as here, power to make rules and regulations has been delegated to an administrative board or agency by the Constitution, itself, the delegation is absolute, except insofar as it is limited by the Constitution of the State, by the Constitution of the United States or by the Legislature . . . pursuant to power expressly conferred upon it by the Constitution.
Guthrie v. Taylor, 279 N.C. 703, 712 185 S.E.2d 193, 200 (1971). Guthrie involved a legal challenge by a North Carolina schoolteacher to a teacher certification regulation promulgated by the State Board, claiming, among other things, that the State Board exceeded its constitutional and statutory authority in enacting such a regulation. The Court began its analysis by reviewing the constitutional grant of power to the State Board, specifically, the power “generally to supervise and administer the free public school system of the State and make all needful rules and regulations in relation thereto.” Id. at 709-10, 185 S.E.2d at 198 (quoting N.C. Const., Art. IX, § 9 (1868)). After quoting the “subject to such laws as may be enacted from time to time by the General Assembly” phrase at the end of Article IX, § 9, the Supreme Court acknowledged the principle that should guide the outcome of this case: “The last sentence of Art. IX, § 9 above quoted, was 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.” Id. at 710, 185 S.E.2d at 198 (Emphasis supplied).

It is important to note that the Supreme Court in Guthrie made clear that the General Assembly has plenary power to limit and revise even the express authority conferred upon the State Board in the Constitution. The genius of this constitutionally provided legislative check on the exercise of power by the State Board is that it allows for a broad, nearly unlimited grant of power to the State Board itself in Article IX. That is, the State Board has the constitutional authority to supervise and administer the public schools. These words – “supervise” and

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2 The Supreme Court in Guthrie actually considered the predecessor to Art. IX, § 5 of the Constitution of 1971 - Art. IX, § 9 of the Constitution of 1868 – the last sentence of which read: “All 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.” N.C. Const., Art. IX, § 9 (1868). The Guthrie Court made note of the revisions to the Constitution and even quoted the new provision, observing that “there is no difference in substance between the powers of the State Board of Education with reference to this matter under the old and the new Constitutions.” Id. at 710, 185 S.E.2d at 199.
“administer” – cover essentially everything. There is no need to weigh down the Constitution with a laundry list of the different tasks the State Board is allowed to do. The State Board can do anything in furtherance of its authority to supervise and administer the public schools. Anything that is, except those things limited by the General Assembly.

Again, Guthrie makes this clear. The plaintiff teacher complained that the State Board lacked authority to enact regulations pertaining to the certification of teachers. Nowhere in the Constitution does (or did) any provision specifically address certification of teachers. Nonetheless, these broad, general grants of authority to “supervise” and “administer” the public schools “conferred upon the [State Board] the powers so enumerated, including the powers to regulate the salaries and qualifications of teachers and to make needful rules and regulations in relation to this and other aspects of the administration of the public school system.” Id. “Thus,” the Court continued, “in the silence of the General Assembly, the authority of the State Board to promulgate and administer regulations concerning the certification of teachers in the public schools was limited only by other provisions in the Constitution itself.” Id. at 710, 195 S.E.2d at 198-99.

In a more recent case, the Supreme Court provided further illustration of the plenary nature of the General Assembly’s oversight powers with regard to public education. State v. Whittle Communications presented the question of whether the State Board of Education’s broad constitutional authority to supervise and administer the public schools of North Carolina could be curtailed by a legislative enactment transferring certain supervisory authority instead to local school districts. 328 N.C. 456, 402 S.E.2d 556 (1991). The controversy arose out of the development and promotion by defendant Whittle Communications (Whittle) of an in-school video news program called Channel One, which was designed to keep students informed on
current affairs. *Id.* at 458, 402 S.E.2d at 557. The daily program was twelve minutes long, with
two of the twelve minutes consisting of commercial advertising. *Id.* at 459, 402 S.E.2d at 557.

Whittle made a presentation concerning Channel One to the State Department of Public
Instruction in July, 1989, and began marketing to local school boards in the fall of 1989. *Id.* at
459, 402 S.E.2d at 558. The State Board of Education considered Channel One at its regular
January meeting and decided it needed additional time to study the matter before its February
meeting. *Id.* On 1 February 1990, the State Board adopted a temporary rule prohibiting local
school boards from entering into contracts that limited teacher discretion regarding presentation
of subject matter and required students to watch commercials – the very type of contract school
boards were contemplating signing with Whittle. *Id.* at 459-60, 402 S.E.2d at 558. The
Thomasville City Board of Education entered into a contract with Whittle to provide the Channel
One programming one week after the State Board of Education promulgated the temporary rule
prohibiting such contracts. *Id.* at 459, 402 S.E.2d at 558. Eleven days after execution of the
contract by the Thomasville Board, the State Board filed a lawsuit against Whittle and the
Thomasville Board seeking a declaration that the contract between the defendants was void and
unenforceable. *Id.* at 461, 402 S.E.2d at 558. As in the present case, the State Board also sought
and obtained a temporary restraining order enjoining the defendants from implementing the 8
February 1990 contract. *Id.* at 461, 402 S.E.2d at 559.

The Superior Court dismissed the State Board’s complaint and declared that the
Thomasville Board’s contract with Whittle was valid and enforceable under North Carolina law,
but its order did not squarely address the issue that became the basis of the Supreme Court’s
decision affirming the outcome. *Id.* at 461-62, 402 S.E.2d at 559. The Supreme Court, instead of
focusing on less substantive issues such as exhaustion of administrative remedies or whether the
State Board followed proper procedure in enacting the temporary rule, looked directly to the
question of the source of authority that might support the State Board’s attempt to prohibit
contracts like the one between the Thomasville Board and Whittle. Channel One, the Court
observed, constituted “supplementary instructional materials,” as opposed to “textbooks,” and
while oversight of textbooks is the job of the State Board, supplemental materials are the
responsibility of local school boards. *Id.* at 463, 402 S.E.2d at 560. Justice Frye, writing for six
members of the Court,\(^3\) held:

We conclude that the State Board of Education did not have the authority to
promulgate a temporary rule governing this contract because the contract involves
supplementary materials, an area which the General Assembly has delegated to
the local school boards to oversee. *See* N.C. Gen. Stat. § 115C-98(b).

*Id.* at 462-63, 402 S.E.2d at 559-60.

Just as in *Guthrie*, the *Whittle Communications* opinion explicitly acknowledges the
supremacy of the Legislature in setting educational policy and allocating responsibilities among
the various entities of the public school system in North Carolina:

Article IX, § 5 of the North Carolina Constitution, which grants the State Board
the authority to “make all needed rules,” also limits this authority by making it
“subject to the laws enacted by the General Assembly.” Thus, we must examine
our statutes to ascertain whether the General Assembly has enacted laws which
would limit the power of the State Board in the area of selection of materials such
as Channel One which we conclude is a supplementary instructional material.

*Id.* at 464, 402 S.E.2d at 560-61. It is noteworthy that whereas in this case the State Board of
Education is complaining about a legislative allocation of responsibilities as between two
constitutional entities, the *Whittle Communications* Court held that the State Board’s authority to

\[^3\] Justice Harry C. Martin, in dissent, did not raise any question regarding the authority of the General Assembly to
allocate sole responsibility for such contracts to the local school boards despite that such authority clearly falls
within the scope of “supervising” and “administering” the public schools of North Carolina. *See generally, id.* at
472-73, 404 S.E.2d at 566.
“supervise” and “administer” public schools could be legislatively reassigned to local school systems, which are creations of statute. See generally, N.C. Gen. Stat. Chapter 115C, Article 5.

Indeed, Whittle makes clear that these constitutional powers cannot be exercised in a manner that interferes with the authority that the General Assembly has granted to local school boards. The Court does this by juxtaposing the statute that prescribes procedures for local school boards to follow in adopting textbooks against the statute prescribing procedures relating to supplementary materials. Id. at 465-66, 402 S.E.2d at 561. Regarding textbooks, the guiding statute (N.C. Gen. Stat. § 115C-98(a)) “directed the local school boards to adopt rules and regulations concerning the local operation of the textbook program, but these rules and regulations were not to be ‘inconsistent with the policies of the State Board of Education concerning the local operation of the textbook program.’” Id. at 466, 402 S.E.2d at 561. The Court continued:

The General Statutes do not contain a similar direction to the State Board of Education for the adoption of supplementary instructional materials. The only statute which speaks to this issue is N.C.G.S. § 115C-98(b) which directs each local school board to adopt “written policies concerning the procedures” used in the adoption of supplementary instructional materials in its own unit. Furthermore, this statute contains no limitation on the local school boards’ directive to adopt these written policies on supplementary instructional materials similar to the limitation concerning the local adoption of rules dealing with the local operation of the textbook program found in § 115C-98(a). . . . Thus, the General Assembly, by adopting chapter 519 in 1969, placed the decision-making process for the selection and procurement of these supplementary instructional materials in the exclusive domain of the local school boards while clearly making the rules adopted by the local boards concerning textbooks subject to the policies of the State Board.

Id. at 466, 402 S.E.2d at 561-62 (Emphasis supplied). Although the details of Whittle Communications can be somewhat cumbersome, the principle on which the outcome is based is simple – in the North Carolina public schools, the General Assembly is the ultimate arbiter and delegator of powers and duties.
Every grant of power to local school boards by the General Assembly would be unconstitutional if the outcome advocated in this case by the State Board actually were the law of North Carolina. Yet the courts of this State, without exception, have recognized that the General Assembly has the discretion and authority to delegate matters of supervision and administration of public schools to local boards. In a recent case, the Court of Appeals held:

The General Assembly “may delegate to local administrative units the power to make such rules and regulations as may be deemed necessary and expedient, and when so delegated it is peculiarly within the province of the administrative officers of the local unit to determine what things are detrimental to the successful management, good order, and discipline of the schools in their charge and the rules required to produce those conditions.”

*Wake Cares, Inc. v. Wake County Board of Education*, 190 N.C. App. 1, 17, 660 S.E.2d 217, 227 (2008) (quoting *Coggins v. Board of Education of Durham*, 223 N.C. 763, 767, 28 S.E.2d 527, 530 (1944)), see also *Hughey v. Cloninger*, 297 N.C. 86, 93, 253 S.E.2d 898, 903 (1979) (“In its discretion the General Assembly may delegate to local administrative units the general supervision and control of schools within their boundaries.” (citing *Coggins, supra*).

This principle of legislative supremacy in matters of public education has become so well-settled since *Guthrie* that it does not provoke much discussion in the more recent cases. In a 2009 opinion, the Court of Appeals quoted Article IX, § 5 of the North Carolina Constitution in its entirety and observed: “Therefore, this constitutional grant of powers to the BOE may be limited and defined by ‘laws enacted by the General Assembly.’” *Sugar Creek Charter School, Inc. v. Charlotte-Mecklenburg Board of Education*, 195 N.C. App. 348, 351, 673 S.E.2d 667, 670 (2009)⁴ (quoting last sentence of N.C. CONST., Art. IX, § 5). In fact, the State Board itself

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⁴ The heading at the top of the Argument section of this brief is a direct quote of LexisNexis Headnote 5 from this case.
has been admonished previously in the Appellate Division when making overly ambitious claims
to “plenary authority”:

Finally, defendants (including the State Board of Education) claim “exclusive
authority to regulate the professional qualifications of persons employed in North
Carolina schools” as “the Constitution itself grants the State Board [this] plenary
authority.” This power is unfettered, the Board of Education asserts, as its
“authority regarding certification of school professionals does not derive from the
General Assembly at all.” [Emphasis by the Court.] Defendants have
misapprehended their power under the N.C. Constitution and the Act. Certainly,
they are subject to both. Article IX, § 5 of the North Carolina Constitution is
unambiguous on this point, as it states: “The State Board of Education shall
supervise and administer the free public school system . . . and shall make all
needed rules and regulations in relation thereto, subject to laws enacted by the
General Assembly.” [Emphasis by the Court.] Moreover, this Constitutional
provision was interpreted by our Supreme Court in Guthrie v. Taylor [citation
omitted]. There, the Court held that Article IX, § 5 “was 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.”

*N.C. Bd. of Examiners for Speech & Language Pathologists and Audiologists v. N.C. State Bd. of
Education*, 122 N.C. App. 15, 20, 468 S.E.2d 826, 830 (1996), affirmed, 345 N.C. 493, 480
S.E.2d 50 (1997). Just as in the *Pathologists and Audiologists* case cited immediately above, the
State Board of Education in the current case has misapprehended its power under the North
Carolina Constitution. The 2016 legislation challenged in the complaint is a legitimate exercise
of the constitutionally-conferring plenary authority of the General Assembly. As such, this Court
should grant defendants’ motions for summary judgment and dismiss the amended complaint.

**B. Since the Creation of the State Board of Education in the Constitution of
1868, Every Action of the State Board Has Been Subject to Reversal by the
General Assembly.**

From the inception of the North Carolina State Board of Education as provided in the
Constitution of 1868, the State Board’s authority as administrator and policy-setter for the State’s
public school system has been subordinate to that of the General Assembly. The original text of
the Constitution of 1868 authorizing the formation of the State Board is unambiguous in establishing the supremacy of the General Assembly over the State Board of Education:

The Board of Education shall succeed to all the powers and trusts of the president and directors of the Literary Fund of North Carolina, and shall have full power to legislate and make all needful rules and regulations in relation to free public schools and the educational fund of the State; *but all acts, rules and regulations of said board may be altered, amended or repealed by the General Assembly, and when so altered, amended or repealed they shall not be re-enacted by the board.*

N.C. CONST. of 1868, Art. IX, § 10. (Emphasis supplied). It is difficult to envision a clearer way than this to express the intention of the People that, as broad as the grant of authority to the State Board may be, it is entirely subject to the control of the directly elected members of the General Assembly.

In 1942 the People made certain amendments to the 1868 Constitution, including changes to the “Powers and duties of Board” section, then at Article IX, § 9:

The State Board of Education shall succeed to all the powers and trusts of the President and Directors of the Literary Fund of North Carolina and the State Board of Education as heretofore constituted. The State Board of Education shall have power to divide the State into a convenient number of school districts; 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 regulation 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.*

N.C. CONST. of 1868, Art. IX, § 9 (1942) (Emphasis supplied). The effect of this change in the final sentence of the provision, if anything, is to increase the power of the General Assembly to control the actions of the State Board. That is, whereas the original language authorized the General Assembly to *react* to acts, rules, and regulations of the State Board, the revised language
empowered the General Assembly to take preemptive measures to exercise its control over the public schools.

Without exception, North Carolina courts and commentators have referred to the changes to the “powers and duties of Board” section of the Constitution of 1971 as “revisions” without any substantive effect. See, e.g., Guthrie, supra at 710, 185 S.E.2d at 199; N.C. State Bar v. DuMont, 304 N.C. 627, 640, 286 S.E.2d 89, 97 (1982) (noting that “the 1970 Constitution was meant to be an editorial revision of the 1868 Constitution and that fundamental changes in the constitution were made only by separate amendment.”). Although quoted in full above, for the reader’s convenience, the provision reads:

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.

N.C. CONST., Art. IX, § 5 (Emphasis supplied). Here, then, the operative phrase “subject to laws enacted by the General Assembly” means exactly the same thing it meant in the old constitution, albeit expressed more economically. The comma at the end of “thereto” establishes beyond question that the operative phrase applies to the entirety of the provision and not merely to the State Board’s rulemaking power.

Given the clarity of the Constitution’s language concerning the relative positions of the Legislature and the State Board, there is no need for weighty examinations of 150 year old committee meeting minutes in search of some hidden object of the framers that the passage of time may have obscured. Here, the intent of the framers is as clear today as it was a century and a half ago, or a half century ago: the State Board is given full power, but that power is wholly subject to the General Assembly’s power.
C. **The 2016 Legislation Was a Legitimate Exercise of The General Assembly’s Power to Limit and Define the Constitutionally Enumerated Powers of the State Board, and Largely Mirrors a Reallocation of Similar Scope Enacted in 1995.**

The State Board’s amended complaint breathlessly claims that the General Assembly’s enactment of HB 17 has upset some totemic order within the State’s public school system “for the first time in the State Board’s 148-year history.” Amended Complaint, ¶ 3. This is false. In fact, HB 17 is a carefully drafted effort to restore the relative duties and powers among the major entities in public education as they existed prior to the enactment of Session Laws 1995-72 and 1995-393. For instance, the example the State Board presents (graphically, in paragraph 4) as emblematic of the General Assembly’s overreach actually is simply removing 1995 language giving oversight authority to the State Board and restoring the provision to its pre-1995 language.

As will be discussed in more detail below, this and the other changes in HB 17 are directed at returning to the Superintendent of Public Instruction authority that had been stripped through the far-reaching 1995 legislation. The objective of the legislature here is to re-establish the traditional role of the Superintendent as the chief day-to-day, or *direct*, administrator of the State’s public schools, while reinforcing the State Board’s traditional role as the chief policy-setting, “legislative,” *general* administrative body for the schools. Inherent in this objective is the legislative recognition that the Superintendent, a directly elected individual on the job 365 days a year, is far better suited to respond to the day-to-day challenges of the public schools than the State Board, which meets a total of 18 days a year and is comprised of eleven appointed and two elected individuals\(^5\) – most of whom have full-time jobs not involving the public school system.

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\(^5\) See Affidavit of North Carolina Superintendent of Public Instruction Mark Johnson, ¶¶ 20, 24 [hereinafter “Johnson Affidavit”].
The new legislation continues the longstanding tradition requiring that the Superintendent’s actions be grounded in policy established by the State Board. As discussed in Section A above, HB 17 is a legitimate exercise by the General Assembly in the push-and-pull of “limitation and revision” of the relative duties of these constitutional entities as provided in Article IX, § 5. See Guthrie, 279 N.C. at 710, 185 S.E.2d at 198.

Although the amended complaint points to dozens of provisions in HB 17 as offending Article IX, § 5, a plurality (40%) of the items listed in paragraph 25(b) involve changes made to N.C. Gen. Stat. 115C-21, which provides for the “powers and duties generally” allocated to the Superintendent. These amendments are detailed in Section 4 of the Session Law, which is attached to this brief as Exhibit “A.” A closer look at these amendments begins to reveal the legislative objectives behind them.

Subsection (a) of § 115C-21 contains a numbered list of administrative duties the General Assembly has allocated to the Superintendent. HB 17 made the following change to the preamble:

(a) Administrative Duties. – Subject to the direction, control, and approval of the State Board of Education, it shall be the duty of the Superintendent of Public Instruction:

6 To facilitate a detailed review of the changes contained in HB 17, and to trace these changes to their antecedents in previous legislation, defendant Superintendent of Public Instruction has created two spreadsheets containing changes made by HB 17 to Chapter 115C, Section 126-5(d), and Chapters 143 and 143A. The larger of the two spreadsheets, attached as Exhibit “C” lists the statute number and subsection vertically on the left-hand side of the spreadsheet, and details changes made to the statute in the various session laws passed since 1971 (the year of the last revision to the Constitution). A blank cell on the spreadsheet indicates that the session law made no change to the corresponding statute subsection. Although a printed version of the spreadsheet is being provided with this brief, the spreadsheet is difficult to use in printed form. The spreadsheet in electronic form is much easier to use. At the time of filing, counsel will forward the electronic file of the spreadsheet to all other counsel and to the Trial Court Administrator for forwarding to the three judge panel.

The second spreadsheet uses information from the first spreadsheet, but in a more focused way to show only the changes made in HB 17 as compared to the two 1995 session laws at which the more recent legislation was directed. This spreadsheet is attached as Exhibit “D.”
The removal of the “Subject to . . . the Board of Education” language here appears particularly troubling to the State Board, in that the amended complaint quotes this part of the statute at least twice (¶ 4, ¶ 25(a)). The deleted passage, however, dates only as far back as 1995. See S.L. 1995-72. Prior to the 1995 amendment, the statute read exactly as it reads in HB 17, and in fact had read that way at least since the recodification of Chapter 115 as Chapter 115C in 1981. See S.L. 1981-423. HB 17 is merely removing the 1995 amendment and restoring the prior statutory language.

Section 4 of HB 17 also restores the most important provision related to the ongoing management responsibility for the public schools to its pre-1995 language. It is instructive to consider the changes to this statute, § 115C-21(a)(5), in the context of its evolution from 1981, to 1995, to 2016.

The 1981 version reads:

(5) To have under his direction, in his capacity as the constitutional administrative head of the public school system, all those matters relating to the supervision and administration of the public school system, except the supervision and management of the fiscal affairs of the Board.

S.L. 1981-423. In 1995, the Legislature made the Superintendent’s exercise of his or her duties under this provision entirely subject to the direction of the State Board:

(5) To have under his direction, in his capacity as the constitutional head of the public school system, manage all those matters relating to the supervision and administration of the public school system that the State Board delegates to the Superintendent of Public Instruction.

S.L. 1995-72. In HB 17, the General Assembly deletes the language added in 1995 and, with minor modification, restores the 1981 language to read:
(5) To manage have under his or her direction and control, all those matters relating to the direct supervision and administration of the public school system that the State Board delegates to the Superintendent of Public Instruction: system.

S.L. 2016-126. It is important to note that the 2016 changes here represent more than a simple return to the pre-1995 state of affairs between the Superintendent and the State Board. The inclusion, for the first time, of the adjective "direct" indicates a concern on the part of the General Assembly that the Superintendent concern himself or herself with the day-to-day administration of the public schools, while implicitly acknowledging that the State Board still controls the bigger picture administrative issues.

This recognition of the continuing vitality of the State Board as policy-setting entity is not an isolated example of the General Assembly’s intentions. Section 4 of HB 17 adds a new subsection, § 115C-21(a)(8) to the Superintendent’s duties, which reads:

(8) To administer, through the Department of Public Instruction, all needed rules and regulations established by the State Board of Education.

S.L. 2016-126.

A further illustration of the General Assembly’s effort to allocate day-to-day duties to the Superintendent and big-picture, “legislative” duties to the State Board is observed in changes made to personnel and staffing provisions in Chapters 115C and 126. For example, the General Assembly created a new subsection in the “administrative duties” provisions - § 115C-21(a)(9) – which reads:

(9) To have under his or her direction and control all matters relating to the provision of staff services, except certain personnel appointed by the State Board, as provided in G.S. 115C-11(j), and support of the State Board of Education, including implementation of federal programs on behalf of the State Board.
Id. This language is nearly identical to a prior version of § 115C-21(a)(7), which had been repealed by the 1995 legislation:

(9) To have solely under his direction and control all matters relating to provision of staff services and support to the State Board of Education, including implementation of federal programs on behalf of the State Board of Education, except as otherwise provided in the Current Operations Appropriations Act.


As explained in detail in Superintendent Johnson’s Affidavit filed contemporaneously with this Brief, issues related to staffing and organizational hierarchy have bedeviled the day-to-day workings of the Department of Public Instruction. See, generally, Johnson Affidavit at ¶¶ 6-19. The State Board’s insistence on micromanaging nearly all hiring decisions, coupled with its inability make quick decisions because of its limited meeting schedule, mean that full-time, day-to-day positions at the Department of Public Instruction remain unfilled for months. It is this sort of engineered ineffectiveness that the General Assembly took action to correct in passing HB 17. Likewise, the HB 17 changes to § 126-5(d) restore the Superintendent to a decision-making role in staffing and personnel matters under the North Carolina Human Resources Act. The General Assembly had removed the Superintendent from this role in 1995, substituting the State Board instead. S.L. 1995-393.

The foregoing examples represent only a few of the changes made by HB 17, but illustrate the predominant motivation of the General Assembly in enacting the law. In 1995 the General Assembly, in passing Chapters 72 and 393 of the 1995 Session Laws, marginalized the constitutional office of Superintendent of Public Instruction – reducing it in stature to little more than a spokesperson role. The then-elected Superintendent, Bob Etheridge, complained to the
Department of Justice and sought an Attorney General Advisory Opinion regarding the constitutionality of this legislation. Chief Deputy Attorney General Andrew A. Vanore, Jr., acknowledging that the legislation "stripped the State Superintendent of Public Instruction of many historic duties and gave those duties to the State Board of Education[,]" advised that Superintendent Etheridge's complaint was a political matter, but not a constitutional one. *In re Advisory Opinion*, 1995 N.C. AG LEXIS 77 (14 Dec. 1995). A copy of this Advisory Opinion is attached as Exhibit "E." Observing that the Supreme Court had held that the Constitution's "subject to such laws . . . enacted . . . by the General Assembly," language "empowered the General Assembly to limit and revise the State Board's express constitutional powers," the Attorney General Opinion concluded:

> Without question, the Supreme Court decided in *Guthrie* that, even as to powers expressly conferred on the State Board by the Constitution, exercise of the State Board's enumerated powers is subject to laws enacted by the General Assembly. If the General Assembly may change the State Board's enumerated constitutional powers and duties, the General Assembly likewise may change, the State Superintendent's enumerated constitutional powers and duties.

*Id.*

In 2016, the General Assembly thought again about the role it had created for the Superintendent, and thought again about whether such a role best served the mission of the State's public school system. Such questions of public policy are for legislative determination. *Martin v. N.C. Housing Corp.*, 277 N.C. 29, 41, 175 S.E.2d 665, 671 (1970). Just as the 1995 legislation stripping away the Superintendent's traditional powers was a legitimate exercise of the General Assembly's constitutional franchise, HB 17, in restoring autonomy to a constitutionally established, directly elected office, reflects the best judgment of the legislature in current educational policy. The North Carolina Supreme Court has observed that the wisdom of

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7 *Guthrie v. Taylor*, 279 N.C. 703, 185 S.E.2d 193 (1971) (discussed infra at pp. 6-8).
an enactment is a legislative and not a judicial question: “The General Assembly has the right to experiment with new modes of dealing with old evils[.]” Id. at 37, 175 S.E.2d at 675. Through the enactment of HB 17, the 2016 General Assembly determined that the time had come to move on from the 1995 experiment in marginalizing the office of Superintendent of Public Instruction. The newly restored balance between the State Board and the Superintendent is authorized by the plain language of the North Carolina Constitution. Redress for the State Board’s complaints may be found only in the voting booth, and not at the courthouse.

D. The Superintendent's Experience and Article III, Section 7.

Because of the existence of the preliminary injunction in this case halting the implementation of HB 17, the Superintendent took his oath of office subject to the 1995 legislation that the General Assembly had acted to curtail in 2016. As detailed in his affidavit, the experience of his first few months in office subject to the old law has been both frustrating and illuminating.

The Superintendent has observed during his short tenure that in complex organizations such as the Department of Public Instruction, governance by committee regarding day-to-day operations is a recipe for ineffectiveness. This is compounded when the “committee” making the day-to-day administrative decisions only meets as a body for one and one-half days per month. Johnson Affidavit, ¶ 20. Time-sensitive decisions often sit unresolved for weeks or months as the Department of Public Instruction waits for the State Board to meet and arrive at some consensus. Id. at ¶¶ 13, 15, 19-21. HB 17 will eliminate this organizational malaise by restoring the Superintendent’s role as chief administrative officer of the Department of Public Instruction as well as of the State Board as provided in Article IX, §4(2) of the North Carolina Constitution.
Operating under the 1995 laws has been illuminating because it has given the Superintendent insight into the tendency of organizations to use authority bestowed upon them to consolidate power to the exclusion of other actors perceived as rivals. As detailed in the Superintendent affidavit, the State Board, having achieved effective supremacy over the office of Superintendent through the 1995 legislation, changed internal policies to eliminate the Superintendent from participating in hiring decisions for State Board positions, and to aggregate to itself nearly all staffing decisions for the Department of Public Instruction. Johnson Affidavit, ¶¶ 5-10. In fact, despite that other members of the Council of State may designate and hire for at least 20 exempt policymaking and 20 exempt managerial positions, the Superintendent was granted only four, two of which were classified as administrative assistants. Id. at ¶ 10.

The State Board also protects its power and marginalizes the Superintendent through a dual reporting structure for employees under which ten leadership positions in the Department of Public Instruction that normally would report to a Superintendent instead are “accountable and responsible” to both the Superintendent and the State Board. Id. at ¶ 7. These positions, including the Deputy Superintendent, serve two masters, although because the State Board has the final say in employment decisions, any conflict likely is resolved in favor of the latter. Id.

Although the difficulties being experienced by the Superintendent of Public Instruction are not in themselves a legal basis upon which a decision in this case should turn, the description of these difficulties provides a lens through which the crucial constitutional question can be considered. The People have provided for two entities in the Constitution with responsibility for the public schools. The framers wisely avoided prescribing a detailed list of specific areas of subject matter for each entity to oversee. Instead, the Constitution gives plenary authority to the General Assembly to allocate and then reallocate powers and duties to meet the needs of the
State’s children at different points in time. In reallocating responsibilities for the public schools, the General Assembly exercised its authority not only under Article IX, § 5, but also under Article III, § 7, which provides that the duties of constitutionally-established elected officers, including the Superintendent of Public Instruction, “shall be prescribed by law.” The passage of HB 17 is a legislative act to restore balance in the relative authority vested in the popularly elected, full-time Superintendent of Public Instruction and the largely appointed, part-time State Board. This Court should declare that the legislation passed and ratified as session law 2016-126 is constitutional, and enter summary judgment against the plaintiff and in favor of the defendants.

**CONCLUSION**

For the reasons stated and upon the authorities cited, the defendant, North Carolina Superintendent of Public Instruction Mark Johnson, respectfully requests that the Court enter an order declaring that the legislation challenged in plaintiff’s amended complaint is constitutional, dissolving the preliminary injunction, and entering final judgment against plaintiff and in favor of defendants.
This the 12th day of April, 2017.

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The undersigned hereby certifies that a copy of the foregoing *Brief in Support of Motion for Summary Judgment* was served upon the following attorneys by U.S. Mail and e-mail to the following:

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