

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

NOVEMBER 20, 2025

**MAILING ADDRESS: The Judicial Department
P. O. Box 2170, Raleigh, N. C. 27602-2170**

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OF
NORTH CAROLINA**

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COURT OF APPEALS

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APPEAL AND ERROR

Preservation of issues—hearsay excluded—no offer of proof made—In a trial for possession of stolen goods arising from the discovery of a stolen pop-up camper on defendant's property, defendant failed to preserve for appellate review the trial court's exclusion of a detective's answer on hearsay grounds—after defense counsel asked whether the person who stole the camper lied to defendant about it—because defendant did not make the required offer of proof as to the content of the excluded testimony. Further, the substance of any answer that might have been given was not apparent from the leading question. **State v. Capps, 412.**

ARBITRATION AND MEDIATION

Arbitration clause—in project-specific contract—preemption by dispute resolution terms in broader contract—motion to compel arbitration denied—appeal dismissed —In a dispute between a construction company (plaintiff) and a facility owner (defendant), where the parties executed a Master Services Agreement (MSA)—providing the general contract framework for all projects they entered into—and agreed to supplement the MSA with project-specific contracts, after which

ARBITRATION AND MEDIATION—Continued

they entered into one such contract (“Construction Contract”) for mechanical piping services at defendant’s Charlotte facility, the trial court in plaintiff’s breach of contract lawsuit properly denied defendant’s motion to compel arbitration, which relied upon the Construction Contract’s arbitration clause. The MSA’s plain language explicitly provided that to the extent a project-specific contract addressed a topic also addressed in the MSA, the MSA’s terms would control and render any corresponding terms in the project-specific contract null and void. Both the MSA and the Construction Contract addressed the topic of dispute resolution, and therefore the MSA’s terms—which allowed the parties to pursue court action—nullified the Construction Contract’s arbitration clause. Further, because there was no valid arbitration agreement between the parties, defendant’s appeal of the interlocutory order denying his motion to compel arbitration was dismissed as not affecting a substantial right. **Bilfinger Inc. v. Cargill, Inc., 322.**

CIVIL PROCEDURE

Trial court’s discretion—consideration of untimely affidavit—in opposition to motion to compel arbitration—In a contract dispute between two companies over the validity of an arbitration clause, where defendant moved to compel arbitration and plaintiff—on the same day as the hearing on defendant’s motion—moved to supplement the record with an additional affidavit in support of its own cross-motion to stay arbitration, the trial court did not abuse its discretion in admitting the affidavit where, even though it was not timely served pursuant to Civil Procedure Rule 6(d), the affidavit was clearly supplemental and was used to rebut a new argument raised by defendant in its memorandum opposing plaintiff’s cross-motion to stay arbitration. **Bilfinger Inc. v. Cargill, Inc., 322.**

CRIMINAL LAW

Prosecutor’s arguments—confusing or erroneous statement of law—cured by jury instruction—In a prosecution for first-degree murder arising from defendant shooting and killing his girlfriend’s brother following a physical conflict between defendant and the victim (over whether defendant had treated the victim and his family with disrespect), any error in the prosecutor’s confusing-at-best, legally-incorrect-at-worst, statement during closing arguments—“Even if it is reasonable, the defendant never has a right to use excessive force”—was cured by the trial court’s proper instruction to the jury regarding the law of self-defense. **State v. Ervin, 420.**

DIVORCE

Equitable distribution—unequal distribution—no abuse of discretion—In plaintiff wife’s action for equitable distribution (in which she specifically sought an unequal distribution), although the trial court entered default against defendant husband for failure to respond in the early stage of the proceedings, the trial court did not abuse its discretion by granting an unequal distribution and awarding a greater share of marital assets to defendant (in particular, the marital home and the value of defendant’s 401(k) account). The entry of default did not affect plaintiff’s burden or the court’s analysis regarding distribution; the court appropriately considered and weighed each distributional factor set forth in N.C.G.S. § 50-20(c); and the court’s findings—none of which were challenged by plaintiff—were binding and supported by competent evidence. **Arrington v. Arrington, 313.**

DOMESTIC VIOLENCE

Protective order—conflicting evidence resolved—denial proper—In a domestic violence protective order (DVPO) action, brought by a wife (plaintiff) against her husband (defendant) on behalf of herself and the parties' minor child, alleging that the child was the product of defendant raping plaintiff and that defendant had sexually assaulted and raped plaintiff "50-100" times during their marriage, the trial court did not err in denying plaintiff's complaint and motion where the only finding of fact challenged by plaintiff (as a mere recitation of evidence) both recounted the conflicting evidence regarding the parties' sexual encounters and explained the court's weight and credibility determinations, explicitly stating that it could not find that defendant "committed an act of domestic violence." Further, the trial court did not err in concluding that plaintiff failed to prove grounds for issuance of a DVPO because the findings of fact did not support a conclusion that an act of domestic violence occurred—a requirement for issuance of a DVPO. **Shomette v. Needham, 400.**

ELECTIONS

Post-election protest filing—statutory requirements—adequate notice—dismissals reversed—In post-election protest proceedings brought by plaintiff (a candidate for a seat on the North Carolina Supreme Court who lost the election by 734 votes) in regard to three groups of challenged voters—voters with incomplete voter registration, overseas voters who failed to include a copy of photo identification or an exception form with their ballots, and voters who never domiciled or resided in North Carolina but whose parents or guardians were eligible North Carolina voters—the dismissals of plaintiff's protests by the State Board of Elections on the basis of his failure to satisfy statutory notice requirements set forth in the Board's Election Protest Form (plaintiff had mailed postcards with a quick response (QR) code to potentially affected voters) were reversed where the relevant statutes (N.C.G.S. §§ 163-182.9 and 163-182.10) required county boards of elections—rather than a protester such as plaintiff—to provide notice of hearings, and then only once the need for an evidentiary hearing had been established following a preliminary hearing—for which no notice to affected voters was required. **Griffin v. N.C. State Bd. of Elections, 436.**

Post-election protest filing—statutory requirements—probable cause of election violations shown—In post-election protest proceedings brought by plaintiff (a candidate for a seat on the North Carolina Supreme Court who lost the election by 734 votes) in regard to three groups of challenged voters—voters with incomplete voter registration, overseas voters who failed to include a copy of photo identification or an exception form with their ballots, and voters who never domiciled or resided in North Carolina but whose parents or guardians were eligible North Carolina voters—after reversing the State Board of Elections' dismissals of plaintiff's protests on notice grounds, the Court of Appeals further determined that probable cause existed to believe that election violations had occurred and, accordingly, reached the merits of plaintiff's challenges to each of the three voter groups. The matters were remanded as to the voters with incomplete registrations and the overseas voters, with instructions for the Board to notify affected voters and provide them 15 days to cure the deficiencies in their registrations. Voters in the final group, who never domiciled or resided in North Carolina, were ruled ineligible to vote in North Carolina, non-federal elections, and the Board was instructed to remove their votes from the Supreme Court election count. **Griffin v. N.C. State Bd. of Elections, 436.**

EVIDENCE

Testimony regarding defendant's prior violent behavior—properly admitted under Evidence Rules—In a prosecution for first-degree murder arising from defendant shooting and killing his girlfriend's brother following a physical conflict between defendant and the victim (over whether defendant had treated the victim and his family with disrespect), the trial court did not err or abuse its discretion in admitting testimony from defendant's girlfriend regarding three incidents in which defendant was violent toward her, where two of the incidents involved defendant brandishing a gun and all three incidents occurred during the time period when defendant, his girlfriend, and the victim were residing together. The evidence was properly admitted under Evidence Rules 401, 402, 403, and 404 because it: was relevant to the context of the parties' relationships and conflicts; demonstrated defendant's motive, intent, opportunity, and preparation to use the gun involved in the shooting; and had probative value that was not substantially outweighed by its prejudice to defendant. **State v. Ervin, 420.**

Victim's alleged gang involvement—exclusion—no error or abuse of discretion shown—In a prosecution for first-degree murder arising from defendant shooting and killing his girlfriend's brother following a physical conflict between defendant and the victim (over whether defendant had treated the victim and his family with disrespect), the trial court did not err or abuse its discretion in excluding evidence of the victim's alleged gang involvement where, even if it was relevant, the trial court determined that the probative value of the evidence to defendant's self-defense theory of the case was substantially outweighed by the danger of unfair prejudice. **State v. Ervin, 420.**

HOMICIDE

First-degree murder—motion to dismiss—sufficient evidence of premeditation and deliberation—In a prosecution for first-degree murder arising from defendant shooting and killing his girlfriend's brother following a physical conflict between defendant and the victim (over whether defendant had treated the victim and his family with disrespect), the trial court did not err in denying defendant's motion to dismiss where the evidence of premeditation and deliberation, viewed in the light most favorable to the state—including that defendant had walked away from a physical confrontation with the victim (which took place on the first floor of the townhome where defendant, his girlfriend, his sister, the victim, and others resided), went to the third floor to retrieve his gun, descended to the second floor where he spoke with his sister for some period of time, then returned to the first floor and shot the victim three times—was sufficient to send the charge to the jury. **State v. Ervin, 420.**

JUDGMENTS

Renewal—against State Treasurer—enforceability not a bar to claim—In plaintiff county board of education's action to renew a judgment against the State Treasurer (involving fines collected for improper equipment violations), the trial court properly denied the motion to dismiss filed by defendants (the Treasurer and other State officials in their official capacity), in which defendants asserted sovereign immunity, because, while plaintiff may never be able to collect the judgment absent an appropriation from the General Assembly to satisfy the judgment, plaintiff was nevertheless entitled to seek renewal and have a new judgment entered. Plaintiff obtained a valid judgment in a prior action and properly brought the renewal action

JUDGMENTS—Continued

within ten years of the original judgment pursuant to N.C.G.S. § 1-47(1). **Richmond Cnty. Bd. of Educ. v. Folwell, 390.**

MANDAMUS

Transfer of inmate from a men's prison to a women's prison—statutory discretion vested in Department of Adult Correction—The trial court erred in issuing a writ of mandamus ordering respondent—the Commissioner of Prisons—to transfer petitioner—an inmate assigned male at birth, but who claimed to be a woman (or an “intersex woman”) and received an amended birth certificate designating her sex as female—from the men's prison where she was incarcerated to a women's prison because the relevant statutes (N.C.G.S. §§ 148-36 and 148-44), taken together, provide the Department of Adult Correction with discretion to assign an inmate to any prison facility so long as male and female inmates are quartered separately (which further comports with federal legislation enacted to prevent prison rape and sexual abuse). The trial court's erroneous conclusion that the department lacked discretion to assign petitioner to a male prison facility arose from its incorrect belief that petitioner's birth certificate created an irrebuttable presumption that she must be classified as female, while N.C.G.S. § 130A-93 provides that a birth certificate is only prima facie evidence of a person's sex. The evidence regarding petitioner's sex was conflicting, with the court's unchallenged findings of fact indicating that petitioner was intersex. **Inscoe v. Ishee, 358.**

PARTIES

Plaintiff—not a real party in interest—lack of standing—motion to amend complaint—denied—In an action filed by the broker of an insurance policy covering a restaurant, which was damaged in a fire allegedly caused by a failure in the fire-suppression system provided and serviced by defendants, where the broker moved to amend its complaint to correct the plaintiff's name from the broker to the insurance company that issued the policy, the trial court properly granted defendants' motions to dismiss for lack of subject matter jurisdiction without allowing the motion to amend. The insurance company—having paid the restaurant owner's claims for damages under the policy—was the true necessary-party plaintiff in this case and was required to sue in its own name to enforce its subrogation rights against defendants. Therefore, the broker was not a real party in interest and lacked standing to sue defendants; accordingly, the trial court lacked jurisdiction to consider the broker's motion to amend and thus properly dismissed the case without ruling on the motion. **Intrepid Direct Ins. Agency v. Amerex Corp., 384.**

POSSESSION OF STOLEN PROPERTY

Constructive possession—incriminating circumstances—stolen camper located on defendant's property—The State presented substantial evidence, in the form of incriminating circumstances, from which a jury could find that defendant constructively possessed a stolen pop-up camper, which was discovered on defendant's property a couple of weeks after it was stolen, to meet the possession element of felonious possession of stolen goods. When law enforcement questioned defendant about the camper, he stated that he had been aware of the camper on his property; that although he didn't know where it came from, he “didn't choose to ask”; and he acknowledged that by the time of the interview he knew the camper was stolen. **State v. Capps, 412.**

TERMINATION OF PARENTAL RIGHTS

Grounds for termination—failure to make reasonable progress—failure to obtain suitable housing—undocumented status not considered—An order terminating a father's parental rights in his son was affirmed where the findings of fact challenged on appeal were supported by competent evidence and where those and other findings supported the conclusion that the father failed to make reasonable progress in correcting the conditions that lead to the child's removal (N.C.G.S. § 7B-1111(a)(2)). Importantly, the trial court's decision was based not on the father's status as an undocumented immigrant, but rather on his failure to secure safe and appropriate housing for himself and his child. Although the father's undocumented status did affect his ability to obtain housing, the court also found that: his primary obstacle was his criminal record; social services gave him resources for finding housing options that would be available to him even with his criminal record and undocumented status, but he failed to follow up on them; and, despite having over two years to find suitable housing and enough finances to afford it, he continuously lived under unsuitable conditions for raising a child (sleeping on a living room couch in a house with a group of unidentified adults). **In re R.A.X., 341.**

N.C. COURT OF APPEALS
2025 SCHEDULE FOR HEARING APPEALS

Cases for argument will be calendared during the following weeks:

January	13 and 27
February	10 and 24
March	17
April	7 and 21
May	5 and 19
June	9
August	11 and 25
September	8 and 22
October	13 and 27
November	17
December	1

Opinions will be filed on the first and third Wednesdays of each month.

ARRINGTON v. ARRINGTON

[298 N.C. App. 313 (2025)]

TAMMY EDWARDS ARRINGTON, PLAINTIFF

v.

JAMES GREGORY ARRINGTON, DEFENDANT

No. COA24-631

Filed 2 April 2025

Divorce—equitable distribution—unequal distribution—no abuse of discretion

In plaintiff wife’s action for equitable distribution (in which she specifically sought an unequal distribution), although the trial court entered default against defendant husband for failure to respond in the early stage of the proceedings, the trial court did not abuse its discretion by granting an unequal distribution and awarding a greater share of marital assets to defendant (in particular, the marital home and the value of defendant’s 401(k) account). The entry of default did not affect plaintiff’s burden or the court’s analysis regarding distribution; the court appropriately considered and weighed each distributional factor set forth in N.C.G.S. § 50-20(c); and the court’s findings—none of which were challenged by plaintiff—were binding and supported by competent evidence.

Appeal by Plaintiff from order entered 11 August 2022 by Judge Dorothy Hairston Mitchell in Durham County District Court. Heard in the Court of Appeals 25 February 2025.

Bourlon & Davis, P.A., by Camilla J. Davis, for plaintiff-appellant.

No brief filed for defendant-appellee.

WOOD, Judge.

Tammy Edwards Arrington (“Plaintiff”) appeals from the trial court’s 11 August 2022 order of equitable distribution awarding an unequal distribution of the marital estate to Defendant. We hold the trial court did not abuse its discretion and affirm the trial court’s order.

I. Factual and Procedural Background

Plaintiff and Defendant married on 30 March 2013 and separated on 30 March 2020. There were no children born of the marriage. On 14 October 2020, Plaintiff filed a complaint for equitable distribution seeking, *inter alia*, the distribution of all marital assets, property,

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[298 N.C. App. 313 (2025)]

income, resources, and other holdings. She specifically sought an unequal distribution.

Defendant did not file a responsive pleading to Plaintiff's complaint. On 16 December 2020, Plaintiff filed a motion for entry of default, seeking an entry of default for failure to respond. On 26 January 2021, Plaintiff filed an inventory affidavit, listing all assets and liabilities as of the date of separation, or acquired thereafter. A hearing on Plaintiff's motion was scheduled for 10 February 2021.

On 5 February 2021, a motion to schedule a judicial settlement conference was filed and subsequently calendared for 27 April 2021. That same day, a discovery conference order was entered, which outlined discovery deadlines and obligations on behalf of each party. Defendant was ordered to file an inventory affidavit by 26 February 2021. On 10 February 2021, the trial court entered default against Defendant for his failure to respond.

The judicial settlement conference was continued to 28 May 2021. The day prior to the conference, Defendant's attorney filed a motion to continue and a motion to withdraw. The trial court granted the motion to withdraw. The day of the conference the trial court entered an order reporting that the judicial settlement conference had not been held and found: "Defendant has failed to participate in any fashion in this case. He [has] not filed an answer, has not filed an [equitable distribution inventory affidavit], nor has he responded to discovery submitted to him by Plaintiff's attorney. [Alternative dispute resolution] is not appropriate."

A pre-trial conference was held on 3 June 2021 and Defendant was not present. An order was entered scheduling the final pre-trial conference and the hearing for equitable distribution. At the final pre-trial conference on 7 July 2021, the trial court continued the hearing to 3 September 2021, finding that Defendant needed additional time to consult with an attorney and "apprise himself of local rules." Defendant obtained new counsel on 23 July 2021.

On 3 September 2021, Defendant's counsel filed a motion to continue, as Defendant failed to bring the correct documents to the hearing. The motion was granted, and the final pre-trial hearing was continued again to 1 October 2021. Defendant filed an inventory affidavit that same day. The final pre-trial hearing was held as scheduled, and the trial court filed the resulting order.

On 1 November 2021, Plaintiff's counsel filed a motion to continue the hearing, alleging that Defendant's inventory affidavit and discovery responses failed to disclose certain assets. The trial court granted Plaintiff's

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motion and scheduled a hearing for 13 December 2021. Subsequently, the hearing was continued an additional time to 6 April 2022.

On 6 April 2022, the trial court held the equitable distribution hearing. Both parties were present at trial and presented evidence to the court. By order entered 11 August 2022, the trial court made findings based on the parties' stipulations and evidence, and classified Plaintiff's and Defendant's assets and liabilities, covering the period from before their marriage through the date of separation.

The trial court found that the "distributional factors set forth in N.C. [Gen. Stat.] Section 50-20(c) apply to the facts and circumstances of this case and that an equal distribution is not equitable." The trial court distributed Plaintiff's and Defendant's assets and liabilities as follows:

Plaintiff and Defendant were each entitled to their own 401(k) retirement accounts, with a balance of \$6,650.32 and \$13,449.75, respectively. Plaintiff's vehicle, a Jeep bought for her son, valued at \$3,058.94, and the loan balance for the vehicle of \$5,213.21, was distributed to Plaintiff. The debt labeled "wedding receipt" and secured through North Carolina State Employees Credit Union (NCSECU) totaled \$14,998.92, and each party was ordered to pay half. Defendant was ordered to pay his share of the debt directly to Plaintiff over the course of seven years in eighty-four monthly payments of \$131.85. The debt owed to Lendmark, which was used for the payment of household and marital bills, totaled \$6,021.44. Although the Lendmark account was solely in Plaintiff's name, the debt was distributed to Defendant who was ordered to make the monthly payments on the loan directly to Plaintiff over a seven-year period in eighty-four monthly payments of \$71.68. Debt acquired through One Main Financial was \$7,053.38 at the date of separation and was distributed to Defendant. Student loan debt acquired during the marriage for Plaintiff's son, in the amount of \$45,193.69, was stipulated to be marital debt, although the loan was solely in Plaintiff's name. Each party was ordered to pay half of the debt. Defendant was ordered to pay his share of the debt directly to Plaintiff over the course of seven years in eighty-four monthly payments of \$269.01.

Lastly, the trial court found that although Defendant had acquired the home prior to their marriage, in which the parties resided during their marriage, Defendant had gifted the home to the marriage one month prior to separation causing the home to become marital property. The only evidence about the value of the home presented to the court was a tax value of \$166,516.00 and a payoff statement showing Defendant had paid \$151,520.69 on 1 November 2021, after the parties' separation. The trial court found the home had a net value of \$14,995.31 and distributed

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the marital home to Defendant. The trial court gave Plaintiff one hundred twenty days to vacate the former marital home.

Plaintiff owned a home acquired prior to the parties' marriage. During the marriage, the parties acquired a loan jointly using the home Plaintiff acquired prior to their marriage as collateral. The trial court determined Plaintiff had not gifted the home to the marriage and the home remained Plaintiff's separate property. The trial court ordered Plaintiff to refinance the loan to remove Defendant's name from the Deed of Trust within twelve months.

On 12 September 2022, Plaintiff filed a notice of appeal from the 11 August 2022 equitable distribution order.

II. Analysis

Plaintiff argues the trial court erred in its equitable distribution order by distributing a greater share of the marital assets to Defendant, when Defendant did not have a pending claim for an unequal distribution and an entry of default had been entered against him. Plaintiff specifically contends the trial court erred by distributing to Defendant the marital home and the value of his 401(k) retirement account, an amount larger than fifty percent of the marital estate.

This Court reviews an equitable distribution order for a "clear abuse of discretion." *Petty v. Petty*, 199 N.C. App. 192, 197, 680 S.E.2d 894, 898 (2009) (citation omitted). "The division of property in an equitable distribution is a matter within the sound discretion of the trial court." *Id.* at 197, 680 S.E.2d 897-98 (citation omitted). Thus, "[t]he trial court's decision 'will be upset only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision.'" *Khajanchi v. Khajanchi*, 140 N.C. App. 552, 558, 537 S.E.2d 845, 849 (2000) (citation omitted). We uphold the trial court's findings of fact if the findings are supported by competent evidence in the record. *Britt v. Britt*, 168 N.C. App. 198, 204, 606 S.E.2d 910, 914 (2005).

The distribution of "marital and divisible property" is found under N.C. Gen. Stat. § 50-20. "In making an equitable distribution of marital assets, the trial court is required to undertake a three-step process: '(1) to determine which property is marital property, (2) to calculate the net value of the property, fair market value less encumbrances, and (3) to distribute the property in an equitable manner.'" *Fitzgerald v. Fitzgerald*, 161 N.C. App. 414, 418, 588 S.E.2d 517, 520-21 (2003) (citation omitted). Pursuant to N.C. Gen. Stat. § 50-20(c), the marital property must be divided equally, "unless the [trial] court determines that an

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equal division is not equitable.” *Smith v. Smith*, 292 N.C. App. 443, 450, 899 S.E.2d 1, 6 (2024) (citations omitted).

If an equal division is not equitable, the trial court may elect to make an unequal distribution. However, “[w]hen making an unequal distribution, the trial court must consider the factors enumerated in [N.C. Gen. Stat.] § 50–20(c) and must make findings which indicate that it has done so.” *Britt*, 168 N.C. App. at 204, 606 S.E.2d at 914. The factors include, *inter alia*,

- (1) The income, property, and liabilities of each party at the time the division of property is to become effective.
- (2) Any obligation for support arising out of a prior marriage.
- (3) The duration of the marriage and the age and physical and mental health of both parties.
- (4) The need of a parent with custody of a child or children of the marriage to occupy or own the marital residence and to use or own its household effects.
- (5) The expectation of pension, retirement, or other deferred compensation rights that are not marital property.
- (6) Any equitable claim to, interest in, or direct or indirect contribution made to the acquisition of such marital property by the party not having title, including joint efforts or expenditures and contributions and services, or lack thereof, as a spouse, parent, wage earner or homemaker.
- (7) Any direct or indirect contribution made by one spouse to help educate or develop the career potential of the other spouse.
- (8) Any direct contribution to an increase in value of separate property which occurs during the course of the marriage.
- (9) The liquid or nonliquid character of all marital property and divisible property.
- (10) The difficulty of evaluating any component asset or any interest in a business, corporation or profession, and the economic desirability of retaining such asset or interest, intact and free from any claim or interference by the other party.

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(11) The tax consequences to each party, including those federal and State tax consequences that would have been incurred if the marital and divisible property had been sold or liquidated on the date of valuation. The trial court may, however, in its discretion, consider whether or when such tax consequences are reasonably likely to occur in determining the equitable value deemed appropriate for this factor.

(11a) Acts of either party to maintain, preserve, develop, or expand; or to waste, neglect, devalue or convert the marital property or divisible property, or both, during the period after separation of the parties and before the time of distribution.

...

(12) Any other factor which the court finds to be just and proper.

N.C. Gen. Stat. § 50-20(c)(1)-(12) (2023).

The trial court is not required to make “exhaustive findings of the evidentiary facts, but must include the ultimate facts considered.” *Mosiello v. Mosiello*, 285 N.C. App. 468, 471, 878 S.E.2d 171, 175 (cleaned up). Stated differently, the trial court is given broad discretion to assess and weigh each distributive factor under N.C. Gen. Stat. § 50-20(c), and “there is no need to show exactly how the trial court arrived at its decision regarding unequal division, but an appellate court must be able to review and conclude the statutory factors were followed.” *Id.* at 471, 878 S.E.2d at 176 (cleaned up). “A single distributional factor may support an unequal division.” *Mugno v. Mugno*, 205 N.C. App. 273, 278, 695 S.E.2d 495, 499 (2010) (citation omitted).

As a preliminary matter, Plaintiff argues that the trial court erred by distributing a greater share of the marital assets to Defendant, when Defendant had an entry of default entered against him and therefore, had no pending claim for unequal distribution. Plaintiff’s argument is misplaced.

“The effect of an entry of default is that the defendant against whom entry of default is made is deemed to have admitted the allegations in plaintiff’s complaint, and is prohibited from defending on the merits of the case.” *Hartwell v. Mahan*, 153 N.C. App. 788, 791, 571 S.E.2d 252, 253-54 (2002) (citations omitted); *see also Luke v. Omega Consulting Grp., LC*, 194 N.C. App. 745, 751, 670 S.E.2d 604, 609 (2009) (“When default is entered due to a defendant’s failure to answer, the substantive

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allegations contained in plaintiff's complaint are no longer in issue, and for the purposes of entry of default and default judgment, are deemed admitted." (citation omitted)). Meaning, Defendant lost his right to assert counterclaims or defenses in response to Plaintiff's complaint.

However, the entry of default does not "dispose of the underlying action" because "[i]n North Carolina, a plaintiff cannot obtain judgment by default in a divorce proceeding." *Adair v. Adair*, 62 N.C. App. 493, 498, 303 S.E.2d 190, 194 (1983). Further, even though the allegations in the plaintiff's complaint are deemed admitted, this "does not relieve plaintiff of the burden of appearing in court to prove the grounds alleged in the complaint." *Id.*

While the entry of default prohibited Defendant from asserting a response to Plaintiff's complaint, it did not alter the scope of the trial court's obligations during an equitable distribution proceeding. Notwithstanding an entry of default, the trial court was still required to determine which property was marital property; calculate the net value of the property; and distribute the property in an equitable manner. *Fitzgerald*, 161 N.C. App. at 418, 588 S.E.2d at 520-21. Consequently, contrary to Plaintiff's argument, the default judgment does not affect the trial court's distribution award.

Furthermore, the party seeking an unequal distribution must prove, by a preponderance of the evidence, that an equal distribution would be inequitable. *See Khajanchi*, 140 N.C. App. at 558, 537 S.E.2d at 849 ("[T]he party who desires an unequal division bears evidentiary burdens concerning the relevant statutory factors . . . [this] burden[] become[s] even more significant when we consider the fact that the trial court has *broad discretion* in . . . distributing the marital estate." (citation omitted)). Once the trial court concludes that an equal distribution is not equitable, it has the discretion to distribute the property accordingly, regardless of which party made the request. *See Mugno*, 205 N.C. App. at 278, 695 S.E.2d at 499 ("Where the trial court decides that an unequal distribution is equitable, the court must exercise its discretion to decide how much weight to give each factor supporting an unequal distribution." (citation omitted)); *see also Montague v. Montague*, 238 N.C. App. 61, 70-71, 767 S.E.2d 71, 78 (2014) ("[T]he trial court is not required to show how it balanced the factors; the weight given to each factor is in the trial court's discretion; and there is no need to show exactly how the trial court arrived at its decision regarding unequal division." (citation omitted)). Thus, Plaintiff's argument that the trial court erred by awarding a greater share of the marital assets to Defendant, despite Defendant having no pending claim for unequal distribution, is without merit.

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Plaintiff moved for an unequal distribution and thus bore the burden of proving that an equal distribution would not be equitable. However, once the trial determined that an equal distribution was not equitable, it had the discretion to allocate the marital assets as it saw fit, by weighing and balancing each statutory factor. Therefore, the trial court was permitted to award a larger share to Defendant, rather than Plaintiff, even though the distribution ultimately granted was originally sought by Plaintiff.

Plaintiff next argues the trial court erred by distributing to Defendant the marital home and the value of the marital portion of his 401(k) retirement account. However, Plaintiff failed to challenge any of the trial court's findings in the 11 August 2022 equitable distribution order. Thus, all of the findings are deemed binding on appeal and "supported by competent evidence." *In re A.M.L.*, 377 N.C. 1, 4, 855 S.E.2d 439, 443 (2021) (citation omitted); *see also Khajanchi*, 140 N.C. App. at 565, 537 S.E.2d at 853 ("Where no exceptions have been taken to the findings of fact, such findings are presumed to be correct and are binding on appeal." (citation omitted)).

Because the undisputed findings of facts are binding and supported, we hold the trial court complied with the requirements under N.C. Gen. Stat. § 50-20(c) as previously set forth. The trial court outlined the assets and liabilities of both Plaintiff and Defendant. While Plaintiff and Defendant equally shared the debt obligations from their "wedding receipts" and Plaintiff's son's student loans, Defendant was ordered to pay the balance of the marital Lendmark and One Main Financial debts. Further, each party was entitled to the value of the marital portion of their respective 401(k) accounts. *See* N.C. Gen. Stat. § 50-20(c)(1) (2023) ("The court shall consider . . . The income, property, and liabilities of each party at the time the division of property is to become effective.").

Additionally, the trial court found that of the marital property Defendant only wanted the marital home, did not request credit towards the post-date of separation payments made to the mortgage or debt, and had allowed Plaintiff to live in the home since the date of separation. The trial court acknowledged that while Defendant paid the mortgage and household bills on the marital home after separation, Plaintiff had maintained the home while living there. *See* N.C. Gen. Stat. § 50-20(c)(11a) ("Acts of either party to maintain, preserve, develop, or expand; or to waste, neglect, devalue or convert the marital property or divisible property, or both, during the period after separation of the parties and before the time of distribution.").

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The trial court found that Defendant paid monthly payments to Plaintiff to pay towards the marital debt and that Defendant was a “generous financial provider.” It further found that “there was no evidence the marriage had suffered financially” from Defendant’s adulterous affairs, and that “[a]ll of the household bills and obligations were paid and as such there was no waste of marital assets.” *See* N.C. Gen. Stat. § 50-20(c)(12) (“Any other factor which the court finds to be just and proper.”).

As discussed *supra*, this Court cannot overrule the trial court’s decision absent a determination that it is so arbitrary or capricious that it could not have been the result of a reasoned decision. *Khajanchi*, 140 N.C. App. at 558, 537 S.E.2d at 849. This Court “give[s] great discretion to the trial court’s consideration of facts, as the trial court is the fact finder in equitable distribution cases and has the ‘right to believe all, none, or some of a witness’ testimony.” *Smith*, 292 N.C. App. at 453, 899 S.E.2d at 8.

We conclude the trial court complied with the requirements set forth in N.C. Gen. Stat. § 50-20(c) and, in its discretion, determined an unequal distribution in favor of Defendant was equitable. After careful review of the record, we cannot conclude the trial court’s determination is so arbitrary that it cannot be the result of a reasoned decision. Thus, we affirm the trial court’s 11 August 2022 order.

III. Conclusion

The trial court did not err by distributing a greater share of the marital assets to Defendant, although Defendant had an entry of default entered against him and had not requested an unequal distribution. An entry of default does not dispose of the underlying equitable distribution action. Notwithstanding which party requests an unequal distribution, once the trial court makes a determination that an unequal distribution is equitable under N.C. Gen. Stat. § 50-20(c), the trial court has broad discretion in making the distribution, including to the non-moving party. The trial court complied with the requirements set forth in N.C. Gen. Stat. § 50-20(c) and, in its discretion, determined an unequal distribution in favor of Defendant was equitable. Accordingly, the trial court’s equitable distribution order is affirmed.

AFFIRMED.

Judges TYSON and MURRY concur.

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BILFINGER INC., PLAINTIFF

v.

CARGILL, INCORPORATED, DEFENDANT

No. COA24-320

Filed 2 April 2025

1. Civil Procedure—trial court’s discretion—consideration of untimely affidavit—in opposition to motion to compel arbitration

In a contract dispute between two companies over the validity of an arbitration clause, where defendant moved to compel arbitration and plaintiff—on the same day as the hearing on defendant’s motion—moved to supplement the record with an additional affidavit in support of its own cross-motion to stay arbitration, the trial court did not abuse its discretion in admitting the affidavit where, even though it was not timely served pursuant to Civil Procedure Rule 6(d), the affidavit was clearly supplemental and was used to rebut a new argument raised by defendant in its memorandum opposing plaintiff’s cross-motion to stay arbitration.

2. Arbitration and Mediation—arbitration clause—in project-specific contract—preemption by dispute resolution terms in broader contract—motion to compel arbitration denied—appeal dismissed

In a dispute between a construction company (plaintiff) and a facility owner (defendant), where the parties executed a Master Services Agreement (MSA)—providing the general contract framework for all projects they entered into—and agreed to supplement the MSA with project-specific contracts, after which they entered into one such contract (“Construction Contract”) for mechanical piping services at defendant’s Charlotte facility, the trial court in plaintiff’s breach of contract lawsuit properly denied defendant’s motion to compel arbitration, which relied upon the Construction Contract’s arbitration clause. The MSA’s plain language explicitly provided that to the extent a project-specific contract addressed a topic also addressed in the MSA, the MSA’s terms would control and render any corresponding terms in the project-specific contract null and void. Both the MSA and the Construction Contract addressed the topic of dispute resolution, and therefore the MSA’s terms—which allowed the parties to pursue court action—nullified the Construction Contract’s arbitration clause. Further, because there

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was no valid arbitration agreement between the parties, defendant's appeal of the interlocutory order denying his motion to compel arbitration was dismissed as not affecting a substantial right.

Judge TYSON dissenting.

Appeal by Defendant from Order entered 29 November 2023 by Judge George C. Bell in Mecklenburg County Superior Court. Heard in the Court of Appeals 23 October 2024.

Bell, Davis & Pitt, P.A., by Joshua B. Durham and Edward B. Davis; Eversheds Sutherland (US) LLP, by Lee C. Davis, pro hac vice, and Tracey K. Ledbetter, pro hac vice, for plaintiff-appellee.

Robinson, Bradshaw & Hinson, P.A., by Edward F. Hennessey, IV; Faegre Drinker Biddle & Reath LLP, by Aaron Van Oort, pro hac vice, for defendant-appellant.

HAMPSON, Judge.

Factual and Procedural Background

Cargill, Incorporated (Defendant) appeals from an Order denying its Motion to Compel Arbitration and granting Bilfinger Inc.'s (Plaintiff) Motions to Stay Arbitration and to Supplement the Record entered on 29 November 2023. The Record before us tends to reflect the following:

Defendant owns facilities across the country, including a facility located in Charlotte, North Carolina. At the Charlotte facility, Defendant refines, packages, and ships edible vegetable oil and shortening products. Plaintiff is an international contractor and construction company. On or about 26 March 2021, Plaintiff contracted with Defendant to provide mechanical and piping services on Defendant's projects throughout the country. The parties executed a Master Services Agreement (MSA), the general contract framework for all projects entered into between the parties. For individual projects over \$250,000, the parties agreed to supplement the MSA with project-specific contracts. The MSA provides that if a project-specific contract addresses a topic addressed by the MSA, the MSA will render those terms null and void:

7(d). . . Notwithstanding any terms in the [project-specific contract] documents, to the extent that a topic is addressed or a remedy is provided for in this Agreement,

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corresponding terms or remedies set forth in the [project-specific contract] documents are null and void and of no [e]ffect as to the rights or obligations of either [Defendant] or [Plaintiff]. To the extent that a topic is not addressed or a remedy is not provided for in this Agreement, then the terms of the [project-specific contract] shall control for that specific topic or remedy.

Plaintiff began a project at Defendant's Charlotte facility to construct two new hydrogenation towers and expand its processing operations. The contract price for the project exceeded \$250,000, so the parties entered into a project-specific agreement to supplement the MSA; the project-specific agreement expressly incorporates by reference another document, the "General Conditions" of the agreement (collectively, Construction Contract). Both the MSA and the Construction Contract contain sections titled "Dispute Resolution", which discuss the procedures to be undertaken in the event a dispute arises between the parties. Under MSA Section 26, if a dispute arises, the parties must first attempt to resolve it by reporting it in writing to senior management representatives. If senior management does not resolve the dispute within twenty days of receiving notice, then the parties may agree to mediate the dispute, but "regardless whether mediation has occurred, either party may pursue court action":

26(b). After [twenty days] and upon mutual agreement of the parties, either party may submit the Dispute to a third party mediator recognized in the field of alternative dispute resolution, and acceptable to the other party. The mediation will be non-binding, and occur at a time and place acceptable to both parties with each party bearing its respective costs. After [twenty days], regardless whether mediation has occurred, either party may pursue court action pursuant to the requirements and limitations set forth in this Agreement. Notwithstanding any other provision of this Agreement, each Party is entitled to immediate access to the courts to: (i) toll any statute of limitation or (ii) seek appropriate injunctive relief or other equitable remedy if, in such party's sole discretion, such action is deemed necessary to avoid irreparable damage or preserve the status quo.

By contrast, under Article 16 of the Construction Contract, "[a]ll claims arising out of the Contract Documents shall be subject to arbitration[.]"

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Indeed, disputes eventually arose between the parties. The parties referred the disputes to senior management, as contemplated by the MSA. Senior management did not resolve the disputes within twenty days. In accordance with MSA Section 26, Plaintiff brought an action against Defendant in Mecklenburg County Superior Court on 26 May 2023, alleging a claim for Breach of Contract and seeking foreclosure of a mechanic's lien. On 24 July 2023, Defendant filed a Demand for Arbitration with the American Arbitration Association. On 26 July 2023, Defendant filed Motions to Compel Arbitration and Stay Judicial Proceedings, relying on the arbitration clause contained in Article 16 of the Construction Contract. Plaintiff filed a Cross-Motion to Stay Arbitration on 5 September 2023. The Motions were heard before the trial court on 12 September 2023. The same day, Plaintiff filed a Motion to Supplement the Record with an additional affidavit (Second Affidavit), which it had served on Defendant the night prior.

On 29 November 2023, the trial court denied Defendant's Motion to Compel Arbitration and granted Plaintiff's Motion to Supplement the Record and Motion to Stay Arbitration. On 12 December 2023, Defendant timely filed Notice of Appeal.

Appellate Jurisdiction

"[A]n appeal from the trial court's denial of a motion to compel arbitration is an interlocutory order." *U.S. Trust Co., N.A. v. Stanford Grp. Co.*, 199 N.C. App. 287, 289, 681 S.E.2d 512, 513 (2009) (citation omitted). Generally, "a party has 'no right of immediate appeal from interlocutory orders and judgments.'" *Bartels v. Franklin Operations, LLC*, 288 N.C. App. 193, 195, 885 S.E.2d 357, 359 (2023) (quoting *Goldston v. Am. Motors Corp.*, 326 N.C. 723, 725, 392 S.E.2d 735, 736 (1990)). However, " 'an order denying arbitration, although interlocutory, is immediately appealable because it involves a substantial right which might be lost if appeal is delayed.'" *Brown v. Centex Homes*, 171 N.C. App. 741, 743, 615 S.E.2d 86, 87 (2005) (quoting *Prime S. Homes, Inc. v. Byrd*, 102 N.C. App. 255, 258, 401 S.E.2d 822, 825 (1991)); N.C. Gen. Stat. § 7A-27(b)(3)(a) (2023) (appeal lies of right directly to the Court of Appeals from any interlocutory order or judgment of a superior court in a civil action or proceeding which affects a substantial right); N.C. Gen. Stat. § 1-569.28(a)(1) (2023) (appeal may be taken from an order denying a motion to compel arbitration).

However, we have also held that where no arbitration agreement is found to exist, the interlocutory appeal does not affect a substantial

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right and is subject to dismissal.¹ See *JRM, Inc. v. HJH Companies, Inc.*, 287 N.C. App. 592, 598, 883 S.E.2d 217, 221 (2023). Here, the trial court concluded there was no agreement to arbitrate because any arbitration agreement was null and void. Thus, if a valid agreement to arbitrate does

1. Our dissenting colleague—who authored *JRM, Inc.*—now takes issue with the approach that case requires us to employ. Indeed, prior to *JRM, Inc.*, we have also simply affirmed in other similar instances. See, e.g., *Register v. Wrightsville Health Holdings, LLC*, 271 N.C. App. 257, 843 S.E.2d 464 (2020) (affirming trial court's denial of motion to compel arbitration); *Sciolino v. TD Waterhouse Investor Servs., Inc.*, 149 N.C. App. 642, 562 S.E.2d 64 (2002) (same); *Kennedy v. Branch Banking & Trust Co.*, 165 N.C. App. 275, 600 S.E.2d 520 (2004) (unpublished) (same).

Under N.C. Gen. Stat. § 1-569.6(b) (2023), “[t]he court shall decide whether an agreement to arbitrate exists or a controversy is subject to an agreement to arbitrate.” On the motion of a person showing an agreement to arbitrate, the court shall order the parties to arbitrate unless it finds there is no *enforceable* agreement to arbitrate. N.C. Gen. Stat. § 1-569.7(a)(2) (2023) (emphasis added). Previously, our statute governing proceedings on a motion to compel or stay arbitration considered whether the party opposing the motion to compel arbitration denied the *existence* of an agreement to arbitrate. See N.C. Gen. Stat. § 1-567.3 (repealed 2004) (emphasis added).

Thus, the language surrounding whether an arbitration agreement “exists” when reviewing a motion to compel or stay arbitration appears to be an artifact of caselaw applying old statutory language. See e.g., *Sciolino*, 149 N.C. App. at 645, 562 S.E.2d at 66 (“When a party disputes the existence of a valid arbitration agreement, the trial judge must determine whether an agreement to arbitrate exists.” (citing N.C. Gen. Stat. § 1-567.3(a) (1999) (repealed 2004)); *Slaughter v. Swicegood*, 162 N.C. App. 457, 461, 591 S.E.2d 577, 580 (2004) (citing N.C. Gen. Stat. § 1-567.3 (2001) (repealed 2004)); *Evangelistic Outreach Ctr. v. Gen. Steel Corp.*, 181 N.C. App. 723, 726, 640 S.E.2d 840, 843 (2007) (“If a party claims that a dispute is covered by an agreement to arbitrate but the adverse party denies the existence of an arbitration agreement, the trial court shall determine whether an agreement exists.” (quoting *Slaughter*, 162 N.C. App. at 461, 591 S.E.2d at 580)).

Where the existence of an arbitration agreement is solely at issue, such as in *JRM, Inc.*, the proper approach may be to treat the appeal as interlocutory and determine whether the appeal should be dismissed or not based on a review of the merits. See 287 N.C. App. at 597-98, 883 S.E.2d at 220-21. Where the enforceability of an existing arbitration agreement is at issue, however, the more appropriate approach may be to accept the matter as involving a substantial right and decide the case squarely on the merits. See *Pressler v. Duke Univ.*, 199 N.C. App. 586, 685 S.E.2d 6 (2009). See also *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 628-29, 129 S. Ct. 1896, 1900-01, 173 L. Ed. 2d 832 (2009) (holding the underlying merits of an appeal from an order denying a stay pending arbitration are irrelevant in determining whether an appellate court has jurisdiction over the appeal).

Nonetheless, where a panel of the Court of Appeals has decided the issue, albeit in a different case, we are bound by that precedent. In *re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989). As such, we faithfully apply *JRM, Inc.*’s rubric to this matter. Moreover, the effect of the mandate is the same: in the absence of an agreement to arbitrate, the trial court’s order denying arbitration will be upheld and the appeal dismissed as interlocutory.

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not exist, Defendant has failed to show a substantial right is affected and this Court lacks jurisdiction to review the trial court's interlocutory order denying Defendant's motion to compel arbitration. *See id.*

Issues

The issues on appeal are whether the trial court: (I) abused its discretion by admitting Plaintiff's Second Affidavit; and (II) properly denied the Motion to Compel Arbitration on the basis there was no agreement to arbitrate between the parties because the MSA rendered the alleged arbitration clause null and void.

Analysis**I. Admission of Second Affidavit**

[1] As a threshold matter, Defendant contends the trial court erred by granting Plaintiff's Motion to Supplement the Record and admitting the Second Affidavit. This Court reviews a trial court's ruling on an untimely affidavit for abuse of discretion. *Lane v. Winn-Dixie Charlotte, Inc.*, 169 N.C. App. 180, 184, 609 S.E.2d 456, 458-59 (2005).

Rule 6(d) of the North Carolina Rules of Civil Procedure generally requires affidavits in support of a motion be served with the motion and—unless otherwise provided—affidavits in opposition to a motion be served at least two days before the hearing on the motion. N.C. Gen. Stat. § 1A-1, Rule 6(d) (2023). However, even “[i]f the opposing affidavit is not served on the other parties at least two days before the hearing on the motion, the court may continue the matter for a reasonable period to allow the responding party to prepare a response, proceed with the matter without considering the untimely served affidavit, or take such other action as the ends of justice require.” *Id.*

Here, Plaintiff served the Second Affidavit on Defendant less than two days before the hearing on the Motion to Compel Arbitration. Nonetheless, the trial court, in its discretion, accepted the Second Affidavit as part of the Record. Specifically, the trial court noted the Second Affidavit was submitted in response to an argument first raised by Defendant in its memorandum opposing Plaintiff's Motion to Stay Arbitration.

In particular, the trial court relied on the Second Affidavit solely for determining the purpose of the MSA's preemption clause and to find—counter to Defendant's argument—the parties did not specifically negotiate any of the terms in Article 16 of the Construction Contract:

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7. Section 7(d) of the MSA provides that “to the extent that a *topic* is addressed or a remedy is provided for in this Agreement [the MSA], corresponding terms or remedies set forth in the [Construction Contract] are null and void and of no affect as to the rights or obligations of either [Defendant] or [Plaintiff]” . . . The purpose of this language was to spare the parties the effort of reviewing the lengthy form contracts to determine each and every way that some clause might cover the same topic already addressed by and agreed to in the MSA. ([Second Affidavit], filed on September 11, 2023 . . . at ¶¶ 3-5.)

. . . .

10. The parties did not specifically negotiate any of the terms in Article 16 of the general conditions of the [Construction Contract]. ([Second Affidavit] at ¶¶ 4-5.)

There is no indication the trial court relied on the Second Affidavit in specifically concluding MSA Section 7(d) rendered Article 16 of the Construction Contract null and void. To the contrary, the trial court concluded the MSA rendered the Construction Contract’s Dispute Resolution provisions null and void by its own terms, reasoning that because MSA Section 26 and Article 16 of the Construction Contract cover the “exact same” topic, the terms contained in the Construction Contract are null and void.

Thus, the trial court’s consideration of the late-filed affidavit was solely supplemental in purpose and used to rebut an argument newly raised by Defendant in Defendant’s own opposition to Plaintiff’s motion. *See Rolling Fashion Mart, Inc. v. Mainor*, 80 N.C. App. 213, 216, 341 S.E.2d 61, 63 (1986) (no abuse of discretion in admitting untimely affidavit where “affidavit was clearly supplemental in that it did no more than explain the transactions referred to in the earlier affidavits filed by the parties and provide copies of the documents involved in those transactions.”). Therefore, Defendant has not demonstrated any abuse of discretion by the trial court in admitting and considering the Second Affidavit. *See Lane*, 169 N.C. App. at 184-85, 609 S.E.2d at 458-59 (finding trial court did not err in allowing affidavit to be admitted after motion was filed where “[p]laintiffs have failed to show abuse of discretion in the trial court’s decision to deny plaintiffs’ request to strike [the] affidavit.”). Consequently, the trial court did not commit reversible error in allowing Plaintiff to supplement the Record with the Second Affidavit.

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II. Motion to Compel Arbitration

[2] Defendant contends the trial court erred in concluding there was no valid agreement to arbitrate. Under N.C. Gen. Stat. § 1-569.7 (2023),

(a) On motion of a person showing an agreement to arbitrate and alleging another person's refusal to arbitrate pursuant to the agreement:

....

(2) If the refusing party opposes the motion, the court shall proceed summarily to decide the issue and order the parties to arbitrate unless it finds that there is no enforceable agreement to arbitrate.

This Court has elaborated “the trial court must perform a two-step analysis requiring the trial court to ascertain both (1) whether the parties had a valid agreement to arbitrate, and also (2) whether the specific dispute falls within the substantive scope of that agreement.” *U.S. Trust Co., N.A.*, 199 N.C. App. at 290, 681 S.E.2d at 514 (citation and quotation marks omitted). “‘[T]he trial court’s findings regarding the existence of an arbitration agreement are conclusive on appeal where supported by competent evidence, even where the evidence might have supported findings to the contrary.’” *Ellis-Don Constr., Inc. v. HNTB Corp.*, 169 N.C. App. 630, 633-34, 610 S.E.2d 293, 296 (2005) (citations omitted). We review the trial court’s conclusions of law de novo. *Hager v. Smithfield E. Health Holdings, LLC*, 264 N.C. App. 350, 354-55, 826 S.E.2d 567, 571 (2019) (citation omitted).

The parties do not contest that “to the extent that a topic is addressed or a remedy is provided for” in the MSA, it renders corresponding contents in the Construction Contract null and void. The parties disagree, however, as to what the language “to the extent” contemplates in this context. Defendant argues MSA Section 26 “did not prescribe terms for arbitration” and thus “addressed dispute resolution only to the extent it involved senior management, mediation by mutual agreement, and access to the courts for the limited purpose of tolling the statute of limitations and to avoid irreparable damage or preserve the status quo[.]” In other words, Defendant contends, because the MSA does not expressly say anything about arbitration, it does not “address” arbitration and thus does not render Article 16 of the Construction Contract null and void. Consequently, according to Defendant, Article 16 of the Construction Contract requires the parties to arbitrate their dispute.

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The MSA provides

[n]otwithstanding any terms in the [Construction Contract] documents, to the extent that a topic is addressed or a remedy is provided for in this Agreement, corresponding terms or remedies set forth in the [Construction Contract] documents are null and void and of no [e]ffect as to the rights or obligations of either [Defendant] or [Plaintiff].

The MSA also provides “[t]o the extent that a topic is *not* addressed or a remedy is not provided for in [the MSA],” then the terms of the Construction Contract shall control on that specific topic or remedy (emphasis added). Both the MSA and the Construction Contract contain sections with the heading “Dispute Resolution”. Within those sections, each discusses the procedures for resolving a dispute, with the MSA allowing for court action and the Construction Contract requiring all disputes to be arbitrated.

In denying Defendant’s Motion to Compel Arbitration, the trial court concluded:

5. Section 7(d) of the MSA provides that “to the extent that a *topic* is addressed *or* a remedy is provided for in this Agreement [the MSA], corresponding terms or remedies set forth in the [Construction Contract] documents are *null and void and of no [e]ffect* as to the rights or obligations of either [Defendant] or [Plaintiff].” (Emphasis added). Thus, the parties agreed in advance that if the MSA and the [Construction Contract] cover the same topic, the provisions of the MSA apply and the provisions of the [Construction Contract] are “null and void and of no [e]ffect.”

6. Because MSA § 26 and [the Construction Contract] § 16 cover the exact same “topic” of dispute resolution, the terms of the [Construction Contract] on the topic of dispute resolution are “null and void” under the MSA.

7. The dispute resolution section of the [Construction Contract] General Conditions, including the delegation clause, therefore never governed the rights or obligations of [Plaintiff] or [Defendant] (on the topic of Dispute Resolution), the parties never agreed to arbitration as a matter of the plain language of the contracts, and the parties never agreed that the arbitrator would decide arbitrability.

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(emphasis in original). In support of these conclusions, the trial court made specific findings, including the following:

7. Section 7(d) of the MSA provides that “to the extent that a *topic* is addressed *or* a remedy is provided for in this Agreement [the MSA], corresponding terms or remedies set forth in the [Construction Contract] are *null and void and of no [e]ffect* as to the rights or obligations of either [Defendant] or [Plaintiff]”

8. The MSA contains a section on the topic of (and is specifically titled) “Dispute Resolution,” which provides that disputes will be resolved first by negotiation among senior management representatives of the parties; thereafter, “either party may pursue court action.” (MSA § 26.)

9. The general conditions to the [Construction Contract] also contain a section on the topic of (and specifically titled) “Dispute Resolution” which states that the parties will resolve disputes through arbitration ([Construction Contract], General Conditions § 16.)

(emphasis in original). These findings accurately recite the relevant provisions of each agreement and are, therefore, supported by the evidence.

Defendant argues “having the same heading or touching the same topic is not enough to prompt preemption under Section 7(d).” However, as the trial court found, not only do the agreements share headings on the same topic, but the substantive provisions under each heading also address what the parties are to do in the event a dispute arises between them.

Defendant further contends the parties agreed the MSA would preempt overlapping “contradictory” terms in the Construction Contract and only to the extent the MSA prescribed those terms. Defendant urges us to read the MSA and the Construction Contract “harmoniously,” such that the terms of the agreements do not overlap, giving effect to the provisions of both agreements. Defendant argues the agreements should be interpreted together, such that any dispute between the parties must first be submitted to senior management in accordance with MSA Section 26, then either party may seek to resolve the dispute through mediation—also in accordance with MSA Section 26; absent mutual agreement to mediate the dispute, it shall be subject to arbitration in accordance with Article 16 of the Construction Contract—and a party may only immediately pursue court action in order to toll the statutes of limitations or seek injunctive or equitable relief pursuant to MSA Section 26.

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It is true, this Court should interpret contracts “in a manner that gives effect to all of its provisions, if the court is reasonably able to do so.” *Johnston Cty. v. R.N. Rouse & Co., Inc.*, 331 N.C. 88, 94, 414 S.E.2d 30, 34 (1992) (citation omitted). However, we also must interpret a contract by its plain language when possible. *See Internet East, Inc. v. Duro Communications, Inc.*, 146 N.C. App. 401, 405, 553 S.E.2d 84, 87 (2001) (“Where the terms of a contractual agreement are clear and unambiguous, the courts cannot rewrite the plain meaning of the contract.”). *See also Morrell v. Hardin Creek, Inc.*, 371 N.C. 672, 686, 821 S.E.2d 360, 369 (2018) (the Court must “enforce the parties’ intent as evidenced by the clear and explicit language of the [contract]”).

Here, the language of the MSA states: to the extent a topic is addressed or a remedy is provided for in the MSA, *corresponding* terms or remedies set forth in the Construction Contract are null and void and of no effect as to the rights or obligations of either Plaintiff or Defendant. The trial court concluded the same:

8. It is not necessary for the Court to determine whether the MSA and [the Construction Contract] dispute resolution provisions conflict because the MSA explicitly states that where a “topic” or “remedy” is addressed in the MSA, then a corresponding topic or remedy in the [Construction Contract] is null and void.

Indeed, MSA Section 7(d) contemplates there may be overlap of topics or remedies in subsequent project-specific agreements such as the Construction Contract—and provides that in such instances, the terms contained in the MSA should control. Moreover, we may not “creatively interpret the parties’ actual . . . agreement in the manner urged . . . and must instead enforce the parties’ intent as evidenced by the clear and explicit language of the” MSA—that the MSA renders any corresponding terms in the Construction Contract null and void. *Morrell*, 371 N.C. at 686, 821 S.E.2d at 369.

Further, the cases cited by Defendant for its argument a contract should be construed in a manner that gives full effect to all provisions are distinguishable from the facts before us. *See R.N. Rouse & Co., Inc.*, 331 N.C. at 90, 414 S.E.2d at 32 (contract stated “in the event of any *conflicting* statements or requirements” between two agreements, the subsequent agreement would control (emphasis added) (quotation marks omitted)); *Internet East, Inc.*, 146 N.C. App. at 405-06, 553 S.E.2d at 87 (agreement compelled arbitration “[u]nless the parties shall agree otherwise”); *In re Hall*, 210 N.C. App. 409, 415, 708 S.E.2d 174, 178 (2011) (construing two agreements in a harmonious manner where

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neither agreement provided for control over the other); *Lowder, Inc. v. Highway Comm.*, 26 N.C. App. 622, 642, 217 S.E.2d 682, 695 (1975) (contract contained “no indication” one clause was to “override” the other), *cert. denied*, 288 N.C. 393, 218 S.E.2d 467 (1975). Indeed, none of these cases concern an agreement which purported to have a voiding effect on corresponding terms and remedies in other agreements.

The dissent places heavy emphasis on the language in MSA Section 26(b) stating “Notwithstanding any other provision of [the MSA], each Party is entitled to immediate access to the courts to: (i) toll any statute of limitation or (ii) seek appropriate injunctive relief or other equitable remedy if, in such party’s sole discretion, such action is deemed necessary to avoid irreparable damage or preserve the status quo.”

Contrary to the dissent’s assertion, our interpretation of the MSA and Construction Contract gives consistent effect to this provision. Section 26(a) requires the parties to first refer “[a]ny controversy or claim” to senior management by written request. Section 26(b) allows the parties—twenty days after referring the dispute to senior management—to either mediate the dispute or pursue court action “pursuant to the requirements and limitations set forth in [the MSA].” Thus, read in the full context of the agreement, Section 26(b) allows the parties to immediately access the courts to toll any statute of limitation or seek injunctive or equitable relief without first submitting the dispute to management or pursuing mediation as prescribed in Section 26(a) and (b) if such action is “*deemed necessary to avoid irreparable damage or preserve the status quo.*” (emphasis added). In other words, the parties may immediately seek court action to preserve their rights while undertaking the dispute resolution process mandated by the MSA. Otherwise, the parties must follow the requirements and limitations set forth in the MSA and the remainder of Section 26—which Plaintiff has done here.

Here, MSA Section 7(d) expressly provides that to the extent the MSA addresses a topic, it renders corresponding terms or remedies set forth in the Construction Contract null and void. Thus, the Record supports the trial court’s Findings that the MSA and the Construction Contract both contain sections titled “Dispute Resolution” and that MSA Section 26 provides specific terms for dispute resolution—expressly allowing for resolution in court—and Article 16 of the Construction Contract provides its own dispute resolution process—arbitration. These Findings, in turn, support the trial court’s Conclusion that because MSA Section 26 and Article 16 of the Construction Contract “cover the exact same ‘topic’”, Article 16 of the Construction Contract is null and void. Consequently, consistent with *JRM, Inc.*, this appeal is interlocutory

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and does not affect a substantial right, subjecting it to dismissal. *See* 287 N.C. App. at 598, 883 S.E.2d at 221.

Conclusion

Accordingly, for the foregoing reasons, Defendant's appeal from the trial court's Order Denying its Motion to Compel Arbitration is dismissed.

DISMISSED.

Judge FLOOD concurs.

Judge TYSON dissents by separate opinion.

TYSON, Judge, dissenting.

The majority's opinion wrongfully dismisses Defendant's immediately-available appeal of the trial court's denial of his motion to compel arbitration. The two clauses and remedies in the Master Service Agreement ("MSA") and the later and more specific Construction Contract are consistent and harmonious. The content and exclusions of the specific provisions read together reflect the intent and agreement of the parties. The paragraph headers are merely surplus and non-binding.

The MSA does not specifically exclude arbitration as an additional option and remedy to senior managements' meeting, mediation, and does not prevent the parties from resorting to the courts in the limited instances stated. The MSA provides:

either party may pursue court action pursuant to the requirements and limitations set forth in this Agreement. *Notwithstanding any other provision of this Agreement, each Party is entitled to immediate access to the courts to: (i) toll any statute of limitation or (ii) seek appropriate injunctive relief or other equitable remedy if, in such party's sole discretion, such action is deemed necessary to avoid irreparable damage or preserve the status quo.* (emphasis supplied).

Resorting to the courts is expressly limited by and to the enumerated purposes stated in this "Notwithstanding" and overriding provision.

It makes perfect sense for the parties to expressly agree to a later and more specific individualized Construction Contract, in addition to

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the MSA, for capital projects over \$250,000, as opposed to smaller or nickel and dime daily maintenance between the parties. An arbitration option is needed as a supplement to the informal discussion between management and non-binding mediation for a prompt, final and binding decision. Much more is at stake for both parties on large projects. The delays inherent during litigation, while in the midst of large-scale projects, are intolerable for both parties.

This is a multi-million or multi-hundred-million dollar project. The project-specific Construction Contract is later in time, was specifically agreed to, and is in addition to, amends, and extends the MSA. The addition of arbitration as another procedure and remedy to resolve disputes does not usurp or conflict with any “topic” or provisions of the MSA. A more specific and later-in-time agreement takes priority and controls over an earlier and more general agreement. *See Wood-Hopkins Contracting Co. v. N.C. State Ports Auth.*, 284 N.C. 732, 738, 202 S.E.2d 473, 476 (1974) (“[W]hen general terms and specific statements are included in the same contract and there is a conflict, the general terms should give way to the specifics.”). The presence of arbitration as a remedy to quickly resolve disputes in the project-specific Construction Contract, is binding and is entirely consistent with the parties’ expressed intent in the later agreement.

The Federal Arbitration Act “was enacted in 1920 in response to widespread judicial hostility to arbitration agreements.” *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339, 179 L. Ed. 2d 742, 750 (2011) (citing *Hall Street Associates, L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 581, 170 L. Ed. 2d 254 (2008)).

The Federal Arbitration Act provides:

A written provision in any maritime transaction or a contract evidencing a *transaction involving commerce* to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . *shall be valid, irrevocable, and enforceable*, save upon such grounds as exist at law or in equity for the *revocation* of any contract.

9 U.S.C. § 2 (2024) (emphasis supplied).

The Supreme Court of the United States “described this provision as reflecting both a ‘liberal federal policy favoring arbitration,’ and the ‘fundamental principle that arbitration is a matter of contract.’” *Id.* (internal citations omitted). Justice Scalia, writing for the majority of the Court held “courts must place arbitration agreements on an equal footing with

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other contracts, and enforce them according to their terms.” *Id.* (internal citations omitted).

The trial court erred in denying Defendant’s motion to compel arbitration and the majority’s opinion errs in dismissing Defendant’s timely appeal. I respectfully dissent.

I. Background

An express agreement between the parties to arbitrate disputes, and the denial of that mechanism to resolve those disputes, triggers immediate review. To cease progress mid-point and languish in litigation purgatory will kill a large construction project quicker than anything else. Disputes over specific approvals, permits, time, materials, finance, completion, quality and delivery schedules demand prompt and final resolution. That is the reason Congress and our General Assembly and multiple binding precedents provide enforcement and allow for interlocutory review of the denial of an expressly-agreed-to alternative dispute resolution.

The later and more specific Construction Contract meets all the elements of a valid express contract and should be enforced according to its terms. Neither Plaintiff, the trial court, nor the majority’s opinion dispute the validity of the later Construction Contract. In fact, it is that very contract Plaintiff seeks to enforce in an unauthorized forum after Plaintiff had bargained for and agreed to arbitration to timely resolve disputes under that very agreement!

Plaintiff brought a purported action in Mecklenburg County Superior Court on 26 May 2023 against Defendant alleging a claim for Breach of Contract and seeking foreclosure of a mechanic’s lien. Neither of Plaintiff’s claims in the trial court seeks to “*toll any statute of limitation or (ii) seek appropriate injunctive relief*” under the MSA.

Defendant timely filed a Demand for Arbitration with the American Arbitration Association on 24 July 2023. Defendant also filed Motions to Compel Arbitration and to Stay Judicial Proceedings on 26 July 2023, relying upon the arbitration clause contained in Article 16 of the Construction Contract. Plaintiff filed a Cross-Motion to Stay Arbitration on 1 September 2023. The Motions were heard before the trial court on 12 September 2023. The trial court denied Defendant’s Motion to Compel Arbitration and granted Plaintiff’s motion to Stay Arbitration on 28 November 2023. On 12 December 2023, Defendant timely filed Notice of Appeal.

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II. Standard of Review

Federal and North Carolina statutes and precedents strongly encourage arbitration as an agreed-upon and alternative means for parties to resolve their disputes. Courts have held to enforce this principle, it is “well established that an order denying a motion to compel arbitration is immediately appealable.” *Cornelius v. Lipscomb*, 224 N.C. App. 14, 16, 734 S.E.2d 870, 871 (2012) (citing *Edwards v. Taylor*, 182 N.C. App. 722, 724, 643 S.E.2d 51, 53 (2007)); *U.S. Trust Co., N.A. v. Stanford Grp. Co.*, 199 N.C. App. 287, 289, 681 S.E.2d 512, 513 (2009) (citation omitted) (“[A]n appeal from the trial court’s denial of a motion to compel arbitration is an interlocutory order.”). The trial court’s conclusions of law are reviewed *de novo* on appeal. *Hager v. Smithfield E. Health Holdings, LLC*, 264 N.C. App. 350, 354-55, 826 S.E.2d 567, 571 (2019).

III. Analysis**A. N.C. Gen. Stat. § 1-569.7(a)(2)**

N.C. Gen. Stat. § 1-569.7(a)(2) (2023) provides:

(a) On motion of a person showing an agreement to arbitrate and alleging another person’s refusal to arbitrate pursuant to the agreement:

....

(2) If the refusing party opposes the motion, the court shall proceed summarily to decide the issue and order the parties to arbitrate unless it finds that there is no enforceable agreement to arbitrate.

The trial court must perform a two-step analysis “to ascertain both: (1) whether the parties had a valid agreement to arbitrate; and also, (2) whether the specific dispute falls within the substantive scope of that agreement.” *U.S. Trust Co., N.A.*, 199 N.C. App. at 290, 681 S.E.2d at 514.

Defendant argues MSA Section 26 “did not prescribe [nor proscribe] terms for arbitration,” did not expressly prohibit it as a procedure or remedy, and “addressed dispute resolution only to the extent it involved senior management, mediation by mutual agreement, and access to the courts for the limited purpose of tolling the statute of limitations and to avoid irreparable damage or preserve the status quo[.]” Defendant correctly asserts the MSA does not expressly contain anything about arbitration, does not “address” arbitration, and does not exclude or render Article 16 of the Construction Contract null and void.

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B. Standards of Interpretation

The Construction Contract is a separate, distinct, specific, and more recent contract between the parties, which contains all essential elements of a valid express agreement. *Wood-Hopkins Contracting Co.*, 284 N.C. at 738, 202 S.E.2d at 476. Article 16 requires the parties to arbitrate resolution of their disputes on these larger-scale construction projects.

Defendant correctly argues the MSA and the Construction Contract must be read “harmoniously,” where a procedure or remedy is not mentioned nor prohibited by the MSA, and the court is required to give effect to the provisions of both agreements. Agreements between the parties must be interpreted together, any dispute between the parties must first be submitted to senior management in accordance with MSA Section 26, then either party may seek to resolve the dispute through non-binding mediation, also in accordance with MSA Section 26. Absent mutual agreement to mediate, the dispute shall be subjected to arbitration in accordance with Article 16 of the Construction Contract.

The trial court and the majority’s opinion failed to recognize or give effect to the parties’ express agreement that, “*Notwithstanding any other provision of this Agreement,*” a party may only immediately pursue court action in order “to toll the statutes of limitations or to seek injunctive or equitable relief” pursuant to MSA Section 26.

Trial and appellate courts must “enforce the parties’ intent as evidenced by the clear and explicit language of the agreement(s).” *Morrell v. Hardin Creek, Inc.*, 371 N.C. 672, 686, 821 S.E.2d 360, 369 (2018). “Where the terms of a contractual agreement are clear and unambiguous, the courts cannot rewrite the plain meaning of the contract.” *Internet East, Inc. v. Duro Commc’ns, Inc.*, 146 N.C. App. 401, 405, 553 S.E.2d 84, 87 (2001) (internal citation omitted). The agreements must be reviewed and enforced “in a manner that gives effect to all of its provisions, if the court is reasonably able to do so.” *Johnston Cty. v. R.N. Rouse & Co., Inc.*, 331 N.C. 88, 94, 414 S.E.2d 30, 34 (1992) (internal citation omitted).

C. JRM, Inc. v. HJH Companies, Inc.

There is no finding nor conclusion the terms of either contract are ambiguous. The majority’s opinion further compounds this error by relying upon *JRM, Inc. v. HJH Companies, Inc.*, 287 N.C. App. 592, 598, 883 S.E.2d 217, 221 (2023). This Court dismissed the appeal because no valid arbitration agreement existed, and no substantial right was affected. This reliance is contrary to the express and plain language of the admittedly-valid Construction Contract, not the MSA, which Plaintiff

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specifically seeks to enforce, not in arbitration, as contractually required, but in the trial court. Resorting to the trial court for breach is specifically prohibited in the MSA, except as specifically allowed therein.

The trial court erroneously concluded as a matter of law, “It is not necessary for the Court to determine whether the MSA and [the Construction Contract] dispute resolution provisions conflict because the MSA explicitly states that where a ‘topic’ or ‘remedy’ is addressed in the MSA, then *a corresponding topic or remedy* in the [Construction Contract] is null and void.”

The fallacy and prejudicial error therein is neither arbitration as a procedure, topic, nor remedy is mentioned at all in the MSA and is certainly not specifically excluded. Where the parties themselves later agreed to and adopted this procedure as an additional remedy to resolve disputes, it controls. *Wood-Hopkins Contracting Co.*, 284 N.C. at 738, 202 S.E.2d at 476.

MSA Section 7(d) also specifically provides. “To the extent that *a topic is not addressed or a remedy is not provided* for in this Agreement, then the *terms of the [project-specific contract] shall control* for that specific topic or remedy.” (emphasis supplied). The trial court also made no findings or conclusions concerning Plaintiff wrongfully filing claims in court for breach of contract and to foreclose a lien in court, where those actions are also specifically excluded as a remedy in the MSA Section 7(d) and are *specifically* prohibited by the agreement to arbitrate in the Construction Contract. MSA Section 26 expressly limits the parties’ access to the courts: “Notwithstanding any other provision of this Agreement, each Party is entitled to immediate access to the courts to: (i) toll any statute of limitation or (ii) seek appropriate injunctive relief or other equitable remedy if, in such party’s sole discretion, such action is deemed necessary to avoid irreparable damage or preserve the status quo.”

The trial court and the majority’s opinion errs by giving primacy to a clause that “addresses a topic” as opposed to the MSA not mentioning a “topic” nor prohibiting a process or remedy. The trial court and the majority’s analysis also ignores the plain language of the MSA to expressly limit either parties’ initial access to the courts under the circumstances specifically stated: “*each Party is entitled to immediate access to the courts to: (i) toll any statute of limitation or (ii) seek appropriate injunctive relief or other equitable remedy if, in such party’s sole discretion, such action is deemed necessary to avoid irreparable damage or preserve the status quo.*” The topics and remedies in the contracts are simply not mutually exclusive.

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Plaintiff's claims being asserted in court also directly violates this specified provision in the MSA, a "Notwithstanding" provision that expressly overrides all others contained therein. The two agreements contain "no indication" one clause was to "override" or exclude the other contract provision, where a process and remedy was not specifically named or excluded, and where express limitations on filing suit for relief for disputes is available only through specifically agreed-upon arbitration. *See Lowder, Inc. v. Highway Comm.*, 26 N.C. App. 622, 642, 217 S.E.2d 682, 695 *cert. denied*, 288 N.C. 393, 218 S.E.2d 467 (1975).

The trial court and the majority's opinion prejudicially err in denying Defendant's motion to compel arbitration and to dismiss Defendant's timely appeal. The decision to dismiss Defendant's timely appeal is also contrary to the Supreme Court of the United States' holding in "Jurisdiction over the appeal, however, 'must be determined by focusing upon the category of the order appealed from, rather than the strength of the grounds for reversing the order.' " *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 628, 173 L. Ed. 2d 832, 838 (2009) (citing *Behrens v. Pelletier*, 516 U.S. 299, 311, 133 L. Ed. 2d 773 (1996)). In other words, even if a litigant actually has no right to arbitrate and a trial court so determines, the party is still entitled to an immediate appeal and review on that issue.

IV. Admission of Untimely Second Affidavit

As I vote to address the merits of this timely interlocutory appeal and to reverse the trial court's denial of Defendant's motion to compel arbitration, I also address the trial court's error in admitting an untimely affidavit to supplement the record. The trial court also granted Plaintiff's Motion to Supplement the Record with an additional untimely affidavit (Second Affidavit), which it had served on Defendant the night prior to hearing.

North Carolina Rules of Civil Procedure 6(d) requires affidavits in support of a motion to be served with the motion and, unless as otherwise provided, affidavits in opposition to a motion *must* be served at least two days prior to the hearing on the motion. N.C. Gen. Stat. § 1A-1, Rule 6(d) (2023).

Rule 6(d) further provides:

If the opposing affidavit is not served on the other parties at least two days before the hearing on the motion, the court may continue the matter for a reasonable period to allow the responding party to prepare a response, proceed with the matter without considering the untimely

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served affidavit, or take such other action as the ends of justice require.

Id. There are no findings or conclusions to support or excuse Plaintiff's express violation of Rule 6(d). *Id.*

The trial court simply stated the Second Affidavit was submitted in purported response to an argument Defendant had raised in its memorandum opposing Plaintiff's Motion to Stay Arbitration. The order is devoid of any basis to deviate from the stated requirements of Rule 6(d), and it should have been excluded. *Id.*

V. Conclusion

The trial court committed reversible error in denying Defendant's motion to compel and allowing Plaintiff to supplement the Record with the untimely Second Affidavit. The trial court's order is properly reversed and remanded for entry of an order allowing Defendant's motion to compel arbitration and to strike Plaintiff's untimely affidavit. The majority's dismissal of Defendant's timely appeal is also erroneous and prejudicial. I respectfully dissent.

IN THE MATTER OF R.A.X.

No. COA24-743

Filed 2 April 2025

Termination of Parental Rights—grounds for termination—failure to make reasonable progress—failure to obtain suitable housing—undocumented status not considered

An order terminating a father's parental rights in his son was affirmed where the findings of fact challenged on appeal were supported by competent evidence and where those and other findings supported the conclusion that the father failed to make reasonable progress in correcting the conditions that lead to the child's removal (N.C.G.S. § 7B-1111(a)(2)). Importantly, the trial court's decision was based not on the father's status as an undocumented immigrant, but rather on his failure to secure safe and appropriate housing for himself and his child. Although the father's undocumented status did affect his ability to obtain housing, the court also found that: his primary obstacle was his criminal record; social services gave him resources for finding housing options that would be

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available to him even with his criminal record and undocumented status, but he failed to follow up on them; and, despite having over two years to find suitable housing and enough finances to afford it, he continuously lived under unsuitable conditions for raising a child (sleeping on a living room couch in a house with a group of unidentified adults).

Appeal by respondent-appellant father from order entered 20 May 2024 by Judge Thomas W. Davis V, in District Court, Forsyth County. Heard in the Court of Appeals 18 March 2025.

Assistant County Attorney Melissa Starr Livesay for petitioner-appellee Forsyth County Department of Social Services.

Matthew D. Wunsche for the guardian ad litem.

Richard Croutharmel for respondent-appellant father.

STROUD, Judge.

Respondent-father appeals from the trial court's Order terminating his parental rights as to his minor child. Respondent-father argues the trial court erred in concluding the child was neglected under North Carolina General Statute Section 7B-1111(a)(1) and that respondent-father willfully left the minor child in foster care for more than twelve months without sufficient progress to effect the minor child's return home under North Carolina General Statute Section 7B-1111(a)(2). As the trial court properly terminated respondent-father's parental rights under North Carolina General Statute Section 7B-1111(a)(2) for willful failure to make progress, we affirm the trial court's termination Order.

I. Background

Rex¹ was born in October 2020 in Forsyth County, North Carolina. On 15 December 2021, the Forsyth County Department of Social Services ("DSS") filed a juvenile petition alleging Rex was neglected since he "does not receive proper care from his parents and lives in an environment injurious to his welfare." Specifically, DSS alleged Rex's mother²

1. A pseudonym is used to protect the identity of the minor child.

2. Rex's mother is not a party to this appeal.

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and Rex were “out at night without a coat or shoes on while [the mother] was knocking on apartments trying to find a place for her and [Rex] to stay for the night[.]” Rex’s lips were turning blue, and the mother “uses drugs and prostitutes in the presence of [Rex], and it was unknown where they were staying.” An order for nonsecure custody was entered 17 December 2021 placing Rex in the custody of DSS. Father was initially unknown but was identified after DNA paternity testing; the trial court found Father is “the natural and biological father” of Rex. Father is an undocumented immigrant from Guatemala.

The initial adjudication hearing was conducted on 11 February 2022 and on 1 April 2022 the trial court entered an order adjudicating Rex as neglected. At the hearing, Father “stated he could not provide care for [Rex] and did not have any kinship care placement to offer[.]” The trial court also noted a child and family team meeting on 14 December 2021 where Father stated “he is unable to provide adequate housing or physical care for [Rex] . . . due to lack of proper identification” and that “he rents a room from his boss, [and] because his boss does not want to be involved with DSS” Rex could not stay there with Father. Father also admitted to “a history of substance abuse treatment or domestic violence treatment.” The trial court ordered Father to take parenting classes; “[o]btain and maintain stable housing that meets the needs” of Rex; “[p]articipate in a Substance Abuse assessment and follow all recommendations[;]” “[o]btain and maintain proper legal identification[;]” demonstrate an ability to meet Rex’s needs; “[d]emonstrate that he can maintain a safe, stable home which is free from domestic violence and from substance use[;]” complete a domestic violence assessment and comply with recommendations; and sign a release allowing DSS and Rex’s Guardian *ad Litem* (“GAL”) to have access to Father’s mental health and substance abuse treatment information.

The first permanency planning hearing was conducted on 6 May 2022 and the trial court found Father had started parenting classes and so far he had not missed a session; participated in substance abuse classes; has “begun to acknowledge concerns of [Rex’s] basic and developmental needs[;]” and complied with the request to sign releases allowing DSS and Rex’s GAL access to his mental health and substance abuse treatment information. However, Father did not obtain and maintain stable housing as he was “currently living at a residence he does not want to share with” DSS and stated he was “unable to secure housing as he does not have an ID” but was going to “receive a passport identification from Guatemala.” The trial court also noted DSS gave Father “various resources located in Forsyth and Guilford County that could assist with

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the immigration process.” The trial court ordered the primary reunification plan to be reunification with a secondary plan of adoption.

The trial court held a second permanency planning hearing on 10 August 2022. The trial court again noted Father’s continued progress with parenting and substance abuse classes; however, Father’s housing situation had not changed. Father was “currently living at a residence he d[id] not want to share with” DSS. DSS had given Father information about a “Fathers Are Parents Too” class, which can be offered in Spanish, and has “funding tied that could assist him with maybe making a down payment on an apartment or house” but Father “has not called to enroll or made efforts to engage in the program in order to be able to receive the available assistance.” Father received a passport from Guatemala in April 2022. A social worker “has provided [Father] with various resources located in Forsyth and Guilford County that could assist him with the immigration process” but he “failed to acknowledge [the] information provided by not responding.”

A third permanency planning hearing was held in November 2022 and February 2023. A K’iche language interpreter was present with Father during the November 2022 and February 2023 hearings as the Spanish interpreter suggested at the end of the August 2022 hearing this would be beneficial to Father; K’iche is a “specific dialect most common to Guatemala[,]” Father’s home country. While Father continued parenting classes, visited with Rex, and showed an interest in Rex’s needs, he again was unable to “identif[y] safe and stable housing for” Rex during this hearing. The trial court noted that Father finally provided his current address during this hearing, but he did not “have a separate living area and [he] sle[pt] in the living room on the floor in front of the kitchen.” Parenting Path was trying to help Father obtain housing, but

Parenting Path staff reported that they have tried to work with [Father] to get the needed documentation together to request a green card for citizenship, however he has yet to provide the requested information. Without proof of citizenship and employment, Parenting Path is unable to assist [Father] with obtaining housing.

The permanent plan after this hearing was changed to a primary plan of adoption with a secondary plan of guardianship due to Father’s continued inability to provide stable housing for Rex.

The fourth and final permanency planning hearing was held on 2 August 2023. The trial court again noted that Father provided his address at the prior hearing but would not allow a home visit by DSS

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since Rex “would not be residing there and therefore [Father] does not want a home visit to occur.” Father stated he was continuing to try to find housing but was unable to provide documentation of his efforts to DSS. The trial court stated Father was in the same position as to housing as he was in December 2021, when DSS first got involved with Rex. The trial court noted Father was aware of the requirement to obtain stable housing but his position is that there is nothing he can do, Father stated “[t]here is no solution.”

On 3 November 2023, DSS filed a motion to terminate Father’s parental rights. DSS alleged grounds for termination under North Carolina General Statute Section 7B-1111(a)(1) for neglect and 7B-1111(a)(2) for willfully leaving Rex in foster care for more than twelve months without showing to the court that he has made reasonable progress in correcting the conditions which led to Rex’s removal. Father’s inability to provide safe and stable housing for Rex was the main basis alleged for termination in the motion.

The termination hearing was held on 8 April 2024 and on 20 May 2024 the trial court entered an Order terminating Father’s parental rights under North Carolina General Statute Sections 7B-1111(a)(1) and (a)(2). Father, the social worker, and the GAL all testified at the termination hearing. The trial court found that “[i]n the 845 days that have passed in [Rex]’s life since he was removed from his mother’s care – as [Father] never provided full-time care to [Rex] prior to his removal – [Father] has not made any progress in securing safe and appropriate housing for himself and” Rex.

The trial court noted that the social worker visited Father’s home but was unable to meet the other residents of the home and Father “has not provided the names or identifying information for the other residents of the home.” At some points Father was sleeping on the floor, but by the time of the termination Order, Father “was sleeping on a couch in the shared living room of the apartment.” The trial court outlined the various times it was explained to Father he must have safe housing before taking custody of Rex and that it could be appropriate for Father and Rex to live in a housing arrangement “without a formal rental or lease agreement” but that DSS would be required to “check out the home and the people who lived in it.” The trial court found Father had a monthly surplus of \$2,000.00 after monthly expenses for the past year and before that he had a monthly surplus of \$1,200.00, which was an adequate amount “to obtain a basic, safe home” for Rex.

Father identified his lack of identification, undocumented status, and not speaking English as the main barriers to obtain housing, but

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“acknowledged in his testimony [at the hearing] that the primary obstacle he encountered in obtaining housing was his criminal record.” Father submitted an application for housing in the Fall of 2022 but was denied due to his criminal record, and Father “did not pursue other apartments to the point of submitting applications, assuming that he would be rejected for the same reasons.” DSS provided Father “with information for ten (10) non-profit agencies and churches that offer housing assistance for undocumented individuals, including undocumented individuals with criminal histories.” Finally, the trial court noted Father was initially provided a Spanish language interpreter and was then provided a K’iche language interpreter during the permanency planning hearings and that Father understood clearly the requirement to find safe housing. Father filed notice of appeal on 10 June 2024.

II. Willful Failure to Make Progress

Father argues

[t]he trial court reversibly erred in concluding the existence of the TPR ground of willfully leaving Rex in foster care for more than 12 months with insufficient progress to effect his return home under N.C. Gen. Stat. § 7B-1111(a)(2) because the trial court used [] Father’s undocumented immigrant status as the sole basis for concluding the existence of this TPR ground and the trial court operated under a misapprehension of law.

We disagree.

A. Standard of Review

We review a district court’s adjudication under N.C.G.S. § 7B-1111(a) to determine whether the findings are supported by clear, cogent and convincing evidence and the findings support the conclusions of law. Findings of fact not challenged by respondent are deemed supported by competent evidence and are binding on appeal. A trial court’s finding of fact that is supported by clear, cogent, and convincing evidence is deemed conclusive even if the record contains evidence that would support a contrary finding. The issue of whether a trial court’s adjudicatory findings of fact support its conclusion of law that grounds existed to terminate parental rights pursuant to N.C.G.S. § 7B-1111(a) is reviewed *de novo* by the appellate court. Under a *de novo* review, the court considers the matter

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anew and freely substitutes its own judgment for that of the trial court.

In re M.T., 285 N.C. App. 305, 336, 877 S.E.2d 732, 753-54 (2022) (citations, quotation marks, and brackets omitted).

B. Findings of Fact

First, we note the trial court's Order was thorough and well-organized, clearly delineating its findings related to Rex's mother and Father separately as well as clearly identifying its findings addressing adjudication and disposition. Father did not challenge 51 of the trial court's detailed findings of fact relevant to adjudication of his parental rights. The trial court made 57 findings of fact regarding Father for purposes of adjudication of termination of parental rights.³ Father challenges six of these findings as unsupported by the evidence. We will address each of the challenged findings.

1. Finding 80

Father first challenges finding 80, which states he "contacted two (2) of those ten (10) agencies [that offer housing assistance for undocumented individuals]. When he did not immediately receive a call back from one of those two agencies, [Father] took no further action to follow up. He made no effort to contact the other eight (8) agencies." Father first testified he did not remember being given a list of ten agencies. He stated he only remembered "the number for the church that [he] called, and they didn't answer - - they didn't call [him] back. And then [social worker Choplin] gave [him] another number for another office, and they didn't answer." Then when asked "[d]id the social worker give you a different agency to contact after that church[.]" Father answered "[f]rom what I recall, no. Perhaps I have forgotten."

Social worker Choplin testified about giving Father a list of ten to fifteen programs to assist with his housing, but stated Father "did not follow up with any of them until later, when he followed up with the church" and then stated she was not "aware of [Father] making efforts to contact any of the other 10 to 15 programs that [she] identified for [Father.]" Social worker Choplin testified she spoke with the Church of Shattalon and Eureka Ministries on behalf of Father and helped Father learn how to use e-mail to apply for housing through these programs. As social worker Choplin gave Father a list of ten to fifteen agencies

3. Findings 1-40 address general procedural matters and adjudication as to the mother only.

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to contact for housing assistance, Father testified he did not remember receiving any information other than the two agencies social worker Choplin identified specifically, and social worker Choplin was not aware Father made efforts to use any of the other agencies given to him by social worker Choplin, this finding is supported by the evidence. The trial court must assess the credibility of the witnesses and draw inferences therefrom. *See In re R.H.*, 295 N.C. App. 494, 500-01, 906 S.E.2d 829, 834 (2024) (“In the context of termination of parental rights proceedings, the proper inquiry is often fact-dependent and the trial court, as a fact-finding court, is in the best position to determine the credibility of the witnesses before it and make findings of fact. Thus, the trial court determines the weight to be given the testimony and the reasonable inferences to be drawn therefrom. If a different inference may be drawn from the evidence, the trial court alone determines which inferences to draw and which to reject.” (citations and quotation marks omitted)).

2. Finding 81

Finding 81 states Father “did not take reasonable steps to pursue housing options that were made known to him and which could have assisted him, despite his criminal record, which he identified as a barrier to securing safe housing.” Father argues “he did take reasonable steps to pursue housing options.” This argument is closely related to Father’s challenge to finding 80, which we consider supported by the evidence, showing Father contacted only two out of ten housing assistance resources given to him by social worker Choplin. We recognize Father testified on direct examination he paid an application fee at Vista Realty but was denied due to his criminal record and that he contacted a few other places, although the record is unclear as to the number of applications he paid for and submitted. However, on cross-examination, Father was unable to name any of the locations or offices he applied to. Father then stated once an office tells him “they have to check [his] records, then [he doesn’t] apply because [he has] already been rejected[.]” Father then admitted, even after being denied for having a criminal record, he never asked DSS for help finding housing that would allow him even with a criminal record. We also note Father had over two years to secure housing instead of a limited time in which it would not be possible to complete this process. Much of finding 81 required the trial court to assess the credibility of Father and social worker Choplin, and finding 81 is supported by the evidence. *See id.*

3. Finding 87

As to finding 87, Father argues he did not testify at the termination hearing he understood Spanish “perfectly” as found by the trial court. Finding 87 specifically states:

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Social Worker Choplin has communicated with [Father] outside of court in Spanish. While this is not [Father's] first language, he has stated on numerous occasions that he understands Spanish. When asked during his testimony today about communications that occurred in Spanish, [Father] responded that he understood, even stating he understood "perfectly." Further, the record reflects that the need to obtain a safe and appropriate living arrangement for [Rex] and to secure childcare was explained to [Father] at hearings with the Ki'che (sic) interpreter.

DSS and the GAL recognize the trial court used a different word, stating Father actually testified to understanding Spanish "completely" instead of "perfectly." Specifically, in response to a question about his criminal record, Father testified "[t]hat's what they told me, not in English, in Spanish. *So I was able to understand completely what they were telling me.*" (Emphasis added.) While Father did not use the word "perfectly" as the trial court found, he did indicate he understood Spanish "completely." The other parts of finding 87, and other uncontested findings of fact, also indicate Father understood Spanish. Webster's dictionary defines "complete" as "3. highly proficient" and "perfect" as "2: expert, proficient[.]" Merriam-Webster's Collegiate Dictionary 254, 919 (11th ed. 2003). Thus, there is no meaningful difference in the words "completely" and "perfectly" as used by Father in his testimony and the trial court in finding 87.

And to the extent Father suggests on appeal that not having a K'iche interpreter outside of court proceedings contributed to his failure to find safe and stable housing, this suggestion is not supported by the unchallenged findings of fact. The trial court's Order thoroughly addressed the question of Father's native language and his understanding of Spanish in findings 82 through 88, but he challenges only a small portion of finding 87. For example, finding 84 states "[p]rior to August 2022, [Father] participated in and completed programs to include Prime for Life, the Nurturing Parenting Program, and Domestic Violence Treatment provided in Spanish or with the aid of a Spanish interpreter. [] DSS and the [c]ourt accepted [Father's] completion of those programs." Finding 87 is supported by the evidence despite the trial court quoting the word "perfectly" instead of "completely."

4. Finding 89

Father challenges finding 89 by arguing that having a babysitter was not part of his case plan, was "irrelevant given he had no housing for Rex and the trial court was not going to place Rex in his custody until

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he had housing[,]” and that Father examined one daycare but could not afford it. But this challenge does not really address the substance of finding 89. Finding 89 states:

At the hearing today, when asked about how [Rex] will be cared for while he is at work, [Father] stated he will seek a daycare or a babysitter. [Father] doesn’t have an identified daycare or an identified babysitter for [Rex] today. The expectation that a daycare spot or an appropriate babysitter will simply materialize upon [Rex’s] return is not realistic.

Finding 89 does not state that finding a babysitter or day care was part of Father’s case plan but having a babysitter or day care available was clearly relevant. Father’s case plan required him to “demonstrate the ability to meet the basic, developmental, and medical needs of [Rex.] Rex was three and a half years old at the time of the hearing.” Father was working full-time, and it is obvious that one of the things a parent must do to meet the “basic needs” of a child who is age three is to have a reliable babysitter or day care to take care of the child while the parent is working. This challenge is without merit.

5. Finding 90

Father challenges finding 90 as “pure speculation” and is “therefore erroneous.” Finding 90 states:

Were the court to return custody of [Rex] today, one of two things would happen:

[Rex] would go to a situation [Father] himself acknowledged isn’t suitable for [Rex], in an environment with an unknown number of unknown adults and no plan for how [Rex] will be cared for when [Father] goes to work tomorrow.

Alternatively, [Rex] would be left in the care of [the mother]. This was the plan reported to [the mother] in her conversation with Social Worker Choplin in January 2024. As it is the only clear plan for [Rex’s] care to have been identified by either parent, and as there has been at least some amount of continued communication between [Father] and [the mother] during the case, the [c]ourt gives some weight to the evidence that this would be the outcome.

Father “denies that he would rely on [the m]other to help him with Rex’s care if he regained custody of Rex.” Father also argues that he “admitted

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that his current residence was inadequate for Rex. Thus, there was no evidence []Father would attempt to house Rex at his current residence.”

Father challenges the first part of finding 90, arguing there “was no evidence []Father would attempt to house Rex at his current residence,” but based on the evidence, the trial court had no reason to believe he would house Rex anywhere else. Father recognized his current residence was in a home with several adults he would not identify and DSS could not do background checks on, and he did not have a plan for care for Rex when he was working. He had been living in similar circumstances during the entire time Rex was in DSS custody, and he had been unable to find other housing. It is entirely reasonable for the trial court to infer that Father would leave Rex in the care of one or more of the “unknown adults” when he was working, if he had no babysitter or daycare. See *In re R.H.*, 295 N.C. App. at 500-01, 906 S.E.2d at 834.

Further, as to the second part of finding 90 that Rex would instead be left in the care of the mother, as “this was the plan reported to . . . Social Worker Choplin in January 2024[,]” and “it is the only clear plan for [Rex’s] care to have been identified by either parent,” and since Father and the mother were still in contact, the court “gives some weight to the evidence that this would be the outcome.” Father argues only that he denies this assertion but does not point to any testimony or evidence to the contrary. Instead, social worker Choplin testified Father gave her the mother’s phone number, the mother was living on the same street as Father, and

[w]hen talking to [the mother] at the jail, I asked her if her and [Father] were still romantically involved. She stated “yes.” She said “He probably doesn’t want me telling you this,” and further went to say that she sees [Father] pretty often. And then on the 4th of January, when we discussed it as well, I asked her if [Rex] was back into either of their care if they would parent together. She stated “yes,” and they also plan to get married.

Again, the trial court could reasonably infer that Father may leave Rex in the care of the mother when he was working.⁴ See *id.* The challenges to finding 90 are overruled.

4. Other portions of the Order addressed the trial court’s concerns about the mother. Unchallenged findings state that the mother “was leaving [Rex] in unsafe situations while she engaged in prostitution and used drugs.” She also had a “mental health crisis but failed to accept help” and had “jeopardiz[ed] her own safety and further jeopardize[ed] her

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6. Finding 92

As to finding 92, Father does not actually challenge the substance of the finding, but states his inability to obtain housing suitable for Rex was based on his immigration status, and

[t]his Court should hold that it is improper to terminate parental rights where the only issue []Father did not overcome on his case plan was finding adequate housing and the only reason he could not overcome that issue was due to his undocumented immigration status in the United States.

Finding 92 states:

However, despite those actions, [Father] has not changed the fundamental issues underlying [Rex's] removal from his care and custody. As of April 2024, [Father] has had two years and four months, well over the twelve months to permanence, to obtain a safe living arrangement for [Rex] and provide a clear plan of care for [Rex]. [Father's] position has remained essentially the same as at the time of [Rex's] removal.

Father does not argue the substance of finding 92 is unsupported by the evidence, and this finding is supported by the evidence. We will instead review Father's argument as to his inability to find housing and the effect of his immigration status in our discussion of the trial court's conclusion of willful failure to make progress below. Finding 92 is supported by the evidence.

C. Conclusion of Willful Failure to Make Progress

Father contends the trial court erred in concluding there were adequate grounds for termination of his parental rights under North Carolina General Statute Section 7B-1111(a)(2) since "the trial court used []Father's undocumented immigrant status as the sole basis for concluding the existence of this TPR ground and the trial court operated under a misapprehension of law." Although Father's undocumented immigrant status was a fact which complicated Father's ability to find

son's." When Rex was removed from the mother's care by DSS, Father was informed that Rex "was exposed to unsafe conditions in [the mother's] care" but "[Father] did not act to intervene and informed []DSS he was unable to care for his child." The trial court also found that Father "knew or should have known of the conditions his son was experiencing in [the mother's] care" even before DSS informed him of this situation.

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housing, according to the Order, it was not part of the basis for the trial court's conclusion. We disagree with Father's contention that his immigration status played a substantial role in the trial court's determination and conclude the trial court properly terminated Father's parental rights under North Carolina General Statute Section 7B-1111(a)(2) for willful failure to make progress.

North Carolina General Statute Section 7B-1111(a)(2) states:

(a) The court may terminate the parental rights upon a finding of one or more of the following:

....

(2) The parent has willfully left the juvenile in foster care or placement outside the home for more than 12 months without showing to the satisfaction of the court that reasonable progress under the circumstances has been made in correcting those conditions which led to the removal of the juvenile. No parental rights, however, shall be terminated for the sole reason that the parents are unable to care for the juvenile on account of their poverty.

N.C. Gen. Stat. § 7B-1111(a)(2) (2023).

[A]n adjudication under N.C.G.S. § 7B-1111(a)(2) requires that a child be "left in foster care or placement outside the home pursuant to a court order" for more than a year at the time the petition to terminate parental rights is filed. This is in contrast to the nature and extent of the parent's *reasonable progress*, which is evaluated for the duration leading up to the hearing on the motion or petition to terminate parental rights.

In re J.S., 374 N.C. 811, 815, 845 S.E.2d 66, 71 (2020) (emphasis in original) (citations, ellipses, and brackets omitted). We first note it is undisputed Rex was "left" in foster care "for more than a year at the time the petition to terminate parental rights [was] filed." *Id.* Father only contends the trial court erred in using Father's immigration status and operated under a misapprehension of law as to whether Father could take immediate custody of Rex and that the trial court improperly required him to complete all elements of his case plan.

Our Supreme Court has outlined how to evaluate whether a parent's lack of progress with their case plan was willful:

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[A] finding that a parent acted “willfully” for purposes of N.C.G.S. § 7B-1111(a)(2) does not require a showing of fault by the parent. A respondent’s prolonged inability to improve her situation, despite some efforts in that direction, will support a finding of willfulness regardless of her good intentions, and will support a finding of lack of progress sufficient to warrant termination of parental rights under section 7B-1111(a)(2).

Id.

In addressing housing concerns, our Supreme Court specifically noted in a case where the mother moved from a motel to a house, but only a month before the termination hearing, “[t]his limited and delayed progress does not amount to reasonable progress in light of the fact that the children had been in YFS custody for over three years.” *In re E.C.*, 375 N.C. 581, 587, 849 S.E.2d 806, 811 (2020) (citation omitted). Here, Father lived in a house with other unknown adults and slept on the couch in the living room; this situation was the same since at least November 2022 and the termination hearing was not until April 2024. Father agreed that this was an unsuitable arrangement for a child but could not secure adequate housing despite having over two years to do so. DSS provided information and assistance to Father in seeking housing and particularly trying to find housing that would be available to him despite his undocumented immigrant status and his criminal record. In addition, Father did not challenge finding 76, where the court found that “[Father] acknowledged in his testimony today that the primary obstacle he encountered in obtaining housing was his criminal record.” We also note Father had sufficient income to be able to pay for housing, as the trial court found that he worked full-time and had a surplus after paying his basic living expenses – including his rent and utilities – of \$2,000.00 per month at the time of the hearing, so his inability to find housing was not based on poverty.

The trial court also noted, and Father was aware, he was not required to have housing with a formal lease agreement but he would need to give DSS the names of adults who would be living in the home with Father and Rex so they could conduct background checks on the individuals. Father refused to do this throughout the pendency of his case. And despite the ten to fifteen resources Father was given by DSS, the testimony at the hearing showed he only contacted two of those resources and acknowledged after he was denied housing at a facility due to his criminal record, he essentially stopped applying because he assumed he would be denied again. Father had ample time to find housing, was given

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resources by DSS but did not utilize the resources fully and took limited steps to obtain housing. Although Father made progress in other areas of his case plan, such as completing parenting classes, he failed to make progress in obtaining suitable housing. Just as in *In re E.C.*, where the respondent actually found housing shortly before the termination hearing, “[t]his limited and delayed progress does not amount to reasonable progress.” *Id.*

As to his immigration status, Father also cites to *In re B.S.O.*, 234 N.C. App. 706, 760 S.E.2d 59 (2014), to illustrate the effect of deportation on a termination of parental rights case. In *In re B.S.O.*, this Court stated “a parent’s deportation should serve as neither a sword nor a shield in a termination of parental rights decision.” 234 N.C. App. at 711, 760 S.E.2d at 64 (citations and quotation marks omitted). And while this principle is not in dispute, the trial court did not rely on, or even discuss, Father’s immigration status in determining there were adequate grounds to terminate his parental rights. Father recognizes his case differs from *In re B.S.O.* since he was not actually deported or facing deportation, as far as we can tell from the record, but instead argues his immigration status prevented him from obtaining housing and it would thus be improper to terminate his parental rights based solely on his failure to secure safe and stable housing.

But we disagree with Father’s contention that “his undocumented status prevented him from acquiring adequate housing for Rex.” The trial court found that his “primary obstacle” in obtaining housing was “his criminal record.” The trial court also found that he had “convictions for Assault of a Female, Assault with a Deadly Weapon, and Assault on a Child Under 12.” Although Father’s immigration status was a factor in his difficulty in finding housing, it was not his “primary obstacle”; that was his criminal record. Father’s assertion the trial court improperly used his immigration status in terminating his parental rights is without merit.

Father also contends the trial court operated under a misapprehension of law since it “essentially found that []Father was unable to have Rex in his care and custody at the time of the TPR hearing since finding 90 outlined what would happen if Father regained custody.” Father cites to *In re J.S.*, 374 N.C. at 812, 845 S.E.2d at 73, to contend the trial court cannot consider whether a parent can regain custody of a child at the time of the termination hearing. Our Supreme Court, quoting *In re L.C.R.*, 226 N.C. App. 249, 252, 739 S.E.2d 596, 598 (2013), provides:

the issue of whether or not the parent is in a position to actually regain custody of the children at the time of the termination hearing is not a relevant consideration under

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N.C.G.S. § 7B-1111(a)(2), since there is no requirement for the respondent-parent to regain custody to avoid termination under that ground. Instead, the court must only determine whether the respondent-parent had made reasonable progress under the circumstances in correcting those conditions which led to the removal of the juvenile. Accordingly, the conditions which led to removal are not required to be corrected completely to avoid termination. Only reasonable progress in correcting the conditions must be shown.

In re J.S., 374 N.C. at 812, 845 S.E.2d at 73 (citation, quotation marks, and ellipses omitted). Although finding 90 is phrased as what would likely happen if “the court were to return custody of [Rex] today,” this finding, in context, was directly addressing Father’s failure to make reasonable progress to correct the exact circumstances that led to Rex’s removal. Essentially, the trial court found that nothing had changed since Rex was removed; Father still did not have a safe place for Rex to live and had no prospects of finding a safe place; and he still had no identified person or facility to provide safe care for Rex while he was working. As outlined above, the trial court discussed Father’s past and current living conditions, the more than two years Father had to correct these conditions, the efforts DSS made to assist Father in finding housing and Father’s limited use of these resources, and Father’s financial situation which showed he was able to afford housing. This argument is overruled.

Finally, Father argues the trial court “operated under a misapprehension of law by believing that []Father was supposed to have accomplished *all* the requirements of his case plan[.]” (Emphasis added.) Father is correct that “a trial judge should refrain from finding that a parent has failed to make reasonable progress in correcting those conditions which led to the removal of the juvenile simply because of his or her failure to fully satisfy all elements of the case plan goals.” *In re A.B.C.*, 374 N.C. 752, 760, 844 S.E.2d 902, 909 (2020) (citations, quotation marks, and ellipses omitted). “However, we have also stated that a trial court has ample authority to determine that a parent’s extremely limited progress in correcting the conditions leading to removal adequately supports a determination that a parent’s parental rights in a particular child are subject to termination pursuant to N.C.G.S. § 7B-1111(a)(2).” *Id.* And in *In re A.B.C.*, we upheld the trial court’s determination that the respondent failed to make reasonable progress since the core issues resulting in the child’s removal were substance abuse issues and the respondent only made limited progress in correcting that condition.

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See id. Here, Father did make more progress in the other areas of his case plan such as parenting classes and substance abuse, but he made essentially no progress in the housing issue. A core issue resulting in Rex's removal from his parent's care was housing; neither Father nor the mother had adequate housing for Rex. Thus, the trial court did not require Father make reasonable progress in all elements of his case plan as he contends and Father's limited progress in addressing housing is a proper basis for the trial court to terminate his parental rights under North Carolina General Statute Section 7B-1111(a)(2).

The trial court relied on Father's inability to provide safe and stable housing to Rex as a basis for terminating his parental rights, not his immigration status. In addition, Father still was unable to provide a suitable housing arrangement for Rex and this did not change in over two years since Rex was removed from his mother's care. Therefore, Father failed to make reasonable progress with his case plan and the trial court did not err in terminating his parental rights under North Carolina General Statute Section 7B-1111(a)(2). We need not review the trial court's conclusion as to North Carolina General Statute Section 7B-1111(a)(1) for neglect. *See In re D.H.H.*, 208 N.C. App. 549, 552, 703 S.E.2d 803, 805-06 (2010) ("Although the trial court found that three grounds existed, a single ground is sufficient to support an order terminating parental rights. Therefore, if we determine that the findings of fact support one of the grounds, we need not review the other grounds." (citations, quotation marks, ellipses, and brackets omitted)).

III. Conclusion

As the challenged findings of fact are supported by the evidence and the findings support the conclusion that Father failed to make reasonable progress with his case plan under North Carolina General Statute Section 7B-1111(a)(2), we affirm the trial court's termination Order.

AFFIRMED.

Judges ZACHARY and COLLINS concur.

INSCOE v. ISHEE

[298 N.C. App. 358 (2025)]

ASHLEE INSCOE, PETITIONER

v.

TODD ISHEE, COMMISSIONER OF PRISONS, RESPONDENT

No. COA24-272

Filed 2 April 2025

Mandamus—transfer of inmate from a men’s prison to a women’s prison—statutory discretion vested in Department of Adult Correction

The trial court erred in issuing a writ of mandamus ordering respondent—the Commissioner of Prisons—to transfer petitioner—an inmate assigned male at birth, but who claimed to be a woman (or an “intersex woman”) and received an amended birth certificate designating her sex as female—from the men’s prison where she was incarcerated to a women’s prison because the relevant statutes (N.C.G.S. §§ 148-36 and 148-44), taken together, provide the Department of Adult Correction with discretion to assign an inmate to any prison facility so long as male and female inmates are quartered separately (which further comports with federal legislation enacted to prevent prison rape and sexual abuse). The trial court’s erroneous conclusion that the department lacked discretion to assign petitioner to a male prison facility arose from its incorrect belief that petitioner’s birth certificate created an irrebuttable presumption that she must be classified as female, while N.C.G.S. § 130A-93 provides that a birth certificate is only *prima facie* evidence of a person’s sex. The evidence regarding petitioner’s sex was conflicting, with the court’s unchallenged findings of fact indicating that petitioner was intersex.

Judge HAMPSON concurring in a separate opinion.

Appeal by respondent from writ entered 28 November 2023 by Judge A. Graham Shirley, II, in Superior Court, Wake County. Heard in the Court of Appeals 24 September 2024.

Emancipate NC, by Elizabeth Simpson, for petitioner-appellee.

Attorney General Jeff Jackson, by Special Deputy Attorneys General Orlando L. Rodriguez and J. Locke Milholland, IV, for respondent-appellant.

INSCOE v. ISHEE

[298 N.C. App. 358 (2025)]

STROUD, Judge.

Todd Ishee, Commissioner of Prisons for North Carolina, appeals from a Writ of Mandamus ordering him to transfer Ashlee Inscoe, an inmate at Nash Correctional Institution, to a women's prison operated by the North Carolina Department of Adult Correction. Under North Carolina statutes, the North Department of Adult Correction is required to "provide quarters for female prisoners separate from those for male prisoners." N.C. Gen. Stat. § 148-44 (2023). The North Carolina Department of Adult Correction also has discretionary authority to consider an inmate's request to transfer to a different prison facility based on the inmate's claim that he or she should be assigned to a different prison facility based on sex or gender. The North Carolina Department of Adult Correction has a multi-disciplinary committee to review requests for transfer and to decide if an inmate should be transferred. After the North Carolina Department of Adult Correction's full consideration of Petitioner's request, in accord with state and federal law, the Division Transgender Accommodation Review Committee made the decision, in its discretion, not to transfer Petitioner to another facility. Petitioner challenged the denial of her request for transfer by filing a petition for a Writ of Mandamus with the Superior Court of Wake County, claiming that the North Carolina Department of Adult Correction did not have the discretion to keep Petitioner in a male facility; her petition alleged that "[Petitioner] is a woman, and thus, she is entitled to be incarcerated at a women's prison."

The trial court ultimately granted the Writ of Mandamus requiring the North Carolina Department of Adult Correction to transfer Petitioner to a women's prison based on the fact that in 2023, Petitioner had her birth certificate amended to state her sex as "female." Although a birth certificate is *prima facie* evidence of a person's sex, it does not create an irrebuttable presumption. The trial court erred in treating the amended birth certificate as creating an irrebuttable presumption that Petitioner is female and therefore must be assigned to a female prison, particularly where the trial court found as a fact that "Petitioner is an intersex individual" who has "at least in part, masculine anatomy" and had an orchiectomy in 2022, resulting in the amendment to the birth certificate. The trial court erred in granting the Writ of Mandamus, and therefore we reverse.

I. Terminology used in this Opinion

Appellate judges strive to write opinions with precision and clarity. No doubt we often fail in meeting this goal but that does not make the

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goal less worthy. Beyond deciding a single case, a court must consider how an opinion may be used.

Once an opinion is filed, lawyers and others will read it with an eye to how they can use it to serve their particular purpose, no matter how remote that may be from what the writer had in mind. Thus, it is well for judicial writers to think how their words might be used, and write to forestall their misuse.

Judicial Writing Manual, 1991, FED. JUD. CTR., p. 21 <https://www.fjc.gov/subject/opinion-writing-legal-writing> [<https://perma.cc/JGN9-C87R>] (last visited Jan. 3, 2025). In an effort to forestall the potential misuse of this opinion, we will first address some terminology used in this opinion.

This Court's usual practice in its opinions is to use names and terminology to refer to parties as used in the order or ruling on appeal, unless that terminology may be confusing in the particular case.¹ Based on the usual practice, in conformity with the trial court's order, here we have generally used "Ashlee Inscoe" as Petitioner's name and "she" and "her" as pronouns for Petitioner. We also note that some documents in the record use Petitioner's former name, William M. Inscoe, and male pronouns for Petitioner. Because the trial court's order uses female pronouns for Petitioner, we will use them also. But our use of pronouns or names in this opinion, either feminine or masculine, does not indicate this Court's disapproval or approval of either type of pronoun, nor do the pronouns or name used indicate any legal ruling or holding by this Court.

II. Factual and Procedural Background

Todd Ishee ("Respondent"), Commissioner of Prisons for North Carolina, appeals from a Writ of Mandamus ordering him to transfer

1. This Court addressed an argument based upon the trial court's terminology used to refer to a party in *Green v. Carter*, which states

the doctrine of collateral estoppel does not apply because the trial court's use of the term "Non-parent" in place of Ms. Green's name or the word "plaintiff" in the custody order was not an adjudication of any fact or issue in that case. Court orders in child custody and child support cases often use descriptive terms to refer to the parties instead of technical legal terms such as "plaintiff" or "defendant." Here, the custody order used the word "Non-parent" to refer to Partner merely for convenience and clarity, just as we have used the terms "Mother" and "Partner" in this opinion.

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Ashlee Inscoe (“Petitioner”), an inmate at Nash Correctional Institution, to a women’s prison within the purview of the North Carolina Department of Adult Correction (“the Department”). On 17 November 2021, with the consent of Respondent, the trial court entered an Order Sealing Motion and Exhibits. The Order sealed the “Motion for Writ of Mandamus and/or Preliminary Injunction, and the accompanying exhibits, from public access indefinitely[.]” Because the Motion for Writ of Mandamus and other documents filed in the trial court were sealed by court order, under North Carolina Rule of Appellate Procedure 42, the record on appeal is also sealed. *See* N.C. R. App. P. 42(a) (“Items sealed in the trial tribunal remain under seal in the appellate courts. When these items are filed with the appellate courts, counsel must attach a copy of the order, statute, or other legal authority that sealed the item below.”).

Because the parties consented to seal the trial court file to protect Petitioner’s medical information, and the trial court approved sealing the court file which resulted in sealing the record on appeal as well, we recognize those reading this opinion may have difficulty understanding this case without access to the documents filed with the trial court or most of the relevant information considered by the Department, the trial court, and this Court. As Petitioner correctly noted in her motion to seal, her “sex and gender are at issue in this matter and the information provided in her Motion is pertinent for the Court to consider.” In its brief to this Court – which was not sealed – the Department addressed “Petitioner’s complex biology and medical file” and referenced facts included in the record on appeal regarding Petitioner’s medical background and incidents during incarceration. Petitioner also discusses and quotes portions of her medical records in her brief, which is not sealed. We have a duty to address the case as the parties presented it to this Court and based on the record and trial court’s findings of fact and conclusions of law. But we appreciate our concurring colleague’s concerns about discussing the facts of this case, and we have limited the information revealed in this opinion to the small portions of the extensive record necessary to address the issues raised by the trial court’s order and the briefs.

Any medical information in this opinion is not intended to re-litigate Petitioner’s sex or gender, as our concurring colleague contends, but to provide the background to understand the discussion of the relevant findings and the challenged conclusions of law in the Order on appeal. For example, the trial court made unchallenged findings of fact based on the evidence presented, including medical information, but then made a conclusion of law stating in part that “the relevant statutes do

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not invite courts to consider the amount (sic) of chromosomes a person has, their physical characteristics, or their hormone levels, nor do the statu[t]es look to gender identity.” This conclusion of law is incorrect, as discussed below, but our discussion of why this conclusion of law is in error requires some factual background.

In a case of this sort, we understand our concurring colleague’s concern that this Court is addressing an intensely personal situation for Petitioner, but we are also addressing a matter of law for the guidance of the Department in conducting its operations in accord with both State and federal law for the benefit of all prisoners and all the residents of North Carolina. In deciding how much information to include in an opinion, we must consider both Petitioner’s private interests and the constitutional mandate for and the public interest in open courts. *See* N.C. Const. art. I, § 18 (“All courts shall be open; every person for an injury done him in his lands, goods, person, or reputation shall have remedy by due course of law; and right and justice shall be administered without favor, denial, or delay.”). Instead of discussing limited information from Petitioner’s case in this opinion, we could have opted to provide public transparency – which is the general rule in cases before this Court – by un-sealing some or all the record filed with this Court. Instead, we sought to balance the competing interests of Petitioner’s medical privacy and this Court’s obligation to provide openness under Article I, section 18 of the Constitution of North Carolina. *See, e.g., Virmani v. Presbyterian Health Servs. Corp.*, 350 N.C. 449, 463, 515 S.E.2d 675, 685 (1999) (“Thus, even though court records may generally be public records under N.C.G.S. § 132-1, a trial court may, in the proper circumstances, shield portions of court proceedings and records from the public; the power to do so is a necessary power rightfully pertaining to the judiciary as a separate branch of the government, and the General Assembly has “no power” to diminish it in any manner. N.C. Const. art. IV, § 1[.] This necessary and inherent power of the judiciary should only be exercised, however, when its use is required in the interest of the proper and fair administration of justice or where, for reasons of public policy, the openness ordinarily required of our government will be more harmful than beneficial.” (citation omitted)).

For these same reasons, this Court and the Supreme Court of North Carolina routinely address appeals dealing with sensitive medical and sexual issues in this manner in other types of cases even where the court files are sealed by operation of law, such as in appeals filed under North Carolina General Statute Section 7B-1001, North Carolina General Statute Section 7B-2602, and North Carolina General Statute Section

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7A-27 “that involve a sexual offense committed against a minor.” N.C. R. App. P. 42 (b). We are not convinced Petitioner’s case should be treated any differently than those cases.² We will therefore summarize facts as relevant to Petitioner’s claims and evidence as well as the Department’s ruling upon Petitioner’s request to the extent necessary to understand the Department’s process and ruling, the trial court’s proceedings and ruling, and this Court’s analysis, while protecting Petitioner’s medical information to the extent possible given the issues presented.

A. Trial Court Proceedings

The record before us tends to reflect that Petitioner began this action by filing a Petition for Writ of Mandamus on 30 September 2021, requesting Respondent to transfer her to a women’s facility. Petitioner’s claim was based on her allegation that she was “currently incarcerated in a men’s prison . . . because she was erroneously assigned male at birth, over forty (40) years ago.” Since 2020, Petitioner had been requesting the Department transfer her to a women’s prison, without success. In the 2021 petition, Petitioner alleged that she “is an intersex woman” and that “‘intersex’ refers to a wide range of variation in physical sex characteristics, such as chromosomes, genitals, and/or gonads, that may cause an individual’s body not to conform to stereotypical notions of male or female.” Petitioner alleged she was “subjected to near-constant verbal and physical harassment” by the other inmates in the facility.

Petitioner first requested transfer in 2020. In April 2020, the facility where Petitioner was housed made a formal request to the Division Transgender Accommodation Review Committee (“DTARC”) to transfer Petitioner to a women’s facility. The DTARC is a “multidisciplinary committee” comprised, at minimum, of the Medical Director, Chief of Psychiatry, Behavioral Health Director, Director of Rehabilitative Services, and the Prison Rape Elimination Act (“PREA”) Director. *Evaluation & Management of Transgender Offenders*, E .2702(k) (2021) Standards for Adult Correctional Institutions (5th ed.). In May 2020, the DTARC requested that Petitioner “be seen by an endocrinologist.” Under the Administrative Remedy Act, Petitioner filed a grievance

2. As a general rule, court files are available to the public unless sealed by court order, and documents in court files containing protected medical information or other types of information protected by law are redacted. *See, e.g., Doe v. Doe*, 263 N.C. App. 68, 92, 823 S.E.2d 583, 598 (2018) (“Adjudicating claims that carry the potential for embarrassing or injurious revelations about parties, witnesses, or a corporation’s image is part of the day-to-day operations of the North Carolina courts as well.” (citation and quotation marks omitted)).

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regarding her housing assignment on 29 July 2020. An endocrinologist examined Petitioner in September 2020 and recommended transfer, and a second doctor reviewed medical records and the endocrinologist's report and also recommended transfer.

In October 2020, the Facility Transgender Accommodation Request Committee ("FTARC") referred the request back to the DTARC. The FTARC is a facility-specific committee providing similar oversight and review as the DTARC, and comprised of representatives from the facility's psychiatry, behavioral health, nursing, administration, unit manager, and PREA Compliance Manager, among others. *Id.* at .2702(j). Petitioner alleged that the DTARC and the Department of Public Safety denied the request to transfer Petitioner in November 2020 based upon Petitioner's "gender assigned at birth" and what she alleged were "vague 'safety concerns.' "

On 16 February 2021 and 1 April 2021, Petitioner filed two more grievances regarding her housing assignment; these were also denied. After "[c]ounsel became aware of [Petitioner's] situation" in July 2021, on 10 August 2021, Petitioner's counsel sent a letter to Respondent and his general counsel seeking Petitioner's transfer to a women's facility. After some "back-and-forth correspondence[,] " Petitioner determined that the Department "does not intend to transfer [Petitioner] to a women's facility" so she filed the Petition for Writ of Mandamus in September 2021. Petitioner alleged that Petitioner "is a woman. Therefore, there is no discretion for [Respondent] to apply as to her housing assignment."

On 8 November 2021, the Department filed a response to the Petition, admitting some allegations and denying others. As relevant to this appeal, the Department admitted "upon information and belief that, currently, Petitioner identifies as a woman" and that she was "assigned male at birth[;]" this assignment was "one factor" the Department considered when "deciding where to incarcerate Petitioner." The Department admitted it had denied Petitioner's request for transfer but alleged the request was denied for three reasons. First, the Department cited "specific, not vague, safety and security reasons." The Department alleged "Petitioner is a convicted child sex offender having been convicted of sexually assaulting a 13-year-old girl, and therefore, is a possible safety and security threat to the population in a women's facility." Second, the Department had "determined that, in the requests for transfer to a women's facility, Petitioner has purposely misstated Petitioner's medical history" and this also posed a "possible threat to the safety and security of" other inmates in a women's facility. Third, the Department noted that "as to Petitioner's own safety and security, Petitioner has admitted numerous times that there are no threats to Petitioner in [the men's facility]"

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and thus “housing Petitioner at [the men’s facility] is not a threat to Petitioner’s safety and security.”

On or about 3 August 2023, Petitioner filed a “Supplement to Motion for Writ of Mandamus[.]” noting that since she filed her original Petition in 2021, she had obtained an amended birth certificate showing her sex as female and undergone “a surgical procedure . . . that aligned her genitalia with her gender identity[.]” When she was initially assigned housing, Petitioner’s birth certificate stated she was male, but on 11 May 2023 the birth certificate was amended to state she is a female. This change was made based on an affidavit from Petitioner’s physician, as allowed by North Carolina General Statute Section 130A-118, after Petitioner had an orchiectomy, or removal of testicles. Since her most recent incarceration in North Carolina, she has been housed in men’s prison facilities and is currently assigned to a single person cell within a housing unit that houses male offenders. Petitioner’s cell opens up to a housing unit designated for men and shared by 107 male inmates.

On 10 August 2023, the trial court entered a Writ of Mandamus ordering Respondent to direct the members of the DTARC to “complete their investigation into” Petitioner’s pending transfer request “and make a final determination[.]” Respondent notified the trial court that the DTARC had reviewed and denied Petitioner’s transfer request on or about 6 September 2023. The DTARC issued its Report on 19 September 2023. The Report concluded Petitioner’s medical, mental health, and program service needs are being met in the current facility, “however, there are safety concerns if she were transferred to her requested facility housing environment.”

The trial court held a hearing on Petitioner’s Motion on 21 November 2023. Following the hearing, the trial court issued a Writ of Mandamus on 28 November 2023 ordering Respondent to transfer Petitioner to a women’s prison by 5 December 2023.

Respondent timely filed written Notice of Appeal on 1 December 2023. The same day, Respondent also filed a Motion for Stay of Order to Transfer Pending Appeal. The trial court granted a temporary stay on 5 December 2023. However, on 2 January 2024, the trial court entered an Order denying Respondent’s Motion to Stay. Respondent then filed a Petition for Writ of Supersedeas and Motion for Temporary Stay in this Court on or about 22 December 2023. This Court entered an Order allowing Respondent’s Motion for Temporary Stay on 22 December 2023. On 8 January 2024, this Court allowed Respondent’s Petition for Writ of Supersedeas.

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B. The DTARC Process

The trial court considered hundreds of pages of exhibits presented by both Petitioner and the Department. Since that information is sealed, we will briefly summarize the DTARC process and some of the evidence before the trial court. This factual background is necessary to understand the DTARC's process and decision.

When an inmate requests transfer to another facility, both state and federal law require the Department to consider the individual inmate's own unique circumstances, including his or her health and safety, as well as the safety of other inmates and the prison facility's management or security concerns. *See* 28 C.F.R. § 115.42(b), (c), (e) (discussing the “[u]se of screening information” in determining where to house inmates); *see also* N.C. Gen. Stat. § 148-36 (2023) (“Secretary of the Department of Adult Correction to control classification and operation of prison facilities.”). In this case, after a full evaluation by medical experts and other specialists on the DTARC, including review of Petitioner's medical information, criminal record, and other information, it determined Petitioner should not be transferred. Specifically, the DTARC concluded that Petitioner's “gender identity history has been complicated by various and repeated unreliable, inconsistent, and at times demonstrably false reports.” Medical testing, including a CT scan, and physical examination, revealed Petitioner has male anatomy. Despite Petitioner's repeated claims she had a genetic karyotype of XX, or female, she never provided any test results to confirm this claim, and she declined the Department's offers to provide genetic testing.³ The DTARC also noted concerns to the safety of other inmates if Petitioner were housed in a female facility since Petitioner is a registered sex offender based upon a conviction for sexual assault on a teenage girl. The DTARC also considered Petitioner's own safety, medical issues, and the availability of services and programs needed for her own well-being.

The DTARC's review process spanned several years and was concluded on 5 September 2023. The DTARC considered voluminous records and reports in its evaluation of Petitioner's request for transfer. The

3. Our concurring colleague states that Petitioner “produced genetic evidence indicating she is female” but our record does not include anything more than Petitioner's claims that she had testing done in California. She also declined the Department's offer to have genetic testing done, and Petitioner alleged in her Supplement to Motion for Writ of Mandamus that a “chromosome test is now irrelevant” due to the amendment to her birth certificate. (Emphasis in original.)

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DTARC's Report noted that Petitioner "has been medically examined and reports indicate functioning male anatomy including a penis and testicles." Although Petitioner "self-report[ed]" as intersex, the DTARC noted that this "[s]elf-report [is] not confirmed by Medical." The DTARC Report included the following summary of its findings:

[Petitioner] is registered as a sex offender related to an offense involving a teenage girl who (per official crime version) [Petitioner] took for a drive, got drunk, and sexually assaulted (victim said she woke up to [Petitioner] on top of her). [Petitioner's] own version of the crime (per OPUS) described the victim as a girlfriend and said her parents were upset and had [Petitioner] "locked up."

[Petitioner's] gender identity history has been complicated by various and repeated unreliable, inconsistent, and at times demonstrably false reports. Examples include reporting undergoing a hysterectomy, experiencing menstruation, describing her testicles as ovaries, and requesting a clitoral reduction to remove her penis. [Petitioner]'s case had been previously reviewed by the DTARC [in 2022] for requested surgeries and transfer to a female facility; these requests were not supported at that time. [Petitioner] recently had an orchiectomy due to medical complaints related to testicular pain. The surgery was approved medically, based on external consultations, but was not related to [Petitioner]'s request for gender-identity related surgeries. Although inaccurate, [Petitioner] has reported to mental health and other providers in the prison system that she is the first person to have gender-identity related surgery in a North Carolina prison.

[Petitioner]'s facility housing status was reviewed by the DTARC with input from PREA, Programs, and Operations. In review of [Petitioner]'s current facility (Nash) placement, the DTARC notes that she has been at the facility for approximately 1.5 years without any major adjustment issues (with exception to the issues created by [Petitioner]'s hoarding hormone medications as described below). According to PREA records, she has no substantiated PREA cases, but has made PREA reports in the recent past which she subsequently recanted or indicated were not accurate. Her medical, mental health, and program service needs are being met at the current facility. In

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this regard the DTARC review did not find issue with her current facility assignment.

In review of [Petitioner]'s requested facility placement (female prison), the DTARC notes concerns. [Petitioner] is registered as a sex offender based on the sexual assault of a female victim and moving her from a male facility to a female facility raises security concerns. [Petitioner] has suggested that moving her to a female facility would be to affirm her gender identity, however, her gender identity history has been complicated by various and repeated unreliable, inconsistent, and at times demonstrably false reports. . . . She has continued her pattern of unreliability has been demonstrated in her recent medication hoarding behaviors as well as in relatively recent PREA reports which she recanted or indicated were not accurate.

The DTARC finds it ill-advised to consider moving [Petitioner] from her current facility where there are no demonstrated issues for her safety or the ability to meet her medical, mental health, and/or program services needs to a requested facility (female) that would create issues for the safety and security of the requested facility (female).

In its "Medical Overview" the DTARC noted concerns regarding Petitioner's misuse and hoarding of her prescribed hormone medications, behavior which posed a risk to Petitioner's own health:

[Petitioner] has repeatedly provided conflicting, inconsistent, and demonstrably false fabricated reports of remote and recent medical history, has repeatedly provided erroneous symptomatology and manifestations of illness not only during her medical care, but has used those erroneous reports outside of her medical care as well. Most recently, [Petitioner] reported that DAC had failed to refill hormone replacement medications. Not only was this entirely untrue, but a routine inspection of [Petitioner]'s room uncovered 450 tablets of estradiol and 68 tablets of spironolactone. As prescribed, this is more than 225 days of medication which was not taken as prescribed. Most concerning is that labs (blood) obtained after this discovery revealed very dangerously high estradiol levels (853). For reference, the highest level of estradiol in a biologic female is 360. Of note, this was an acute development, as

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recent lab work demonstrated normal estradiol levels. The only explanation for this was that [Petitioner] must have consumed what would be considered a potentially toxic dose of the medication. [Petitioner]’s supratherapeutic level demonstrates not only severe non-compliance but impacts many other aspects of medical treatments, and most concerning, poses a significant risk to [Petitioner]’s health. These repeated and concerning manipulations, coupled with PREA accusations which were subsequently recanted, create serious question about the credibility of [Petitioner]’s self-report to medical providers and medical decisions made in such circumstances must be carefully weighed in order to not initiate treatments which could harm the patient.

Based on all these considerations, the DTARC stated that:

The DTARC does not support the request for gender-identity related facility transfer. Her request for transfer to a female facility was reviewed by the DTARC with input from PREA, Programs, and Operations. A review of the security staff ability to house and supervise [Petitioner] to ensure [Petitioner]’s safety and the safety of the population in her current facility assignment appears acceptable, however, there are safety concerns if she were transferred to her requested facility housing environment. Medical, mental health, and program services are available to meet the needs of [Petitioner] at her current facility assignment.

III. Analysis

“The writ of mandamus is an order from a court of competent jurisdiction to a board, corporation, inferior court, officer or person commanding the performance of a specified official duty imposed by law.” *Sutton v. Figgatt*, 280 N.C. 89, 93, 185 S.E.2d 97, 99 (1971) (citations omitted). It is “a limited and extraordinary remedy to provide a swift enforcement of a party’s already established legal rights.” *Holroyd v. Montgomery Cnty.*, 167 N.C. App. 539, 543, 606 S.E.2d 353, 356 (2004). “The party seeking such writ must have a clear legal right to demand it, and the tribunal, board, corporation, or person must be under a present, clear, legal duty to perform the act sought to be enforced.” *Bd. of Managers of James Walker Mem’l Hosp. of Wilmington v. City of Wilmington*, 235 N.C. 597, 600, 70 S.E.2d 833, 836 (1952) (citations omitted). We review grants of mandamus *de novo*. *See Graham Cnty. Bd.*

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of *Elections v. Graham Cnty. Bd. of Comm'rs*, 212 N.C. 313, 322, 712 S.E.2d 372, 379 (2011). We also consider issues of statutory construction *de novo*. See *N.C. Farm Bureau Mut. Ins. Co., Inc. v. Hebert*, 385 N.C. 705, 711, 898 S.E.2d 718, 724 (2024) (“Questions of statutory construction are . . . reviewed *de novo*.” (citation omitted)). Finally, “[q]uestions of law are reviewed *de novo*.” *Cherry Cmty. Org. v. Sellars*, 381 N.C. 239, 247, 871 S.E.2d 706, 714 (2022) (citation omitted).

In its Writ of Mandamus, the trial court made findings of fact and conclusions of law. The Department does not challenge the trial court’s findings of fact on appeal, so those are binding on this court. See *id.* (“A trial court’s unchallenged findings of fact are presumed to be supported by competent evidence and are binding on appeal.”). We will note some findings as relevant to the issues on appeal. The Department raises arguments about some of the trial court’s conclusions of law. The trial court first concluded that the Department has “discretionary authority relating to the actions of [the] FTARC and [the] DTARC and their decisions made under PREA[,] 34 U.S.C.S. § 30301-09; 28 C.F.R. Part. 115[,]” and that the Department committed “no abuse of discretion . . . as it relates to [the] FTARC, [the] DTARC, or discretionary decisions made under PREA.” Therefore, the trial court concluded the Department had conducted its review of Petitioner’s request for transfer in compliance with federal and state law and it did not abuse its discretion. But the trial court then concluded the Department did *not* have discretion in regard to Petitioner’s request for transfer and issued the Writ of Mandamus on this basis.

The Department challenges the trial court’s issuance of the Writ of Mandamus based on North Carolina General Statute Sections 148-44 and 130A-93. The Department contends that the trial court erred in its interpretation of these statutes. After making conclusions of law about the Department’s proper review of Petitioner’s request under state and federal law, the trial court’s next conclusion of law addressed North Carolina General Statute Section 148-44:

4. However, N.C. Gen. Stat. § 148-44 is a sex-based, mandatory requirement on the Secretary of the Department of Corrections to maintain separate living and working facilities (or “quarters”) for men and women.

The Department does not challenge conclusion of law 4.

The Department’s arguments on appeal address the remaining conclusions of law:

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5. Further, Petitioner's birth certificate is *prima facie* evidence that Petitioner is of the female sex under N.C. Gen. Stat. § 130A-93.

6. Respondent has failed to present evidence that challenges the authenticity of the birth certificate. They also do not dispute that an orchiectomy was performed, such orchiectomy being the basis for the amended birth certificate.

7. In making the determination of Petitioner's sex, the [c]ourt notes that the relevant statutes do not invite courts to consider the amount (sic) of chromosomes a person has, their physical characteristics, or their hormone levels, nor do the statu[t]es look to gender identity. The statutes solely look to a person's sex. Through her birth certificate, Petitioner has presented *prima facie* evidence that her sex is female.

8. In securing her amended birth certificate, Petitioner met the North Carolina requirements of N.C. Gen. Stat. § 130A-118 with a notarized letter from a doctor confirming certain statutory requirements. That is all she has to do in order to modify her sex. There is no dispute between the parties as to whether Petitioner has met these requirements. To pursue further lines of inquiry and to rule against the *prima facie* evidence that Petitioner has presented, on the current record, would put this [c]ourt in the position of a legislature. This [c]ourt declines to take such a position. Accordingly, this [c]ourt concludes that Petitioner's sex is female under N.C. Gen. Stat. § 148-44.⁴

4. Our concurring colleague believes that this "conclusion is clearly beyond the scope of this appeal." We note that the Department argued in its brief on appeal that the trial court erred in *this* conclusion of law by treating Petitioner's birth certificate stating she is female as *prima facie* evidence of her sex and that the birth certificate alone dictates her assignment to a female facility under North Carolina General Statute Section 148-44. This question was raised by the Department's brief on appeal and we have therefore addressed it. The Department argued that "the trial court's interpretation of N.C.G.S. §§ 148-44 and 130A-93 divested the Department of its discretion to make housing determinations." (Capitalization altered.) The Department argued at length about the trial court's erroneous interpretation of the interaction of North Carolina General Statute Section 130A-93 and 148-44.

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We review the trial court's conclusions of law *de novo*. *See In re Bass*, 366 N.C. 464, 467, 738 S.E.2d 173, 175 (2013) (citation and quotation marks omitted). The trial court concluded, “§ 148-44 is a sex-based, mandatory requirement on the Secretary of the Department of Corrections to maintain separate living and working facilities (or “quarters”) for men and women.” However, the Department's decision of where to house a particular inmate is inherently discretionary based on federal and state law. Our statutes grant the Department discretionary authority to determine the appropriate facility in which to house each individual:

Subject to such rules and regulations, the Secretary shall classify the facilities of the State prison system and develop a variety of programs so as to permit proper segregation and treatment of prisoners according to the nature of the offenses committed, the character and mental condition of the prisoners, and such other factors as should be considered in providing an individualized system of discipline, care, and correctional treatment of persons committed to the Division. The Secretary of the Adult Correction, or his authorized representative, shall designate the places of confinement where sentences to imprisonment in the State's prison system shall be served. *The Secretary or his representative may designate any available facility appropriate for the individual in view of custodial and correctional considerations.*

N.C. Gen. Stat. § 148-36 (emphasis added). Thus, our statutes expressly accord the Department with discretion to determine the appropriate facility based on “custodial and correctional considerations.” *Id.* Petitioner contends, however, that based on the statutory mandate the Department provide separate “quarters” for male and female prisoners, the Department's discretion is limited to determining the particular facility but not the *type* of facility (i.e., male or female prison) to which an inmate may be assigned.

North Carolina General Statute Section 148-44 provides: “The Department shall provide quarters for female prisoners separate from those for male prisoners.” N.C. Gen. Stat. § 148-44. Petitioner contends Section 148-36 is subordinate to Section 148-44, requiring the Department to house male and female inmates separately because Section 148-36 does not reference sex. Thus, Petitioner argues, the Department's decision on Petitioner's transfer request was not, in fact, discretionary. Therefore, in Petitioner's view, the Writ of Mandamus did not remove discretion from the Department at all because its decision

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was not discretionary. This interpretation misconstrues the statutes and, indeed, strips the Department of the discretion granted to it.

The grant of discretion to the Department under Section 148-36 is broad, requiring only that the Department make a decision based on “custodial and correctional considerations.” N.C. Gen. Stat. § 148-36. Taken together with the requirement to provide separate quarters for male and female inmates under Section 148-44, *see* N.C. Gen. Stat. § 148-44, the Department may assign an inmate to any prison facility so long as male and female inmates are quartered separately.

Also, federal regulations accompanying PREA affirm state agencies’ discretionary authority in housing determinations. PREA is a federal law enacted to “establish a zero-tolerance standard for the incidence of prison rape in prisons in the United States” and “develop and implement national standards for the detection, prevention, reduction, and punishment of prison rape.” 34 U.S.C. § 30302. Although PREA is a federal law, its terms reflect that it also applies to State prisons.⁵ In the accompanying regulations in the subsection entitled “Screening for Risk of Sexual Victimization and Abusiveness[.]” federal regulations expressly address housing assignments for transgender and intersex inmates:

(b) The agency^[6] shall make individualized determinations about how to ensure the safety of each inmate.

(c) In deciding whether to assign a transgender or intersex inmate to a facility for male or female inmates, and in making other housing and programming assignments, *the agency shall consider on a case-by-case basis* whether a placement would ensure the inmate’s health and safety, and whether the placement would present management or security problems.

....

5. For example, in its subsection providing definitions, PREA defines “prison” as “any confinement facility of a Federal, State, or local government, whether administered by such government or by a private organization on behalf of such government, and includes (A) any local jail or police lockup; and (B) any juvenile facility used for the custody or care of juvenile inmates.” 34 U.S.C. § 30309(7). Federal regulations accompanying PREA employ a nearly identical definition, which likewise encompasses state facilities: “Prison means an institution under Federal or State jurisdiction whose primary use is for the confinement of individuals convicted of a serious crime[.]” 28 C.F.R. § 115.5.

6. Under PREA, “[a]gency means the unit of a State, local, corporate, or nonprofit authority, or of the Department of Justice, with direct responsibility for the operation of any facility that confines inmates, detainees, or residents[.]” 28 C.F.R. § 115.5.

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(e) A transgender or intersex inmate's own views with respect to his or her own safety shall be given *serious consideration*.

28 C.F.R. § 115.42(b), (c), (e) (emphasis added). This language illustrates that federal law contemplates multi-factor, discretionary decisions. Indeed, as these regulations underscore, such individualized considerations are necessary to uphold each inmate's safety, as well as each facility's management and security. *See* 28 C.F.R. § 115.42(a), (c).

Here, in issuing its second Writ of Mandamus, the trial court expressly first concluded the Department had not abused its discretion in making a housing decision under PREA arising from the FTARC and the DTARC reviews. However, in this second Writ of Mandamus, the trial court also ordered "Petitioner is to be transferred to a women's prison within the purview of the North Carolina Department of Adult Correction." Given the discretionary nature of the Department's housing decisions, this command moves from compelling an official to make a discretionary decision to "requir[ing] a particular result" – an impermissible use of mandamus. *In re T.H.T.*, 362 N.C. 446, 454, 665 S.E.2d 54, 59 (2008) (citation omitted); *see also Hamlet Hosp. & Training Sch. for Nurses v. Joint Comm. on Standardization et al.*, 234 N.C. 673, 680, 68 S.E.2d 862, 868 (1952) ("In such cases mandamus lies only to compel public officials to take action, but ordinarily it will not require them, in matters involving the exercise of discretion, to act in any particular way."). "It is well settled law that Mandamus cannot be invoked to control the exercise of discretion of a board, officer, or court . . . unless it clearly appears that there has been an abuse of discretion." *Moody v. Transylvania Cnty.*, 271 N.C. 384, 390, 156 S.E.2d 716, 720 (1967) (citation and quotation marks omitted). In this case, however, the trial court expressly concluded "[t]here was no abuse of discretion by Respondent as it relates to [the] FTARC, [the] DTARC, or discretionary decisions made under PREA." The trial court's grant of mandamus infringed on the Department's discretionary authority.⁷

7. Indeed, the two Writs of Mandamus entered in this case illustrate the issue. In its first Writ of Mandamus entered 10 August 2023, the trial court ordered Respondent to compel the DTARC to make a final determination on Petitioner's transfer request—a type of action clearly approved of by our caselaw. *See Bd. of Educ. of Yancey Cnty. v. Bd. of Comm'rs of Yancey Cnty.*, 189 N.C. 650, 652, 127 S.E. 692, 693 (1925) ("The interested citizen is entitled to compel the exercise of discretion by public officers, in such as the instant case; but he cannot direct its course."); *Midgette v. Pate*, 94 N.C. App. 498, 504, 380 S.E.2d 572, 576 (1989) ("Where a duty to make a decision is imposed upon a body or officer, even though discretion is involved in the determination, mandamus will lie to compel the body

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The trial court's erroneous conclusion that the Department had no discretion to assign Petitioner to a male prison facility was based directly on its legal error in considering Petitioner's birth certificate as creating an irrebuttable presumption she must be classified as female. Our concurring colleague states that there was no reason for this Court to discuss the facts of this case because "Petitioner's sex is irrefutably unnecessary to the analysis." But we must address the arguments about the trial court's conclusions of law properly presented by the parties in their briefs. According to Petitioner, her "gender identity" is necessary to our analysis. She argues that her "gender identity, her lived experience, her medical records, and a number of other markers including, but not limited to, her official amended birth certificate, reflect the indisputable (*and undisputed*) fact that [Petitioner] is a woman." (Emphasis in original.) Petitioner argues that her sex is the only fact necessary to the analysis, and her amended birth certificate requires a legal conclusion that she is female and must be assigned to a female facility. She contends that

N.C. Gen. Stat. § 130A-93(h) is clear in its mandate that a vital record such as [Petitioner's] amended birth certificate is *prima facie* evidence of [Petitioner's] sex. The Department's denial that [Petitioner] is a female prisoner ignores [Petitioner's] material reality, and destroys the meaning of Sections 130A-118(b)(4) and 130A-93(h) which, unlike the Department, do have the authority to determine an individual's sex. The statutes regarding vital records and sex apply to all North Carolina residents, regardless of prisoner or intersex status. If the Department is allowed the statutorily-unfounded "discretion" to deny [Petitioner's] sex, simply because it does not agree with the State Registrar, then the Department would be given the power to invalidate the sex of any prisoner in North Carolina.

In response, the Department argues the trial court's conclusion of law interpreting this statute – which adopted Petitioner's contention regarding the legal effect of her birth certificate – is in error. The Department contends that "[a]bsent reversal, § 130A-93—a statute about public health and vital statistics, not prisons—would suddenly dictate the placement determinations of the Department and completely eliminate

or officer to make the decision, since there is no discretion involved in whether action is to be taken." (citation omitted)).

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the Department's discretion to make certain housing determinations as provided by state and federal law."

The trial court's conclusions of law 6, 7 and 8 were based upon an erroneous interpretation of North Carolina General Statute Section 130A-93. The trial court stated correctly that a birth certificate is "prima facie evidence" of Petitioner's sex. *See* N.C. Gen. Stat. § 130A-93(h) ("A certified copy issued under the provisions of this section shall have the same evidentiary value as the original and shall be prima facie evidence of the facts stated in the document."). But *prima facie* evidence creates only a rebuttable presumption. Petitioner's birth certificate was amended in May 2023, before the DTARC concluded its review in September 2023, but the DTARC also considered voluminous other evidence in making its decision, as we briefly summarized above. But the existence of evidence opposing the *prima facie* presumption created by the birth certificate can overcome the rebuttable presumption. The trial court's conclusions to the contrary, as stated in conclusions of law 7 and 8, are in error.

Our Supreme Court has described a rebuttable presumption as "a mere inference of fact" which "loses its potency" upon the presentation of opposing evidence:

It is now quite generally held by the courts that a rebuttable or prima facie presumption has no weight as evidence. It serves to establish a prima facie case; but, *if challenged by rebutting evidence, the presumption cannot be weighed against the evidence. Supporting evidence must be introduced, and it then becomes a question of weighing the actual evidence introduced, without giving any evidential force to the presumption itself.*

In re Wall's Will, 223 N.C. 591, 595-96, 27 S.E.2d 728, 731 (1943) (emphasis added) (citation and quotation marks omitted). The Supreme Court has distinguished between the presumption created by "prima facie" evidence and an irrebuttable conclusion of law:

A rebuttable presumption is not an irrebuttable conclusion of law. It is a mere inference of fact. A rebuttable presumption has no weight as evidence. It serves to establish a *prima facie* case, but *if challenged by rebutting evidence, the presumption cannot be weighed against the evidence.* Supporting evidence must be introduced, without giving any evidential weight to the presumption itself.

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In re L.D.B., 168 N.C. 206, 211, 617 S.E.2d 288, 291 (2005) (emphasis in original) (citation omitted).

Here, Petitioner's argument and the trial court's Writ of Mandamus, in conclusions of law 6, 7, and 8, treat the amended birth certificate as creating an irrebuttable conclusion of law. The argument, and the trial court's ruling, can be expressed as a simple, but erroneous, logical syllogism:

Major premise: The Department must "provide quarters for female prisoners separate from those for male prisoners." N.C. Gen. Stat. § 148-44.

Minor premise: Petitioner's amended birth certificate is *prima facie* evidence that she is female.⁸

Conclusion: Therefore, the Department must house Petitioner in a female facility.

The legal error begins in the minor premise and leads to the erroneous conclusion. As noted above, we review the trial court's conclusions of law *de novo*.⁹ See *In re Bass*, 366 N.C. at 467, 738 S.E.2d at 175; see also *Carolina Power & Light Co. v. City of Asheville*, 358 N.C. 512, 517, 597 S.E.2d 717, 721 (2004) ("Conclusions of law drawn by the trial court from its findings of fact are reviewable *de novo* on appeal." (citation omitted)). Petitioner's amended birth certificate is *prima facie* evidence that she is female, "but, if challenged by rebutting evidence, the presumption cannot be weighed against the evidence." *In re Wall's Will*, 223 N.C. at 596, 27 S.E.2d at 731. The Department presented voluminous

8. The trial court's error in treating the birth certificate as requiring a conclusion of law that "Petitioner's sex is female" is illustrated in the conclusion quoted by our concurring colleague. We also note that the Department argued,

even assuming that § 130A-93 has *some* relevance in the prison context, that statute says only that an individual's birth certificate is "prima facie evidence of the facts stated in the document." N.C.G.S. § 130A-93(h). In deciding where to house Petitioner, state law tasks the Department with considering a far broader range of factors than simply whether Petitioner's birth certificate is accurate. Most notably, the Department needed to consider how it could best ensure Petitioner's safety and the safety of the other offenders in its custody. Particularly given Petitioner's complex biology and medical file, the Department could not responsibly let a birth certificate blindly dictate Petitioner's placement. Section 130A-93 does not require otherwise. (Emphasis in Original.)

9. Our concurring colleague asserts that we were not "asked" to "rebut the presumption" created by Petitioner's birth certificate. But we were asked to review the trial court's conclusions of law, and we review conclusions of law *de novo*. Here, the trial court's conclusion of law was in error, based on both the law as to the effect of *prima facie* evidence and the unchallenged findings of fact.

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evidence that Petitioner is male or at least intersex. Petitioner presented no evidence that she is actually female; she claims to be intersex. The medical evidence showed she had full male anatomy, at least until the orchiectomy, when the testicles were surgically removed. Petitioner's evidence tended to show she was "intersex" which is not the same as female. Petitioner's birth certificate does not require a finding or a legal conclusion she is female or that she must be housed in a female prison facility. In fact, the trial court found, in one of the *unchallenged* findings of fact, that "Petitioner is an intersex individual[.]"¹⁰ Although much of the evidence considered by the DTARC challenges the Petitioner's claim of being "intersex," this finding is unchallenged and we accept it as true for purposes of appellate review. See *Graham Cnty. Bd. of Elections*, 212 N.C. at 322, 712 S.E.2d at 379. Under the regulations of the Department, "intersex" is defined as "[a] person who has a sexual or reproductive anatomy or chromosomal pattern that does not seem to fit typical definitions of male or female. Intersex medical conditions are sometimes referred to as disorders of sex development. An example would be an individual born with characteristics of both sexes." *Offender Sexual Abuse and Sexual Harassment Policy*, F .3400(m) (2022). Put more simply, an intersex person is physiologically neither clearly male *nor* clearly female. This Court has previously noted the definitions of "male" and "female"¹¹:

A "female" is defined as an "individual that bears young or produces eggs as distinguished from one that begets young." Webster's New Collegiate Dictionary 422 (8th ed. 1977); see also Oxford English Dictionary 823 (2nd ed. 1989) (defining female as "belonging to the sex which bears offspring"). A "male" is defined as "of, relating to, or

10. In her brief to this Court, Petitioner repeatedly insists that she is both female and intersex. She argues that "Petitioner[] is a female prisoner who is wrongfully incarcerated inside a men's prison in North Carolina, in violation of a mandatory centuries-old statute that instructs: 'The Department shall provide quarters for female prisoners separate from those for male prisoners.' N.C. Gen. Stat. § 148-44." In the next paragraph, she quotes finding of fact 7: "[Petitioner] is an intersex individual and under Prison Rape Elimination Act (PREA) standards, she is at a high risk of being an abuse victim."

11. The North Carolina General Assembly has not adopted a statutory definition of male, female, or "biological sex" applicable to this case. However, we note that the definitions as used in this opinion are generally consistent with the definitions as stated in Chapter 90, Article 1N, entitled "Gender Transition Procedures on Minors." See N.C. Gen. Stat. Ch. 90, art. 1N (2023). These definitions were effective as of 1 August 2023, before the trial court's issuance of the Writ.

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being the sex that begets young by performing the fertilizing function in generation and produces relatively small usually motile gametes (as sperms, spermatozoids, or spermatozoa) by which the eggs of a female are made fertile.” Webster’s New Collegiate Dictionary 695 (8th ed. 1977); *see also* Oxford English Dictionary 259 (2nd ed. 1989) (“Of or belonging to the sex which begets offspring, or performs the fecundating or fertilizing function of generation.”).

Green v. Carter, 293 N.C. App. 51, 62, 900 S.E.2d 108, 116 (2024) (brackets omitted).

Based on the trial court’s *unchallenged* findings of fact, Petitioner is neither male nor female; she is intersex. The trial court found that “Petitioner developed, at least in part, masculine anatomy and was raised as a boy. . . . Both parties agree that Petitioner underwent an orchiectomy on September 7, 2022.” An orchiectomy is the “surgical removal of one or both testes.” Merriam-Webster’s New Collegiate Dictionary 873 (11th ed. 2005). An amended birth certificate, obtained in May 2023 – about three years *after* Petitioner first requested transfer to another facility – does not change the physical fact that Petitioner is intersex. The trial court treated the birth certificate as creating an irrebuttable presumption that Petitioner is female, despite its finding of fact that she is intersex, and therefore made an error of law in concluding that Petitioner is female. This conclusion of law was based on an erroneous interpretation of North Carolina General Statute Section 130A-93 since *prima facie* evidence does not preclude the trial court from considering evidence opposing the rebuttable presumption, such as evidence presented in this case about “chromosomes a person has, their physical characteristics, or their hormone levels.” Evidence of this type can be considered, and should be considered if presented, in opposition to the *prima facie* evidence of the birth certificate.

The trial court’s unchallenged finding that Petitioner is “intersex” does not eliminate the Department’s discretion to determine an appropriate housing assignment. In considering Petitioner’s request for transfer, the Department was required to exercise its discretion to deal with actual physical realities of both Petitioner and other inmates, and its discretion is not limited by Petitioner’s personal “material reality,” as she describes it, or her “gender identity.” To protect all inmates in North Carolina’s prison facilities, the Department must operate its prisons based on real custodial and correctional considerations, including the characteristics and needs of each prisoner as well as the available prison

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facilities and programs and the protection of all prisoners. Thus, the trial court's error of law in the application of North Carolina General Statute Section 130A-93 in conjunction with North Carolina General Statute Section 148-44 caused the trial court to issue the Writ of Mandamus in error. This error infringed on the Department's discretionary authority to determine the appropriate housing assignment by ordering the Department to assign an inmate to a particular facility or type of facility. Mandamus was not the proper remedy in this case.¹² Consequently, the trial court's issuance of the second Writ of Mandamus was in error.

12. Additionally, we note Petitioner had an alternative legal remedy available to her. Our statutes, in the section immediately following the mandate for the Division of Prisons to adopt an Administrative Remedy Procedure, provide:

(a) Upon approval of the Administrative Remedy Procedure . . . , and the implementation of the procedure, this procedure shall constitute the administrative remedies available to a prisoner for the purpose of *preserving any cause of action under the purview of the Administrative Remedy Procedure*, which a prisoner may claim to have against the State of North Carolina, the Division of Prisons of the Department of Adult Correction, or its employees.

(b) No State court shall entertain a prisoner's grievance or complaint which falls under the purview of the Administrative Remedy Procedure *unless and until* the prisoner shall have exhausted the remedies as provided in said procedure. If the prisoner has failed to pursue administrative remedies through this procedure, any petition or complaint he files shall be stayed for 90 days to allow the prisoner to file a grievance and for completion of the procedure. If at the end of 90 days the prisoner has failed to timely file his grievance, then the *petition or complaint* shall be dismissed. Provided, however, that the court can waive the exhaustion requirement if it finds such waiver to be in the interest of justice.

N.C. Gen. Stat. § 148-118.2 (2023) (emphasis added).

Thus, our statutes clearly contemplate that an inmate dissatisfied with the outcome of the grievance process may file a petition or complaint in a state court for judicial review. *Cf. Evans v. Ishee*, 2023 WL 3671821 (W.D.N.C.) (declining to exercise supplemental jurisdiction over an inmate's claim brought pursuant to N.C. Gen. Stat. § 148-118.2(b) where no federal claims were viable). Indeed, the North Carolina Industrial Commission has reviewed a case in which an inmate filed a claim pursuant to the State Tort Claims Act, *Alston v. N.C. Dep't of Pub. Safety*, 2017 WL 6949233, I.C. No. TA-24795 (N.C. Ind. Com.), and declined to hear another State Tort Claims Act claim because the inmate had not exhausted his administrative remedies, *Taylor v. N.C. Dep't of Corr.*, 2010 WL 519701, I.C. No. TA-19535 (N.C. Ind. Com.) (citing N.C. Gen. Stat. § 148-118.2). Thus, Petitioner could have filed a complaint in superior court for judicial review of her prior grievances. Therefore, mandamus is not a proper remedy. *See TAC Stafford, LLC v. Town of Mooresville*, 282 N.C. App. 686, 698, 872 S.E.2d 95, 104 (2022) ("The trial court may only issue a writ of mandamus in the absence of an alternative, legally adequate remedy." (citation and quotation marks omitted)).

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IV. Conclusion

Accordingly, for the foregoing reasons, we reverse the trial court's 28 November 2023 Writ of Mandamus.

REVERSED.

Judge ZACHARY concurs.

Judge HAMPSON concurs in a separate opinion.

HAMPSON, Judge, concurring.

I agree that the Writ of Mandamus was not the proper remedy in this case. This is so because the issuance of the Writ erroneously infringed on the Department's discretionary authority to determine the appropriate housing assignment by ordering the Department to assign an inmate to a particular facility or type of facility. That determination resolves the narrow issue before us.

The majority, however, goes well beyond this narrow issue. Instead, the majority elects to expose Petitioner's identity, medical records, and other materials in order to relitigate Petitioner's sex and gender identity. Not only is this unnecessary, it is misguided. As such, I cannot join the majority's opinion.

As the majority recognizes, its words matter. Indeed, in feeling the need to disclaim its use of female pronouns and Petitioner's name, the majority speaks volumes. The use of female pronouns and name is not at issue. No party disputes the use of these pronouns. Respondent's briefing consistently uses she/her pronouns for Petitioner. The majority's disclaimer purporting not to rule on Petitioner's gender identity only serves to preview its ruling rejecting Petitioner's gender identity.

The majority then makes the unfortunate choice to reveal the contents of Petitioner's medical records, DTARC report, and other personal and private information in great detail. This material was filed under seal—precisely to protect this information from public disclosure. This personal and sensitive information is entirely irrelevant to the issue of whether mandamus is an appropriate remedy in this case. Its only

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purpose in the majority opinion is to, again, attempt to undermine Petitioner's gender identity.¹

Finally, after having expressly concluded the trial court's grant of mandamus infringed on the Department's discretionary authority, the majority takes direct aim at Petitioner's gender identity. In so doing, the majority ignores the trial court's unchallenged Findings and instead substitutes its own judgment on the matter. Although the trial court did find "Petitioner is an intersex individual," it also found: Petitioner's birth certificate lists her sex as female and was amended pursuant to N.C. Gen. Stat. § 130A-118(b)(4); Petitioner produced genetic evidence indicating she is female; and, both parties agree Petitioner's gender identity is female and she has undergone gender affirming care consistent with her gender identity since at least 2019. The trial court then made the following unchallenged Conclusion of Law:

In securing her amended birth certificate, Petitioner met the North Carolina requirements of N.C. Gen. Stat. § 130A-118 with a notarized letter from a doctor confirming certain statutory requirements. That is all she has to do in order to modify her sex. There is no dispute between the parties as to whether Petitioner has met these requirements. To pursue further lines of inquiry and to rule against the *prima facie* evidence that Petitioner has presented, on the current record, would put this Court in the position of a legislature. This Court declines to take such a position. Accordingly, this Court concludes Petitioner's sex is female under N.C. Gen. Stat. § 148-44.

The majority does not address this Conclusion. And, importantly, this Conclusion is clearly beyond the scope of this appeal. N.C. R. App. P. 28 (2024); *State v. Barfield*, 127 N.C. App. 399, 401, 489 S.E.2d 905, 907 (1997) ("Appellate review is confined to those exceptions which pertain

1. The majority states our Courts "routinely address appeals dealing with sensitive medical and sexual issues in this manner in other types of cases even where the files are sealed by operation of law[.]" That is so where those sealed items are material to the case at hand. Here, however, they are not. Based on the Department's arguments, an individual assigned female at birth could be in the same position as Petitioner (although a transfer request would not be considered by DTARC or FTARC). That being the case, it cannot be true that Petitioner's biological or other medical history is relevant to our analysis. Further, how DTARC arrived at its decision is clearly in no way material to whether the trial court had the authority to order Petitioner's transfer via Writ of Mandamus. Thus, I see no compelling reason to include so much of Petitioner's private, sealed information in the majority opinion.

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to the argument presented.”). Fundamentally, it is error to address issues not properly before us. *See Matter of R.A.F.*, 384 N.C. 505, 512, 886 S.E.2d 159, 164 (2023) (“[T]he Court of Appeals *may not address* an issue not raised or argued by [a party][.]” (emphasis added)).

Further, while the majority and I agree Petitioner’s birth certificate constitutes *prima facie* evidence of her sex, the majority—unasked—improperly attempts to itself unilaterally rebut the presumption Petitioner’s birth certificate creates. Petitioner’s sex is irrefutably unnecessary to the analysis. The broad question presented by this case is whether a trial court may compel, by writ of mandamus, the Department to transfer Petitioner from one prison facility to another, following an administrative review by the Department and its decision not to transfer Petitioner. Drilling down, we must determine whether the assignment of an inmate to a particular facility is a discretionary decision. Those questions are unchanged by the sex or gender of the inmate involved. Had the majority’s analysis stopped before its discussion attacking the rebuttable presumption created by the birth certificate, the result would be the same and the opinion would have fully addressed the dispositive issue on appeal. Thus, the majority’s exposition on Petitioner’s sex and gender identity is clearly *dicta*. *See Trs. of Rowan Tech. Coll. v. J. Hyatt Hammond Assocs., Inc.*, 313 N.C. 230, 242, 328 S.E.2d 274, 281 (1985) (“Language in an opinion not necessary to the decision is *obiter dictum* and later decisions are not bound thereby.” (citations omitted)).²

In sum, I believe the majority far exceeds the task before us. It is enough to say that after conducting an in-depth investigation and review, the Department made a discretionary determination on the facts before it not to transfer Petitioner—an intersex person—to a women’s prison. The grant of discretion to the Department under Section 148-36 is broad, requiring only that the Department make a decision based on “custodial and correctional considerations.” N.C. Gen. Stat. § 148-36 (2023). Taken together with the requirement to provide separate quarters for male and female inmates under Section 148-44, the Department may assign

2. The majority takes issue with this characterization, stating that it addressed this matter because “[t]his question was clearly raised by the Department’s brief on appeal[.]” However, the Department also raised issues regarding the trial court’s interpretation of Section 148-44; that Section’s requirement of “separate quarters” for male and female inmates and the interpretation of the term “quarters”; and Petitioner’s right to placement in a particular facility. Yet the majority declines to address those arguments in the same manner. I think this appropriate because those issues are separate from the dispositive issue in this case: whether the trial court could order Petitioner’s transfer using a writ of mandamus.

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an inmate to any prison facility so long as male and female inmates are quartered separately. On the Record before us, there is no indication the Department abused its discretion in making its individualized determination in this case. The trial court expressly found the Department had not abused its discretion under the PREA in its FTARC and DTARC review processes—which included individualized consideration of Petitioner’s circumstances and safety, each facility’s management and security, and the safety of other inmates. The trial court’s issuance of the Writ of Mandamus to compel transfer was, thus, error. This is so because it improperly infringed on the Department’s discretionary authority and, instead, compelled a particular result. While, as the majority correctly notes, Petitioner may have other remedies available to her, mandamus is not the proper vehicle in this case.

INTREPID DIRECT INSURANCE AGENCY,
AS SUBROGEE OF MORNING STAR, LLC D/B/A HARDEE’S RESTAURANTS, PLAINTIFF
v.
AMEREX CORP. AND PYE-BARKER FIRE & SAFETY, LLC., DEFENDANTS

No. COA24-583

Filed 2 April 2025

Parties—plaintiff—not a real party in interest—lack of standing—motion to amend complaint—denied

In an action filed by the broker of an insurance policy covering a restaurant, which was damaged in a fire allegedly caused by a failure in the fire-suppression system provided and serviced by defendants, where the broker moved to amend its complaint to correct the plaintiff’s name from the broker to the insurance company that issued the policy, the trial court properly granted defendants’ motions to dismiss for lack of subject matter jurisdiction without allowing the motion to amend. The insurance company—having paid the restaurant owner’s claims for damages under the policy—was the true necessary-party plaintiff in this case and was required to sue in its own name to enforce its subrogation rights against defendants. Therefore, the broker was not a real party in interest and lacked standing to sue defendants; accordingly, the trial court lacked jurisdiction to consider the broker’s motion to amend and thus properly dismissed the case without ruling on the motion.

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Appeal by plaintiff from order entered 16 October 2023 by Judge William Taylor Browne in Stanly County Superior Court. Heard in the Court of Appeals 29 January 2025.

Hausler Law Firm, PLLC, by Kurt F. Hausler, and Nielsen, Zehe & Antas, P.C., by Brian T. Suth, pro hac vice, and John J. Murphy, pro hac vice, for plaintiff-appellant.

Hamilton Stephens Steele & Martin, PLLC, by Graham B. Morgan and Keith J. Merritt, for defendant-appellee Amerex Corp.

Pinto Coates Kyre & Bowers, PLLC, by Richard L. Pinto and Britney M. Millisor, for defendant-appellee Pye-Barker Fire & Safety, LLC.

ZACHARY, Judge.

This case arises out of an apparent mistake in pleading. Plaintiff Intrepid Direct Insurance Agency (“Intrepid Agency”), as subrogee of Morning Star, LLC (“Morning Star”), filed a complaint against Defendants Amerex Corp. (“Amerex”) and Pye-Barker Fire & Safety, LLC (“Pye-Barker”). Intrepid Agency subsequently filed a motion to amend its complaint “to correct [a] misnomer by correcting the name of Plaintiff” to Intrepid Insurance Company (“Intrepid Insurance”). Defendants filed motions to dismiss for lack of subject-matter jurisdiction, arguing that Intrepid Agency was without standing to bring the initial complaint. The trial court granted Defendants’ motions to dismiss, and Intrepid Agency appeals that decision. After careful review, we affirm.

I. Background

On 22 December 2019, a fire caused significant damage to a Hardee’s restaurant in Albemarle, North Carolina. The restaurant was owned and operated by Morning Star. At all times relevant to this appeal, the restaurant was covered by an insurance policy provided by Intrepid Insurance; Intrepid Agency served as the policy’s broker. According to the amended complaint, Morning Star’s claims for damages sustained to the restaurant as a result of the fire were paid.

On 14 December 2022, Intrepid Agency, as subrogee of Morning Star, filed a complaint against Defendants. Intrepid Agency raised claims for negligence and breach of contract arising from the alleged failure of the restaurant’s fire-suppression system. The fire-suppression system was provided by Amerex and serviced by Pye-Barker.

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On 24 February 2023, Intrepid Agency filed a motion to amend its complaint “to correct [a] misnomer by correcting the name of Plaintiff” to Intrepid Insurance, rather than Intrepid Agency. Amerex filed its motion to dismiss, answer, and crossclaims against Pye-Barker on 27 February 2023. Pye-Barker filed its motion to dismiss and answer on 2 March 2023.

On 7 and 11 August 2023, respectively, Amerex and Pye-Barker filed additional motions to dismiss. Pye-Barker also filed a memorandum of law in support of its motion. Both motions and the memorandum addressed the alleged misnomer, with Defendants arguing that Intrepid Agency lacked standing to bring the claims advanced in the initial complaint because Intrepid Agency was not a “real party in interest.” *See* N.C. Gen. Stat. § 1A-1, Rule 17(a) (2023).

On 2 October 2023, Intrepid Agency’s motion to amend and Defendants’ motions to dismiss came on for hearing in Stanly County Superior Court. On 16 October 2023, having determined that it lacked subject-matter jurisdiction to grant Intrepid Agency’s motion to amend, the trial court entered an order granting Defendants’ motions to dismiss. Intrepid Agency¹ filed notice of appeal on 3 November 2023.

II. Discussion

On appeal, Intrepid Agency argues that the trial court erred by granting Defendants’ motions to dismiss without allowing Intrepid Agency to amend its complaint. We disagree.

A. Standard of Review

“Standing concerns the trial court’s subject[-]matter jurisdiction and is therefore properly challenged by a Rule 12(b)(1) motion to dismiss.” *WLAE, LLC v. Edwards*, 257 N.C. App. 251, 258, 809 S.E.2d 176, 181 (2017) (citation omitted). This Court reviews de novo a trial court’s ruling on a Rule 12(b)(1) motion to dismiss for lack of subject-matter

1. Preliminarily, we must address whether Intrepid Agency or Intrepid Insurance is the plaintiff-appellant in this appeal. Appellant’s counsel “adamantly denies that Intrepid Agency . . . was before the [trial] court,” and further asserts that they were “never retained by Intrepid Agency” but instead were “engaged by [Intrepid Insurance] to file a subrogation claim as subrogee for Hardees [sic].” However, not only did Intrepid Agency file the initial complaint, but it also filed the motion to amend. Further, in the order from which appeal is taken, the trial court identified Intrepid Agency as the plaintiff. Finally, Intrepid Agency filed notice of appeal, not Intrepid Insurance. Accordingly, consistent with the record before us, we recognize Intrepid Agency as the plaintiff-appellant in this matter, notwithstanding counsel’s representation otherwise to this Court.

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jurisdiction, and in doing so, “may consider matters outside the pleadings.” *Id.* (citation omitted).

B. Analysis

Intrepid Agency “insists that this matter involves a clerical error”—namely, “a scrivener’s error in which its counsel misnamed the insurance company . . . using the similar name of the insurance broker.” As such, it argues that this case is merely a matter of misnomer, and the trial court should have permitted it to correct its pleading pursuant to either Rule 15(c) or 17(a) of the North Carolina Rules of Civil Procedure.

Rule 15 governs the amendment of complaints. Subsection (c) provides that any “claim asserted in an amended pleading is deemed to have been interposed at the time the claim in the original pleading was interposed, unless the original pleading does not give notice of the transactions, occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleading.” N.C. Gen. Stat. § 1A-1, Rule 15(c). Rule 17(a) provides, in pertinent part, that “[e]very claim shall be prosecuted in the name of the real party in interest.” *Id.* § 1A-1, Rule 17(a). Furthermore:

No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

Id.

However, as Defendants note, neither of these Rules is applicable in this case because Intrepid Agency lacked standing to file the initial complaint. “When the insurance paid the insured covers the loss in full, the insurance company, as a necessary party plaintiff, must sue in its own name to enforce its right of subrogation against the tort-feasor.” *Shambley v. Jobe-Blackley Plumbing & Heating Co.*, 264 N.C. 456, 457, 142 S.E.2d 18, 20 (1965) (citation omitted). According to the amended complaint, Intrepid Insurance paid Morning Star’s claims under the insurance policy; as such, Intrepid Insurance was the necessary-party plaintiff and was required to “sue in its own name to enforce its right of subrogation against” Defendants. *Id.* (citation omitted). Because Intrepid Agency lacked standing to bring these claims, the complaint

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was a nullity; consequently, the trial court lacked subject-matter jurisdiction to consider the motion to amend under either Rule 15(c) or 17(a), and was therefore required to grant Defendants' motions to dismiss.

Our Supreme Court has explained that “[s]tanding refers to whether a party has a sufficient stake in an otherwise justiciable controversy such that [it] may properly seek adjudication of the matter.” *Town of Midland v. Harrell*, 385 N.C. 365, 371, 892 S.E.2d 845, 850 (2023) (citation omitted). “If a plaintiff does not have standing to assert a claim for relief, the trial court lacks subject[-]matter jurisdiction over the claim.” *Id.* “Standing is measured at the time the pleadings are filed. In other words, a plaintiff must have standing at the time of filing to have standing at all. Subsequent events cannot confer standing retroactively.” *Id.* (cleaned up).

“A universal principle as old as the law is that the proceedings of a court without jurisdiction of the subject matter are a nullity.” *Coderre v. Futrell*, 224 N.C. App. 454, 457, 736 S.E.2d 784, 787 (2012) (citation omitted). Therefore, “[w]henver it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.” N.C. Gen. Stat. § 1A-1, Rule 12(h)(3).

In the related context of voluntary dismissal under Rule 41(a), this Court has recognized that “where a plaintiff lacked standing to file the initial complaint, that complaint is a nullity leaving no valid complaint to which an amended complaint could relate back.” *Gantt v. City of Hickory*, 290 N.C. App. 279, 284, 892 S.E.2d 223, 227 (2023) (cleaned up), *disc. review denied*, 386 N.C. 281, 900 S.E.2d 682 (2024). Although Intrepid Agency relies upon Rules 15(c) and 17(a) rather than Rule 41(a) and strenuously seeks to distinguish *Gantt*, the fundamental legal principle of that opinion—that a complaint filed by a party that lacks standing is a nullity—nevertheless applies with equal force to the procedural posture presented here.

As if to prove this point, the *Gantt* Court directly cited cases involving Rules 15(c) and 17(a) in support of its standing analysis. *See id.* (citing *Coderre*, 224 N.C. App. at 457, 736 S.E.2d at 787; *WLAE*, 257 N.C. App. at 260, 809 S.E.2d at 182–83). In *Coderre*, where the plaintiff “lacked standing to file the initial complaint,” thus rendering it a nullity, this Court held that “[w]ithout standing to bring the initial complaint, there was no valid complaint to which the amended complaint could relate back.” 224 N.C. App. at 457, 736 S.E.2d at 787. Accordingly, this Court was unable to consider the plaintiff’s appellate argument that it should have been allowed, under Rule 15(c), “to add an additional party

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plaintiff to an already filed action and have the new plaintiff's claims relate back to the original filing." *Id.* at 457, 736 S.E.2d at 786.

Similarly, in *WLAE*, the plaintiff argued on appeal that "the trial court should have allowed [the] plaintiff the opportunity to amend its complaint to add the real party in interest" pursuant to Rule 17(a). 257 N.C. App. at 260, 809 S.E.2d at 182. However, this Court recognized that "because the trial court did not have subject[-]matter jurisdiction over th[e] proceeding at the time of filing, the court did not have the authority to order such substitution of party, and any attempt to do so would have been a nullity." *Id.* at 260, 809 S.E.2d at 182–83.

Intrepid Agency attempts to distinguish *Gantt* by noting that, in that case, this Court differentiated between a voluntary dismissal under Rule 41 and relation-back under Rules 15 and 17. The *Gantt* Court distinguished its holding from a pair of "cases [that] required amendments to alter a party's legal capacity to sue," neither of which "involved a voluntary dismissal under Rule 41." 290 N.C. App. at 282, 892 S.E.2d at 226. However, the instant case is far more similar to *Gantt*, *Coderre*, and *WLAE* than to those cases distinguished by the *Gantt* Court, primarily because this case does not involve the "alter[ation of] a party's legal capacity to sue." *Id.* Intrepid Agency is not seeking to alter its legal capacity to sue; it *never had* the legal capacity to sue.

Ultimately, Intrepid Agency was inadvertently named as plaintiff instead of Intrepid Insurance at the time of the complaint's filing, a mistake that deprived the trial court of subject-matter jurisdiction over the proceedings. *See WLAE*, 257 N.C. App. at 260, 809 S.E.2d at 182–83. Lacking subject-matter jurisdiction, the trial court was not authorized to rule upon Intrepid Agency's motion to amend, and moreover, was bound to dismiss this matter. N.C. Gen. Stat. § 1A-1, Rule 12(h)(3).

III. Conclusion

For the foregoing reasons, the trial court properly determined that Intrepid Agency lacked standing to file the complaint in this matter. Therefore, we affirm the court's order granting Defendants' motions to dismiss.

AFFIRMED.

Chief Judge DILLON and Judge STROUD concur.

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RICHMOND COUNTY BOARD OF EDUCATION, PLAINTIFF

v.

DALE FOLWELL, NORTH CAROLINA STATE TREASURER,
 IN HIS OFFICIAL CAPACITY ONLY, NELS ROSELAND, NORTH CAROLINA STATE
 CONTROLLER, IN HIS OFFICIAL CAPACITY ONLY, KRISTIN WALKER, NORTH CAROLINA
 STATE BUDGET DIRECTOR, IN HER OFFICIAL CAPACITY ONLY, EDDIE M. BUFFALOE, JR.,
 SECRETARY OF THE NORTH CAROLINA DEPARTMENT OF PUBLIC SAFETY,
 IN HIS OFFICIAL CAPACITY ONLY, JOSH STEIN, ATTORNEY GENERAL OF THE STATE
 OF NORTH CAROLINA, IN HIS OFFICIAL CAPACITY ONLY, DEFENDANTS

No. COA24-827

Filed 2 April 2025

**Judgments—renewal—against State Treasurer—enforceability
not a bar to claim**

In plaintiff county board of education's action to renew a judgment against the State Treasurer (involving fines collected for improper equipment violations), the trial court properly denied the motion to dismiss filed by defendants (the Treasurer and other State officials in their official capacity), in which defendants asserted sovereign immunity, because, while plaintiff may never be able to collect the judgment absent an appropriation from the General Assembly to satisfy the judgment, plaintiff was nevertheless entitled to seek renewal and have a new judgment entered. Plaintiff obtained a valid judgment in a prior action and properly brought the renewal action within ten years of the original judgment pursuant to N.C.G.S. § 1-47(1).

Judge FLOOD dissenting.

Appeal by defendants from order entered 19 August 2024 by Judge James Floyd Ammons, Jr., in Wake County Superior Court. Heard in the Court of Appeals 12 February 2025.

Crump Law Office, by George E. Crump, III, for plaintiff-appellee.

Dowling PLLC, by Troy D. Shelton and Craig D. Schauer, for defendants-appellants.

DILLON, Chief Judge.

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Plaintiff Richmond County Board of Education commenced this action in February 2024 to collect on a judgment it obtained in a prior action against various officials and agencies of the State of North Carolina in 2014, a judgment which was affirmed by our Court.

In this present action, Defendants North Carolina State Treasurer Dale Folwell and North Carolina State Controller Nels Roseland (collectively, Appellants”), appeal from the trial court’s order denying their motion to dismiss Plaintiff’s complaint pursuant to Rule 12(b)(6) of our Rules of Civil Procedure.

On appeal, Appellants argue the trial court erred, essentially contending that Plaintiff’s new action seeking a money judgment is barred by sovereign immunity. For the reasoning below, we disagree with Appellants and affirm the trial court’s order. Specifically, though we agree with Appellants that Plaintiff may not be able *to collect* on any judgment entered against Appellants in this action (unless money is appropriated by our General Assembly to pay the judgment), we conclude that Plaintiff is entitled to have a new judgment entered based on the uncollected prior judgment.

I. Factual and Procedural Background

This matter concerns a statute enacted by our General Assembly in 2011 which required any defendant convicted of driving with improper equipment to pay a \$50.00 fee and for the fee to be remitted to the State for maintenance of State prisons. Plaintiff, a county board of education, commenced this action contending that it – and not the State prisons – was entitled to any \$50.00 fee collected under the 2011 statute in Richmond County to be used for the public schools in that county. Plaintiff based its contention on a provision in our state constitution which mandates that fines collected in a county court be used for the public schools in that county, stating as follows:

... the clear proceeds of all penalties and [] fines collected in the several counties . . . shall belong to and remain in the several counties, and shall be faithfully appropriated and used exclusively for maintaining free public schools.

N.C. Const. art. IX, § 7(a).

The prior action came to our Court on three occasions.

In the first appeal to our Court, we concluded that Plaintiff’s claim was not barred by sovereign immunity. *See Richmond Cnty. Bd. of*

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Educ. v. Cowell, 225 N.C. App. 583, 591 (2013). On remand, the trial court entered judgment against the government defendants.

In the second appeal, we affirmed a trial court's order, concluding that our state constitution, indeed, required any \$50.00 fee collected under the 2011 statute be used for the public schools and *not* for the prisons, and ordered the initial defendants pay to Plaintiff "all sums collected in Richmond County" from defendants convicted of an improper equipment violation. *Richmond Cnty. Bd. of Educ. v. Cowell*, 243 N.C. App. 116, 123 (2015). On remand, the trial court determined that Richmond County had collected \$272,300.00 in fines under the 2011 statute and ordered the defendants pay Plaintiff that amount.

In the third appeal, however, we reversed the trial court's order, concluding that it is not in the power of the judiciary to order satisfaction of the judgment against the State; that is, the judgment could be satisfied only if our General Assembly appropriated the money to satisfy the judgment. *Richmond Cnty. Bd. of Educ. v. Cowell*, 254 N.C. App. 422, 427–28 (2017) (hereinafter "*Cowell III*").

a. The Current Action

On 12 February 2024, Plaintiff filed a complaint (the "Complaint") against the above-captioned defendants seeking that a new judgment be entered based on the \$272,300.00 judgment entered in the prior action.

In May 2024, Defendants filed a motion to dismiss the Complaint pursuant to Rules 12(b)(1), (2), and (6) of our Rules of Civil Procedure, contending the State had not waived its sovereign immunity for the new action and Plaintiff lacked an executable judgment that it could enforce and renew through a new action.

By order entered 26 July 2024, the trial court denied Defendants' motion to dismiss. Defendants appealed from that 2024 order.

II. Jurisdiction

We note that this appeal is interlocutory. However, Defendants argue, in part, that they are immune from suit based on sovereign immunity. And our Supreme Court has held that an order denying a motion to dismiss based on sovereign immunity affects a substantial right and is, therefore, immediately appealable. *Cedarbrook Res. Ctr., Inc. v. N.C. Dep't of Health & Hum. Servs.*, 383 N.C. 31, 44 (2022). Accordingly, Defendants' sovereign immunity argument is properly before us.

We also consider Defendants' other arguments though they do not necessarily affect a substantial right. *See RPR & Assocs. v. State*, 139

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N.C. App. 525, 530–31 (“Although this question . . . is interlocutory in nature, we choose to address it, given that [the] defendants’ sovereign immunity argument is properly before us. After all, to address but one interlocutory or related issue would create fragmentary appeals.”).

III. Analysis

We agree with Defendants that any judgment that Plaintiff may obtain in this matter may not ever be collectible. Specifically, our Supreme Court in *Smith v. State*, 289 N.C. 303 (1976), also cautioned that:

In the event [that the] plaintiff is successful in establishing his claim against the State, *he cannot, of course, obtain execution to enforce the judgment.* The validity of his claim, however, will have been judicially ascertained. The judiciary will have performed its function to the limit of its constitutional powers. Satisfaction will depend on the manner in which the General Assembly discharged its constitutional duties.

Id. at 321 (citations omitted) (emphasis added).

Based on *Smith*, we stated in *Cowell III* as follows:

[W]hen the courts enter a judgment against the State, and no funds already are available to satisfy that judgment, the judicial branch has no power to order State officials to draw money from the State treasury to satisfy it.

Of course, this case is no mere contract dispute. The State violated the North Carolina Constitution when it moved money otherwise destined for Richmond County schools to a separate State fund to pay for county jail programs throughout the State. As a result, this Court held that it is appropriate—as the trial court ordered—that this money be paid back to the clerk’s office in Richmond County.

It was well within the judicial branch’s power to order this money—taken from Richmond County in violation of the constitution—to be returned. This, in turn, means that if the money collected from these fines still rested within the Statewide Misdemeanant Confinement Fund, awaiting the outcome of this protracted litigation, the courts could order State officials to return the money to Richmond County and the other affected counties.

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But, as the parties concede, this cannot be done because the money is gone. [Plaintiff] did not obtain a preliminary injunction to prevent the State from spending money while it litigated the case[.] . . . As a result, the only way the State can satisfy the judgment entered by the trial court is to pay *new* money from the State treasury—money not obtained from the improper equipment fees, but from the taxpayers and other sources of general State revenue. Under *Smith*, the judicial branch lacks the power to order State officials to pay this new money from the treasury.

254 N.C. App. at 427–28 (citations and internal quotation marks omitted).

Plaintiff contended on appeal in *Cowell III*, however, that even without specific appropriation from the General Assembly, the trial court's writ of mandamus can be interpreted as an order that State officials take whatever steps are necessary to pay the judgment from any discretionary sources that are available. We rejected this argument, providing:

[A] writ of mandamus may be used only to command public officials to perform a purely ministerial duty imposed by law; it generally may not be invoked to review or control the acts of public officers respecting discretionary matters.

. . . .

In sum, the role of the courts in this constitutional dispute is over. As the Framers of our constitution intended, the judiciary performed its function to the limit of its constitutional powers by entering a judgment against the State and in favor of [Plaintiff]. The State must honor that judgment. But it is now up to the legislative and executive branches, in the discharge of their constitutional duties, to do so. The Separation of Powers Clause prevents the courts from stepping into the shoes of the other branches of government and assuming their constitutional duties. We have pronounced our judgment. If the other branches of government still ignore it, the remedy lies not with the courts, but at the ballot box.

Id. at 428–29 (citations and internal quotation marks omitted).

In sum, Plaintiff obtained a valid judgment in the prior action, though Plaintiff at present cannot collect, as our General Assembly has not appropriated the money to pay the judgment.

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Our General Assembly has determined that a judgment creditor's right to collect on a judgment is subject to a ten-year statute of limitations *but that* a judgment credit may bring a new action to enforce the prior judgment one time, thus effectively renewing a prior judgment for ten more years:

Within ten years an action –

- (1) Upon a judgement or decree of any court of . . . any state No such action may be brought more than once . . . to continue the lien of the original judgment.

N.C.G.S. § 1-47(1). Indeed, we have held that “[a]n independent action seeking to effectively renew a judgment must be brought within ten years of entry of the original judgment, and such renewal action can only be brought once.” *Unifund CCR Partners v. Loggins*, 270 N.C. App. 805, 809 (2020) (citing N.C.G.S. § 1-47). We hold that a party with a valid judgment against the State or other governmental entity has the right to bring a renewal action on that judgment under G.S. 1-47.

Here, Plaintiff seeks to renew the judgment it obtained in the first action. And based on the record before us, it appears that Plaintiff commenced this present action within ten years of that first judgment. Accordingly, we hold that the trial court did not err by denying Defendants’ motion to dismiss. If Plaintiff is successful in this action in “renewing” its prior judgment, Plaintiff still may never collect, depending on whether our General Assembly appropriates money to pay any said new judgment. Nonetheless, Plaintiff is entitled to renew its judgment and hope.

AFFIRMED.

Judge COLLINS concurs.

Judge FLOOD dissents by separate opinion.

FLOOD, Judge, dissenting.

On appeal from a trial court’s granting or denial of a motion to dismiss pursuant to Rule 12(b)(6) of the North Carolina Rules of Appellate Procedure, this Court’s review is limited to the face of the pleadings, which includes the plaintiff’s prayer for relief contained therein. While the majority concludes that Plaintiff, in filing its complaint (the

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“Complaint”), “seeks to renew the judgment it obtained in the first action[,]” the face of the Complaint reveals an absence of law and fact in support of Plaintiff’s claim, and such a conclusion requires that this Court make inferences impermissible under our standard of review. I therefore respectfully dissent.

As presented in the factual and procedural background section of the majority opinion, in *Cowell III*, this Court heard the initial defendants’ appeal from the trial court’s 1 November 2016 order, in which the trial court: found that the fees collected under N.C.G.S. § 7A-304(a)(4b) in Richmond County amounted to a total sum of \$272,300, granted Plaintiff’s petition for writ of mandamus, and ordered the initial defendants to pay Plaintiff damages in the amount of this total sum. 254 N.C. App. 422, 425 (2017). Upon review of the initial defendants’ appeal, we reversed the trial court’s order, and in so doing, this Court unequivocally provided that, while it was within the trial court’s power to order restitution of the collected statutory fees to Plaintiff, “the judicial branch has no power to order State officials to draw money from the State treasury to satisfy it”; “the role of the courts in this constitutional dispute is *over*”; and Plaintiff’s “remedy lies not with the courts, but at the ballot box.” *Id.* at 427–29 (emphasis added).

As such, in the current action, while Plaintiff’s claim of a money judgment against Defendant-Appellants has been properly established, *see Richmond Cnty. Bd. of Educ. v. Cowell*, 243 N.C. App. 116, 123 (2015) (hereinafter, “*Cowell II*”), Plaintiff cannot obtain judicial execution of this judgment, as it is not within the trial court’s purview to ordain such execution. *See Cowell III*, 254 N.C. App. at 427–29; *see also Smith v. State*, 289 N.C. 303, 321 (1976) (holding that, after judicially ascertaining a claim, “[t]he judiciary will have performed its function to the limit of its constitutional powers. Satisfaction will depend upon the manner in which the General Assembly discharges its constitutional duties”); *D & W, Inc. v. City of Charlotte*, 268 N.C. 720, 722–23 (1966) (“In our judicial system the Superior Court is a court subordinate to the Supreme Court. Upon appeal our mandate is binding upon it and must be strictly followed without variation or departure. No judgment other than that directed or permitted by the appellate court may be entered. Otherwise, litigation would never be ended, and the supreme tribunal of the state would be shorn of authority over inferior tribunals.” (citations and internal quotation marks omitted)).

The majority, however, appears to interpret the Complaint’s prayer for relief—to “have and recover judgment of . . . the principal sum of \$272,300.00”—as Plaintiff seeking solely to renew the judgment it

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obtained in the first action, and which was affirmed in *Cowell II*, and consequently concludes that this Court must affirm the trial court's denial of Defendant-Appellants' Rule 12(b)(6) motion to dismiss. As explained below, in my view, the majority's interpretation amounts to a misreading of Plaintiff's prayer for relief, and relies on inferences that contravene our standard of review.

On appeal from the trial court's denial of a defendant's Rule 12(b)(6) motion to dismiss, "this Court reviews *de novo* whether, as a matter of law, the allegations of the complaint are sufficient to state a claim upon which relief may be granted." *Green v. Kearney*, 203 N.C. App. 260, 266 (2010) (citation omitted) (cleaned up). In making this determination, this Court must consider whether, on "the face of the [plaintiff's] complaint[,] construed liberally, the complaint (1) is supported by law, (2) "reveals the absence of facts sufficient to make a good claim[,] or (3) "discloses some fact that necessarily defeats the plaintiff's claim." *Burgin v. Owen*, 181 N.C. App. 511, 512 (2007) (citation and internal quotation marks omitted); see also *Green*, 203 N.C. App. at 266–67.

Here, as presented in the Complaint, to satisfy Plaintiff's prayer for relief, Plaintiff must "have *and* recover" the \$272,300 money judgment to which Plaintiff alleges entitlement. (Emphasis added). A plain reading of this language demonstrates that, to satisfy Plaintiff's prayer for relief, the trial court must *both* establish Plaintiff's entitlement to a money judgment from Defendant-Appellants *and* execute said judgment. See *Burgin*, 181 N.C. App. at 512. While neither our Supreme Court nor this Court have expressly provided that a plaintiff's prayer for relief, consisting of two claims connected by the word "and," is to be read conjunctively, we are not without guidance in this interpretation of such a prayer for relief.

Regarding interpretation of statutory language, our Supreme Court has stated "that ordinarily, when the conjunctive 'and' connects words, phrases or clauses of a statutory sentence, they are to be considered jointly." *Harrell v. Bowen*, 362 N.C. 142, 145 (2008) (citation and internal quotation marks omitted). Comparatively, our Supreme Court has explained that "the word 'or,' as used in a statute, is a disjunctive particle indicating that the various members of the sentence are to be taken separately." *In re Powell*, 237 N.C. App. 441, 444 (2014) (citation and internal quotation marks omitted) (cleaned up). These expositions may inform our understanding of a plaintiff's connective use of "and," as well as "or," in a prayer for relief, as Rule 8 of the North Carolina Rules of Civil Procedure—a creation of statute, and which governs the propriety of a plaintiff's claims—provides:

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A party may set forth two or more statements of a claim . . . alternatively[.] . . . When two or more statements are *made in the alternative* and one or more of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements.

N.C. R. Civ. P. 8(e)(2) (emphasis added).

These binding authorities, taken together, support the interpretation that, in a prayer for relief consisting of two claims, for one claim to be considered independently of the other, the claims must be made in the alternative—or separately—which is accomplished by use of the connecting word “or.” See *In re Powell*, 237 N.C. App. at 444; N.C. R. Civ. P. 8(e)(2). Conversely, by use of the word “and” to connect two claims in a prayer for relief, a plaintiff indicates the claims are to be considered jointly, and for the trial court to provide relief, *both* claims must be satisfied. See *Harrell*, 362 N.C. at 145; N.C. R. Civ. P. 8(e)(2); see also *State v. Rieger*, 267 N.C. App. 647, 649 (2019) (“When examining the plain language of a statute, undefined words . . . must be given their common and ordinary meaning.” (citation and internal quotation marks omitted)). Finally, while our appellate courts have published no opinion germane specifically as to this issue, courts of other jurisdictions have published decisions that, while non-binding, are instructive of, and support, this plain interpretation of a plaintiff’s use of the conjunctive “and,” versus use of the disjunctive “or,” in a prayer for relief. See *Brookline Residential, LLC, v. City of Charlotte*, 251 N.C. App. 537, 545, n.4 (2017) (“Although decisions from other jurisdictions are not binding on this Court on an issue arising under North Carolina law, we may consider such decisions as persuasive authority.” (citation omitted)); *Carolina Power & Light Co. v. Emp. Sec. Comm’n of N.C.*, 363 N.C. 562, 569 (2009) (noting that, while not binding, a decision from another jurisdiction was nonetheless “instructive”); see also *U.S. v. Garcon*, 54 F.4th 1274, 1278 (11th Cir. 2022) (“The parties’ dispute turns on the meaning of the word ‘and[,]’ . . . so we consider the ordinary meaning of that word. ‘And’ means ‘along together with[,]’ [s]o when ‘and’ is used to connect a list of requirements, the word ordinarily has a ‘conjunctive’ sense, meaning that all the requirements must be met.” (citations omitted)); *Stewart v. Dina’s Pizza and Pub, Inc.*, 8th Dist. Cuyahoga No. 106790, 2018-Ohio-3415, ¶ 9, 2018 WL 409398, at *2 (providing that, upon appellate review of a motion to dismiss a plaintiff’s claims, “where there is no indication that [the] claims [were] pled in the alternative, the demand for relief is in the conjunctive” (citations and internal quotation marks omitted)).

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Applying the above-delineated interpretation to Plaintiff's Complaint, for this Court to consider independently each of the two claims in Plaintiff's prayer for relief, such that either claim may be sufficient to survive a Rule 12(b)(6) motion to dismiss—as appears to be the majority's interpretation—Plaintiff must have prayed to “have *or* recover” the money judgment. *See In re Powell*, 237 N.C. App. at 444; N.C. R. Civ. P. 8(e)(2); *see also U.S. v. Garcon*, 54 F.4th at 1278; *Stewart*, 2018-Ohio-3415, ¶ 9. Plaintiff, however, has prayed to “have *and* recover” the money judgment, meaning the claims must be considered *together*, and for the trial court to satisfy Plaintiff's prayer for relief, Plaintiff must *both* “have” the money judgment, *and* “recover” the money judgment. *See Harrell*, 362 N.C. at 145; N.C. R. Civ. P. 8(e)(2); *see also U.S. v. Garcon*, 54 F.4th at 1278; *Stewart*, 2018-Ohio-3415, ¶ 9. While, as presented by this Court in *Cowell II*, the judiciary may properly establish Plaintiff's entitlement to a money judgment from Defendant-Appellants, as determined in *Cowell III*, the judiciary may *not* order execution of this judgment, thus Plaintiff may not “recover” the money judgment. *See Cowell III*, 254 N.C. App. at 427–29; *Cowell II*, 243 N.C. App. at 123. As such, it is not within the trial court's power to satisfy Plaintiff's conjunctive prayer for relief to “have and recover” the money judgment.

Moreover, even when treating Plaintiff's allegations as true and affording a liberal construction of the Complaint, Plaintiff's prayer for relief is not as to just *any* money judgment to which Plaintiff is allegedly entitled; Plaintiff *specifically* identified in its prayer for relief “the principal sum of \$272,300.00.” *See Burgin*, 181 N.C. App. at 512; *see also Green*, 203 N.C. App. at 266. As set forth above, this “principal sum” was established in the trial court's 1 November 2016 order—the very order reversed by this Court in *Cowell III*. 254 N.C. App. at 427–29. While the majority would conclude that Plaintiff merely “seeks to renew the judgment” affirmed in *Cowell II*, nowhere in the Complaint does Plaintiff state that it seeks renewal of this judgment, and to reach such a conclusion requires this Court to make inferences in contravention of our scope of review—namely, the face of the Complaint. *See Burgin*, 181 N.C. App. at 512. A review of the face of the Complaint reveals Plaintiff has failed to present a cause of action from which Plaintiff may make a claim for relief, as the money judgment explicitly identified in Plaintiff's prayer for relief was reversed by this Court, and therefore no longer exists. *See Cowell III*, 254 N.C. App. at 427–29.

As the trial court may not order satisfaction of Plaintiff's prayer for relief to “have and recover” a money judgment, and Plaintiff's underlying cause of action is specifically as to a money judgment no longer in effect,

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the face of the Complaint reveals an absence of law and fact upon which Plaintiff may make a good claim for relief. *See Burgin*, 181 N.C. App. at 512; *see also Cowell III*, 254 N.C. App. at 427–29. Accordingly, upon a de novo review, I believe the trial court’s denial of Defendant-Appellants’ Rule 12(b)(6) motion to dismiss was in error, and such error requires this Court to reverse the trial court’s order and remand with instructions that the trial court grant Defendant-Appellants’ motion to dismiss Plaintiff’s Complaint. *See Green*, 203 N.C. App. at 266; *Burgin*, 181 N.C. App. at 512. For the foregoing reasons, I respectfully dissent.

MADIGAN SHOMETTE o/b/o T.N., PLAINTIFF
v.
MICHAEL NEEDHAM, DEFENDANT

No. COA24-172

Filed 2 April 2025

Domestic Violence—protective order—conflicting evidence resolved—denial proper

In a domestic violence protective order (DVPO) action, brought by a wife (plaintiff) against her husband (defendant) on behalf of herself and the parties’ minor child, alleging that the child was the product of defendant raping plaintiff and that defendant had sexually assaulted and raped plaintiff “50-100” times during their marriage, the trial court did not err in denying plaintiff’s complaint and motion where the only finding of fact challenged by plaintiff (as a mere recitation of evidence) both recounted the conflicting evidence regarding the parties’ sexual encounters and explained the court’s weight and credibility determinations, explicitly stating that it could not find that defendant “committed an act of domestic violence.” Further, the trial court did not err in concluding that plaintiff failed to prove grounds for issuance of a DVPO because the findings of fact did not support a conclusion that an act of domestic violence occurred—a requirement for issuance of a DVPO.

Appeal by plaintiff from order entered 18 August 2023 by Judge Jena P. Culler in District Court, Mecklenburg County. Heard in the Court of Appeals 5 November 2024.

Rech Law, P.C., by Kate A. Rech, for plaintiff-appellant.

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[298 N.C. App. 400 (2025)]

No brief filed for defendant-appellee.

STROUD, Judge.

Plaintiff appeals from a trial court order denying her Complaint and Motion for Domestic Violence Protective Order (“DVPO”). Because the trial court’s finding of fact was supported by competent evidence, and the finding of fact supports the trial court’s conclusion of law, we affirm the trial court’s order.

I. Background

Plaintiff (“Wife”) and Defendant (“Husband”) were married on 14 November 2022. The parties have a minor child together, T.N., born August 2021, who Wife alleged in her Complaint and Motion for DVPO “was a product of [Husband] raping [her] during the parties’ marriage.” The parties separated on 3 April 2023.

On 28 April 2023, Wife filed a Complaint and Motion for DVPO (“28 April 2023 Complaint and Motion for DVPO”) in District Court, Mecklenburg County, file number 23-CVD-601007.¹ That same day, a magistrate judge denied Wife’s request for an *Ex Parte* DVPO. On 1 May 2023, the trial court also denied Mother’s request for an *Ex Parte* DVPO. The trial court found in its May 2023 order denying issuance of the *Ex Parte* DVPO that

[t]he parties are separated but [Husband] visited the home to see their son. He wanted to see [Wife] and got upset when he couldn’t. He told her he’d be moving back in on Sunday. She saw on the [security] camera that he did return to the home on Sunday and tried to get in the house . . . but was unsuccessful. Insufficient evidence of acts of DV. This seems more a dispute of access to the home.

Having been unsuccessful in obtaining an *Ex Parte* DVPO, Wife did not proceed to a contested hearing for the trial court to determine whether to grant a DVPO. Instead, on 15 May 2023, Wife filed a Notice of Voluntary Dismissal of the 28 April 2023 Complaint and Motion for DVPO.

1. Wife made allegations of rape and attempted rape in the 28 April 2023 Complaint and Motion for DVPO, alleging specific dates, starting on 18 November 2020 and up to 19 March 2023, albeit in less detail than in her second Complaint and Motion for DVPO, which she filed 6 July 2023.

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On 2 June 2023, Husband filed a complaint against Wife in Mecklenburg County seeking child custody, child support, physical and mental health examination of Wife, a motion for parenting capacity evaluation of Wife, equitable distribution, and attorney's fees. He alleged that

[Wife] has routinely accused [him] of committing acts of rape against her throughout the marriage. Further, [Wife] would often corner [Husband] demanding that he admit to "what he had done." Upon information and belief, [Wife] would often record portions of these conversations between [Wife] and [Husband], when [she] was cornering [him].

He also included allegations regarding the 28 April 2023 Complaint and Motion for DVPO Wife had filed.

On 12 June 2023, Wife filed a Verified Complaint with claims for "Assault, Battery, Intentional Infliction of Emotional Distress, Negligent Infliction of Emotional Distress, False Imprisonment, and Punitive Damages" (capitalization altered), against Husband in Superior Court, Mecklenburg County ("Superior Court Complaint"). On or about 27 June 2023, Wife brought criminal charges against Husband and he was arrested and released.

On 6 July 2023, Wife filed another Complaint and Motion for Domestic Violence Protective Order ("6 July 2023 Complaint and Motion for DVPO") against Husband. She sought a DVPO for herself and on behalf of the parties' minor child, T.N. The 6 July 2023 Complaint and Motion for DVPO was filed on a form complaint, AOC-CV-303, Rev. 3.22, but she attached to this form her Superior Court Complaint and documents related to the criminal charges described above. According to Wife's 6 July 2023 Complaint and Motion for DVPO,² she was a virgin when the parties married, and the first time she had sex was on 18 November 2020, "while [Wife] and [Husband] were on their honeymoon." She alleged that "[Husband] initiated sex with [Wife]. [Wife] informed [Husband] that she was on her period and did not want to have sex on her period." She alleged Husband insisted on trying, but it was very painful and she asked him to stop, but he did not stop. Wife's 6 July 2023 Complaint and Motion for DVPO then alleges several other very detailed instances of occasions when Husband either had sex with her or tried to have sex with her. Ultimately, she

2. The attachments describe numerous sexual acts in extreme graphic detail and we will describe Wife's allegations generally for purposes of this opinion.

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alleges that she believed “that [Husband] sexually assaulted and raped her approximately 50-100 times during their marriage.”

That same day, a trial court entered an *Ex Parte* DVPO based on findings that “[Husband] raped [Wife] numerous times throughout the marriage while she was holding and nursing the minor child. On 3/19/[2023], [Husband] attempted to rape [Wife] and she had to force him off of her physically.” The trial court also found “[Husband] was arrested and after being released he text [sic] [Wife] 6 times in violation of his bond condition.”

The trial court held a hearing on the 6 July 2023 Complaint and Motion for DVPO on 16 August 2023. Wife testified that “throughout [their] marriage” Husband “raped” her “between 50 and 100 times[.]” As in her Superior Court Complaint, Wife described in graphic detail many times when Husband had sex with her or tried to have sex with her and she did not want to and repeatedly told him “no[.]” Wife testified that she had initiated criminal proceedings for “secondary forcible rape” against Husband in Mecklenburg County, North Carolina, and that other “criminal investigations” were proceeding in both Mecklenburg County and in Pigeon Forge, Tennessee.

Husband also testified. He agreed that the first time the parties had sex was on their honeymoon, but he claimed they had sex many times during the two-week honeymoon and he was not aware of “anything abnormal during the honeymoon that upset her[.]” Husband testified that the first time Wife had used the word “rape” regarding him was on the “date of separation, [3 April 2023].” He did not “learn any of the specifics” about her claims about rape until he “saw the . . . first ex parte order.”³ Just before their separation, Wife had told him “she had felt used during sex.” He also testified about moving out of the house, his attempts to visit with the minor child, and his arrest, which caused him to lose his job. He denied that he had ever raped Wife or “physically held her down.”

In an order entered 16 August 2023, and in an amended order entered 18 August 2023, the trial court denied Wife’s 6 July 2023 Complaint and Motion for DVPO as to her and the parties’ minor child, and rendered the 6 July 2023 *Ex Parte* DVPO “null and void.” The trial court concluded Wife “failed to prove grounds for issuance of a [DVPO].” Wife timely

3. It appears Husband was referring to the 28 July 2023 Complaint and Motion for DVPO, as there was no *ex parte* order issued based on the 28 July 2023 Complaint and Motion for DVPO.

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appealed the trial court's order denying her 6 July 2023 Complaint and Motion for DVPO on 30 August 2023.

II. Analysis

Wife makes two arguments on appeal. First, Wife argues the trial court's Finding of Fact No. 8 was not supported by competent evidence and that this finding could not serve as sufficient grounds to support its conclusion Wife "failed to prove grounds for issuance of a [DVPO]." Next, Wife argues the trial court "erred by failing to find and conclude that an act of domestic violence occurred in accordance with [North Carolina General Statute Section] 50B-1(a) and, therefore, erred by failing to enter a [DVPO] in favor of [Wife]." We disagree and affirm the trial court's order.

A. Standard of Review

When the trial court sits without a jury regarding a DVPO, the standard of review on appeal is whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts. Where there is competent evidence to support the trial court's findings of fact, those findings are binding on appeal.

Hensey v. Hennessy, 201 N.C. App 56, 59, 685 S.E.2d 541, 544 (2009) (citation, quotation marks, and brackets omitted).

Findings of fact supported by competent evidence are conclusive on appeal even if there is evidence to the contrary. This is because

where different reasonable inferences can be drawn from the evidence, the determination of which reasonable inferences shall be drawn is for the trial court. This Court can only read the record and, of course, the written word must stand on its own. But the trial judge is present for the full sensual effect of the spoken word, with the nuances of meaning revealed in pitch, mimicry and gestures, appearances and postures, shrillness and stridency, calmness and composure, all of which add to or detract from the force of spoken words.

Moorhead v. Moorhead, 296 N.C. App. 90, 93, 909 S.E.2d 327, 330 (2024) (citations and quotation marks omitted). Whether an act of domestic violence has occurred is a conclusion of law, *see Kennedy v. Morgan*,

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221 N.C. App. 219, 223, 726 S.E.2d 193, 196 (2012), and this Court reviews conclusions of law *de novo*, see *State v. Williams*, 362 N.C. 628, 632, 669 S.E.2d 290, 294 (2008).

B. Sufficiency of Findings

Wife argues the trial court's Finding of Fact No. 8 was not supported by competent evidence and that this finding "merely recited the evidence" and does not serve as an "ultimate finding[] of fact." Wife contends recitations of testimony cannot serve as the sole basis of the trial court's findings to support its conclusions. We affirm the trial court's order as this contested finding goes beyond mere recitations of testimony.

Here, the trial court's Finding of Fact No. 8 reads:

[Wife] contends that [Husband] "raped" her 50 to 100 times during their 2 and a half year marriage. She described several occasions when she says she said no and he didn't stop. [Husband] denies ever continuing to have sex with [Wife] when she told him to stop or pushed him off except when she was saying so while laughing or in a playful manner. The statutes regarding sexual offenses that are applicable require evidence of by [sic] force and against the will of the victim. The evidence of "against her will" is her saying she said no and him contradicting that evidence saying he never proceeded past a non-playful laughing no similar to when they were play wrestling. There is almost no evidence from which the court could find any alleged action was by force. The court considering all of the evidence and weighing the credibility of each witness cannot find by the greater weight of the evidence that [Husband] committed an act of domestic violence.

"There are two kinds of facts: Ultimate facts, and evidentiary facts. Ultimate facts are the final facts required to establish the plaintiff's cause of action or the defendant's defense; and evidentiary facts are those subsidiary facts required to prove the ultimate facts." *Woodard v. Mordecai*, 234 N.C. 463, 470, 67 S.E.2d 639, 644 (1951) (citations omitted). "Pursuant to Rule 52(a) [of our North Carolina Rules of Civil Procedure], the trial court's findings of fact must be more than mere evidentiary facts; they must be the specific ultimate facts sufficient for an appellate court to determine that the judgment is adequately supported by competent evidence." *Williamson v. Williamson*, 140 N.C. App. 362, 363-64, 536 S.E.2d 337, 338 (2000) (citation, quotation marks, ellipsis, and original brackets omitted).

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In *In re Green*, this court explained in a footnote “verbatim recitations of the testimony . . . *do not constitute findings of fact* by the trial judge, because they do not reflect a conscious choice between the conflicting versions of the incident in question which emerged from all the evidence presented.” 67 N.C. App. 501, 505 n.1, 313 S.E.2d 193, 195 n.1 (1984) (emphasis in original). Where the trial court fails to make adequate and sufficient findings to support its conclusions, this Court must vacate the order and remand for further proceedings. *See id.* (“The purported ‘findings’ . . . do not even come close to resolving the disputed factual contentions of the parties, and, under ordinary circumstances would require this Court to remand the matter to the [d]istrict [c]ourt for the entry of appropriately considered and detailed factual findings.”); *see also Crosby v. Crosby*, 272 N.C. 235, 238-39, 158 S.E.2d 77, 80 (1967) (“However, when the court fails to find facts so that this Court can determine that the order is adequately supported by competent evidence . . . , then the order entered thereon must be vacated and the case remanded for detailed findings of fact.” (citation omitted)).

However, as further explained by our Supreme Court in *In re A.E.*, “recitations of . . . testimony . . . do not constitute findings of fact . . . *absent an indication concerning whether the trial court deemed the relevant portion of the testimony credible.*” 379 N.C. 177, 185, 864 S.E.2d 487, 495 (2021) (emphasis added) (citations, quotation marks, brackets, and original emphasis omitted). “There is nothing impermissible about describing testimony, so long as the court ultimately makes its own findings, resolving any material disputes.” *In re T.N.H.*, 372 N.C. 403, 408, 831 S.E.2d 54, 59 (2019) (citations and quotation marks omitted).

Where the evidence is conflicting . . . , the [trial] judge must resolve the conflict. He sees the witnesses, observes their demeanor as they testify and by reason of his more favorable position, he is given the responsibility of discovering the truth. The trial court must determine the weight to be given the testimony and the reasonable inferences to be drawn therefrom. If different inferences may be drawn from the evidence, the trial court determines which inferences to draw and which to reject. Only the trial court can draw these inferences or any other potential inferences based on the evidence. This Court does not resolve issues of credibility or conflicting evidence.

Carolina Mulching Co. LLC v. Raleigh-Wilmington Investors II, LLC, 272 N.C. App. 240, 246, 846 S.E.2d 540, 544-45 (2020) (citations, quotation marks, and original brackets omitted). “The findings should resolve

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the material disputed issues, or if the trial court does not find that there was sufficient credible evidence to resolve an issue, should so state.” *Carpenter v. Carpenter*, 225 N.C. App. 269, 279, 737 S.E.2d 783, 790 (2013) (citation omitted).

In *Williamson*, this Court reversed and remanded a trial court order where the findings were not “ultimate facts required by Rule 52(a), . . . but rather . . . mere recitations of the evidence . . . not reflect[ing] the processes of logical reasoning[.]” *Williamson*, 140 N.C. App. at 364, 536 S.E.2d at 339 (citations and quotation marks omitted). “This is indicated by the trial court’s repeated statements that a witness ‘testified’ to certain facts or other words of similar import.” *Id.* For instance, the trial court’s findings in *Williamson* had language such as “from [the defendant’s] *testimony*” and “[the p]laintiff *testified*[.]” to then only outline what these witnesses testified to. *See id.* (emphasis in original). Such “findings are mere recitations of the evidence and are not the ultimate facts required to support the trial court’s conclusions of law[.]” *Id.* Further, in *In re Green*, this Court identified via a footnote that “[e]leven out of the twelve ‘[f]indings of [f]act’ begin by stating that the witness ‘testified under oath’, and continue to merely restate the content of that testimony.” 67 N.C. App. at 505 n.1, 313 S.E.2d at 195 n.1 (ellipses omitted).

At the trial court hearing, Wife testified to allegedly being “raped . . . 50 to 100 times[]” by Husband throughout the course of their marriage. However, when asked whether “[d]uring sex, had [Wife] ever pushed you off her and told you to stop?” Husband responded “[s]he had done that, in a playful way, though. Never – it never sounded serious. It was always while she was laughing.” Further, during cross-examination, Wife was presented with text messages sent between her and Husband on 8 August 2022, and the following interaction occurred:

Q. Okay. And what’s the date on that text?

A. That is August 8th, 2022.

Q. Is it fair to say that you were talking about you ovulating and for him to come home and hurry up?

A. Yes.

Q. Okay. So this is August 8th, 2022 and I think you said you were – you were – you were married on November 14th of 2020. So this is close to, you know, a year and a half later. How many times would you say he has allegedly raped you in August – by August 8th, 2022?

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A. In August -- I can't give a specific number, no.

Q. Okay. Just -- you said 50 to 100 times, so would it be fair to say maybe half; 25 times, at minimum?

A. At minimum.

Q. At minimum 25 times. And that's -- and that's the one you want to have a kid, a child, with?

A. I still loved [Husband].

Additionally, Wife was presented with a post she made on 22 July 2023, after filing her 6 July 2023 Complaint and Motion for DVPO, to a local group dedicated to moms in her area, indicating she “definitely want[ed] to get pregnant sometime soon.”

Wife specifically testified about an instance of alleged rape on 10 March 2022 during a road trip with Husband, their child, and Wife's sister. Wife testified her sister was asleep when Husband took her into the bathroom and tried to “rape” her. When asked on cross-examination whether she ever called out for help during this event, she answered “[n]o. I was telling [Husband] I didn't want to have sex.”

Here, Finding of Fact No. 8 first correctly characterizes the conflicting testimony presented by Wife and Husband. But after this, the trial court clearly addresses the weight and credibility of the evidence, stating that after “considering all of the evidence and weighing the credibility of each witness cannot find by the greater weight of the evidence that [Husband] committed an act of domestic violence.” Though this finding uses language such as “[Wife] contends[,]” “[Wife] described[,]” and “[Husband] denies[,]” this finding goes beyond “mere recitation[] of . . . evidence” as described by this Court in *Williamson* and *In re Green*. See *Williamson*, 140 N.C. App. at 364, 536 S.E.2d at 339; see also *In re Green*, 67 N.C. App. at 505 n.1, 313 S.E.2d at 195 n.1. The trial court weighed testimony of the parties and determined the credibility of the evidence, ultimately determining it could not “find by the greater weight of the evidence that [Husband] committed an act of domestic violence.” This finding also indicates “[t]here is almost no evidence from which the court could find any alleged action was by force.” This part of the finding is also correct. Wife testified about not wanting to have sex for various reasons and about telling Husband “no” but then they ended up having sex after she told him “no.” Wife testified that “[i]f I say no, I do consider that rape.”

When the trial court rendered its ruling at the hearing, it noted the careful consideration of the testimony of each party and the

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sex offenses list of statutes that are in the domestic violence statute. I have looked at each of those. And each of those requires a finding of force – by force. There is basically a he said/she said situation about whether or not he continued past her saying no. He says that . . . he never did . . . if it was a serious no. He referenced playful no's or pushing off, similar to when they are play wrestling. [Wife] defined rape as when she says no, it means no. I don't disagree that when with regard to sexual intercourse, that no means no. But I have to follow the law and the law in our statutes say "by force and against the will."

Finding of Fact No. 8 was supported by competent evidence, and it is an ultimate finding of fact which resolves the disputed issue.

C. Act of Domestic Violence

Next, Wife argues the trial court erred in not finding and concluding that an act of domestic violence occurred under North Carolina General Statute Section 50B-1(a), and further erred in not granting Wife's 6 July 2023 Complaint and Motion for DVPO in accord with such findings. Wife contends, even if the trial court's finding is an ultimate finding of fact, it is still in error as the trial court should have concluded that an act of domestic violence occurred. We disagree.

We first note that the trial court made one conclusion of law in the DVPO on appeal: "[Wife] has failed to prove grounds for issuance of a domestic violence protective order." Wife does not directly challenge this conclusion of law in her appellate brief. Instead, she argues that the trial court should have instead made a different conclusion of law. We will treat this argument as a challenge to the trial court's conclusion of law since she has made this argument, however inartfully.

Under Section 50B-1(a) of our General Statutes,

[d]omestic violence means the commission of one or more of the following acts upon an aggrieved party or upon a minor child residing with or in the custody of the aggrieved party by a person with whom the aggrieved party has or has had a personal relationship, but does not include acts of self-defense:

- (1) Attempting to cause bodily injury, or intentionally causing bodily injury; or
- (2) Placing the aggrieved party or a member of the aggrieved party's family or household in fear of

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imminent serious bodily injury or continued harassment, as defined in G.S. 14-277.3A, that rises to such a level as to inflict substantial emotional distress; or

(3) Committing any act defined in G.S. 14-27.21 through G.S. 14-27.33. [*i.e.*, sex offenses]

N.C. Gen. Stat. § 50B-1(a) (2023).

Wife argues that she “specifically alleged all three subsections of [North Carolina General Statutes Section] 50B-1(a) in her [6 July 2023 Complaint and Motion for DVPO] for the trial court to have considered and presented evidence on each of the three[]” subsections, not just subsection (3). It is true that Wife checked all the boxes on the 6 July 2023 Complaint and Motion for DVPO, for each subsection of the statute. In the blank where the form directs to “[g]ive specific dates and describe in detail what happened,” Wife stated, “[p]lease see attached, which is incorporated by reference as though set forth fully herein.” Wife also included an attachment referencing paragraphs 4, 5, and 8 of the 6 July 2023 Complaint and Motion for DVPO. Paragraphs (a) through (d) are general allegations about the parties’ residences, date of marriage, date of separation, their minor child, and Wife’s pregnancy with their second child. Then Wife makes detailed allegations of sexual assault or rape and incorporates the Superior Court Complaint and criminal papers noted above.

Wife argues in detail about how the trial court could have made findings that would support a conclusion that an act of domestic violence occurred under any three subsections of Section 50B-1(a), not just subsection (3), and argues the trial court erred in not doing so. Further, Wife contends the trial court only considered the occurrence of an act of domestic violence in the scope of “by force” and “against the will of the victim” under the sexual offenses identified by subsection 50B-1(a)(3) of the statute. Thus, Wife argues the trial court erred in not considering the other subsections of 50B-1(a), *i.e.*, (a)(1) and (a)(2), in finding whether an act of domestic violence occurred.

Wife’s argument focuses on her testimony about various instances of sex with Husband and her contention that he was raping her or sexually assaulting her. She contends the trial court should have found that Husband “attempted to cause bodily injury[] or intentionally caused bodily injury” to her based upon this testimony. It is true, as Wife argues, that a forced sexual act *may* cause “bodily injury,” but Wife neither alleged such injury nor presented evidence of this type of injury. Her 6 July 2023 Complaint and Motion for DVPO and her testimony focused

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almost entirely and in exceptionally graphic detail on acts she deemed sexual assaults or rape or attempts of sexual assault or rape.

But no matter what findings the trial court could have made based on the evidence presented, we have already determined that the trial court's finding of fact was supported by competent evidence. This Court is not free to substitute its judgment for the trial court or to make new findings of fact. The trial court carefully considered the evidence and made determinations as to the weight and credibility of the evidence. The trial court's findings of fact do not support a conclusion of law that an act of domestic violence occurred under any subsection of Section 50B-1(a). Therefore, the trial court did not err by concluding that "[Wife] has failed to prove grounds for issuance of a [DVPO]."

III. Conclusion

The trial court's finding of fact was based on competent evidence and is an ultimate finding of fact, not a "mere recitation" of testimony, as it answers the material issue of whether Husband had committed any act of domestic violence as alleged by Wife. The trial court's conclusion of law was supported by the finding of fact. The trial court did not err in denying Wife's 6 July 2023 Complaint and Motion for DVPO.

AFFIRMED.

Judges ZACHARY and CARPENTER concur.

STATE v. CAPPS

[298 N.C. App. 412 (2025)]

STATE OF NORTH CAROLINA

v.

RICKY KEITH CAPPS

No. COA24-653

Filed 2 April 2025

1. Appeal and Error—preservation of issues—hearsay excluded—no offer of proof made

In a trial for possession of stolen goods arising from the discovery of a stolen pop-up camper on defendant's property, defendant failed to preserve for appellate review the trial court's exclusion of a detective's answer on hearsay grounds—after defense counsel asked whether the person who stole the camper lied to defendant about it—because defendant did not make the required offer of proof as to the content of the excluded testimony. Further, the substance of any answer that might have been given was not apparent from the leading question.

2. Possession of Stolen Property—constructive possession—incriminating circumstances—stolen camper located on defendant's property

The State presented substantial evidence, in the form of incriminating circumstances, from which a jury could find that defendant constructively possessed a stolen pop-up camper, which was discovered on defendant's property a couple of weeks after it was stolen, to meet the possession element of felonious possession of stolen goods. When law enforcement questioned defendant about the camper, he stated that he had been aware of the camper on his property; that although he didn't know where it came from, he "didn't choose to ask"; and he acknowledged that by the time of the interview he knew the camper was stolen.

Appeal by defendant from judgment entered 13 September 2023 by Judge J. Thomas Davis in McDowell County Superior Court. Heard in the Court of Appeals 29 January 2025.

Attorney General Jeff Jackson, by Special Deputy Attorney General Mary W. Scruggs, for the State.

Lockamy Law Firm, by C. Scott Holmes, for defendant-appellant.

STATE v. CAPPS

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ZACHARY, Judge.

Defendant Ricky Keith Capps appeals from the trial court's judgment entered upon a jury's verdict finding him guilty of felonious possession of stolen goods. After careful review, we conclude that Defendant received a fair trial, free from error.

I. Background

Gina Monte left her home in Nebo on 24 November 2021 to spend Thanksgiving out of town. When she returned on 29 November, the Jayco Jay Series pop-up camper that had been parked in her driveway was no longer there. Monte called the police to report that her camper had been stolen.

On 7 December 2021, law enforcement officers who were responding to a fire on Defendant's property discovered the stolen camper there. At trial, Detective Burlin Ballew of the McDowell County Sheriff's Office described the property as a "fielded area" of "maybe a hundred yards in length" in front of "what used to be [Defendant's] residence there that had burned previously." In that field, which one officer described as an "impromptu campground," "there were a few campers, a tent" and "a shack type thing sort of structure."

Robert "Speedy" Jaynes resided in the field on Defendant's property and was present when officers discovered the stolen camper. Speedy produced a bill of sale to officers indicating that he had purchased the camper from Paul Poteat on 25 November. Speedy also gave officers permission to photograph the camper's exterior and interior. The camper appeared to have been modified to serve as a stationary residence: additional vinyl siding, wooden pallets, and a tarp were attached, and several blocks were wedged under the tires to keep the camper level. The camper also had been spray-painted a different color scheme. Nevertheless, the camper was identified as Monte's by its model number and serial number.

Meanwhile, on the same day that the camper was discovered, Monte reported to Detective Ballew that she had received a letter from an anonymous source who claimed to have "a bit of information that [she] might be interested in." Detective Ballew called the phone number provided in the anonymous letter, and the ensuing conversation led him to believe that he needed to interview Defendant regarding the camper.

Detective Ballew interviewed Speedy on 15 December. The next day, Detective Ballew and a colleague interviewed Defendant and

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another suspect, Daniel Thrall, at Defendant's property. Defendant acknowledged that he knew at that point that the camper had been stolen, and that it had been on his property when he returned home following his release from jail on 25 November. According to Defendant, it was his understanding that John Daniels "got the camper for [Defendant]" and brought it to Defendant's property "because of money [Daniels] owed" to Defendant. Defendant also told Detective Ballew that "he didn't know where [the camper] came from and he didn't choose to ask." After speaking with Thrall and Defendant, Detective Ballew left the property believing that the camper "had been sold to Speedy" on Defendant's behalf.

On 6 March 2023, a McDowell County grand jury indicted Defendant for one count of felonious possession of stolen goods. Defendant's case came on for trial in McDowell County Superior Court on 12 September 2023.

Defendant moved to dismiss the charge at the close of the State's evidence, arguing "that no reasonable juror could find that [he] ever knowingly possessed any stolen property." The trial court denied the motion. Defendant opted not to present evidence but renewed his motion to dismiss at the close of all evidence, which the trial court again denied.

On 13 September 2023, the jury returned its verdict finding Defendant guilty of felonious possession of stolen goods. The court sentenced Defendant to a term of 9 to 20 months' imprisonment in the custody of the North Carolina Department of Adult Correction. Defendant gave notice of appeal in open court.

II. Discussion

Defendant argues that the trial court erred by excluding as inadmissible hearsay certain testimony that he sought to elicit while cross-examining Detective Ballew. Defendant also contends that the trial court erred by denying his motion to dismiss because the State presented insufficient evidence that he possessed the camper discovered on his property. We disagree.

A. Hearsay

[1] We first address Defendant's hearsay argument. Defendant claims that "[t]he trial court erred by excluding [as hearsay] the answer to the question about whether Daniels, the person who stole the camper, lied to [Defendant] about it." However, Defendant failed to preserve this argument for appellate review because he made no offer of proof as to the substance of the excluded testimony.

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“In order for a party to preserve for appellate review the exclusion of evidence, the significance of the excluded evidence must be made to appear in the record and a specific offer of proof is required unless the significance of the evidence is obvious from the record.” *State v. Raines*, 362 N.C. 1, 20, 653 S.E.2d 126, 138 (2007) (citation omitted), *cert. denied*, 557 U.S. 934, 174 L. Ed. 2d 601 (2009). Further, our Supreme Court has “held that the essential content or substance of the witness[s] testimony must be shown before we can ascertain whether prejudicial error occurred.” *Id.* (citation omitted). “Absent an adequate offer of proof, we can only speculate as to what a witness’s testimony might have been.” *State v. Ramirez*, 293 N.C. App. 757, 761, 901 S.E.2d 256, 259 (2024) (citation omitted).

In the case at bar, defense counsel asked Detective Ballew: Defendant “told you that John [Daniels] had lied to him, did he not?” The State objected on hearsay grounds and the trial court sustained the objection. Rather than providing an offer of proof of Detective Ballew’s answer to the question for the record, defense counsel finished the cross-examination by stating: “Those are my questions.” “By failing to make an offer of proof, [D]efendant has failed to properly preserve this issue for appellate review” *State v. Hardy*, 353 N.C. 122, 134, 540 S.E.2d 334, 344 (2000), *cert. denied*, 534 U.S. 840, 151 L. Ed. 2d 56 (2001).

Defendant nevertheless posits that this argument is preserved because “the offer of proof was in the leading question – which contained the answer.” Defendant supports this contention with a citation to a nonprecedential opinion of this Court. *See State v. Everett*, 178 N.C. App. 44, 55, 630 S.E.2d 703, 710 (2006) (“An offer of proof is not necessary to preserve an issue for appellate review if the substance of the excluded testimony is apparent from the context within which the question was asked.”), *aff’d and ordered not precedential*, 361 N.C. 217, 639 S.E.2d 442 (2007). Moreover, *Everett* has not subsequently been cited for this proposition in any binding opinion of our appellate courts.

But even assuming, *arguendo*, that *Everett* is mandatory authority, it still would not support Defendant’s argument. It is manifest that “the essential content or substance of [Detective Ballew’s] testimony must be shown before we can ascertain whether prejudicial error occurred.” *Raines*, 362 N.C. at 20, 653 S.E.2d at 138 (citation omitted). Here, Defendant fails to show the essential content or substance of Detective Ballew’s excluded testimony; all that appears in the record is defense counsel’s unanswered leading question. As the State notes, “it is quite possible that [Detective Ballew] would have said that Defendant did not tell him that Mr. Daniels had lied to him or that the unsubstantiated

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'lie' had nothing to do with any relevant subject matter." Accordingly, even under the rule from *Everett*, if it were to apply, "the substance of the excluded testimony is [not] apparent from the context within which [defense counsel's] question was asked." 178 N.C. App. at 55, 630 S.E.2d at 710. "It is well established that an exception to the exclusion of evidence cannot be sustained where the record fails to show what the witness[s] testimony would have been had he been permitted to testify." *State v. Simpson*, 314 N.C. 359, 370, 334 S.E.2d 53, 60 (1985).

Without an offer of proof as to Detective Ballew's answer to defense counsel's unanswered leading question, there is no evidence in the record to support Defendant's claim that Daniels lied to Defendant about the camper. Further, the State emphasizes that the evidence in the record "shows that Defendant did not ask who owned the camper and did not want to know, not that he was lied to about the ownership of it." This further underscores the futility and impropriety of any attempt to review this issue on appeal.

"Absent an adequate offer of proof, we can only speculate as to what [Detective Ballew]'s testimony might have been." *Ramirez*, 293 N.C. App. at 761, 901 S.E.2d at 259 (citation omitted). "We cannot engage in speculation as to how Detective [Ballew] would have answered the question, and Defendant's argument is thus dismissed." *Id.*

B. Motion to Dismiss

[2] Defendant further argues on appeal that the trial court erred by denying his motion to dismiss for insufficient evidence the charge of felonious possession of stolen goods.

1. Standard of Review

When ruling on a motion to dismiss, "the trial court need determine only whether there is substantial evidence of each essential element of the crime and that the defendant is the perpetrator. Substantial evidence is that amount of relevant evidence necessary to persuade a rational juror to accept a conclusion." *State v. Chekanow*, 370 N.C. 488, 492, 809 S.E.2d 546, 549 (2018) (cleaned up). "In making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *Id.* at 492, 809 S.E.2d at 549–50 (citation omitted).

"The trial court is concerned only with the sufficiency of the evidence to take the case to the jury and not with its weight, and the test of the sufficiency of the evidence to withstand the motion is the same

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whether the evidence is direct, circumstantial[,], or both.” *Id.* at 492, 809 S.E.2d at 550 (cleaned up). “Circumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence.” *Id.* (citation omitted).

“Once the court decides that a reasonable inference of [the] defendant’s guilt may be drawn from the circumstances, then it is for the jury to decide whether the facts satisfy the jury beyond a reasonable doubt that the defendant is actually guilty.” *Id.* (cleaned up). “But if the evidence is sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator, the motion to dismiss must be allowed.” *Id.* (cleaned up). “Whether the State presented substantial evidence of each essential element of the offense is a question of law”; consequently, an appellate court “review[s] the denial of a motion to dismiss de novo.” *Id.* (citation omitted).

2. Analysis

Defendant alleges that there was insufficient evidence that he possessed the camper because “Daniels stole the camper and sold it to Speedy with[out] [Defendant] ever having dominion or control,” and therefore, the State failed to show that he had actual or constructive possession of the camper.

“The essential elements of felonious possession of stolen property are: (1) possession of personal property; (2) valued at greater than \$1,000.00; (3) which has been stolen; (4) with the possessor knowing or having reasonable grounds to believe the property was stolen; and (5) with the possessor acting with dishonesty.” *State v. Privette*, 218 N.C. App. 459, 471, 721 S.E.2d 299, 309 (cleaned up), *disc. review denied*, 365 N.C. 566, 724 S.E.2d 532 (2012). The only element at issue in this appeal is the first—whether Defendant had possession of the stolen camper.

“Possession may be either actual or constructive.” *Id.* (cleaned up). Here, the State makes no argument concerning actual possession; rather, the State maintains that Defendant had constructive possession of the stolen camper.

“Constructive possession exists when the defendant, while not having actual possession of the goods[,], has the intent and capability to maintain control and dominion over them.” *Id.* (cleaned up). “When contraband is found on the premises under the control of an accused, this fact, in and of itself, gives rise to an inference of knowledge and possession which may be sufficient to carry the case to the jury on a charge of unlawful possession.” *Chekanow*, 370 N.C. at 493, 809 S.E.2d

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at 550 (cleaned up). But “[w]here the defendant’s possession is nonexclusive, constructive possession may not be inferred in the absence of other incriminating circumstances.” *Privette*, 218 N.C. App. at 471, 721 S.E.2d at 309 (cleaned up).

“In determining whether sufficient incriminating circumstances exist to support a finding of constructive possession,” our courts consider the following factors identified by our Supreme Court:

- (1) the defendant’s ownership and occupation of the property . . . ;
- (2) the defendant’s proximity to the contraband;
- (3) indicia of the defendant’s control over the place where the contraband is found;
- (4) the defendant’s suspicious behavior at or near the time of the contraband’s discovery;
- and (5) other evidence found in the defendant’s possession that links the defendant to the contraband.

Chekanow, 370 N.C. at 496, 809 S.E.2d at 552. “Evidence of conduct by the defendant indicating knowledge of contraband . . . is also sufficient to permit a jury to find constructive possession.” *State v. Rice*, 252 N.C. App. 480, 484, 798 S.E.2d 432, 435 (2017) (cleaned up).

“Our determination of whether the State presented sufficient evidence of incriminating circumstances depends on the totality of the circumstances in each case. No single factor controls, but ordinarily the questions will be for the jury.” *Id.* (citation omitted). Additionally, “ownership of the premises on which the contraband is found is strong evidence of control, and thus, should be considered as a weighty factor in the analysis.” *Chekanow*, 370 N.C. at 497, 809 S.E.2d at 552–53 (cleaned up).

Here, Defendant asserts that “the evidence tended to show that the camper changed hands but was never possessed by” him, and hence he claims that “[t]he court convicted [him] of possessing the camper simply because it was located on his property.” To the contrary, the trial court properly denied his motion to dismiss because there was sufficient evidence that he constructively possessed the camper to submit the question of his guilt to the jury.

First, Detective Ballew testified that Defendant “knew [the camper] was stolen” by the time that Detective Ballew interviewed him. The State thus produced evidence “indicating [Defendant’s] knowledge of contraband” on his property, which we have held is “sufficient to permit a jury to find constructive possession.” *Rice*, 252 N.C. App. at 484, 798 S.E.2d at 435 (cleaned up).

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The State also presented further evidence of incriminating circumstances. Detective Ballew testified that Defendant “didn’t know where [the camper] came from and he didn’t choose to ask.” As our Supreme Court has recognized, “a defendant’s suspicious behavior in conjunction with the discovery of the contraband” may be considered an incriminating circumstance. *Chekanow*, 370 N.C. at 498, 809 S.E.2d at 554. Additionally, Defendant saw the camper on his property beginning on 25 November; his continuing “proximity to the contraband” is properly considered an incriminating circumstance. *See id.* at 497, 809 S.E.2d at 553 (recognizing that a defendant’s prior presence “in the place where the contraband was found approximately two days later” may constitute an incriminating circumstance). Finally, Defendant’s “ownership of the premises on which the [camper wa]s found is strong evidence of control, and thus, should be considered as a weighty factor in the analysis.” *Id.* at 497, 809 S.E.2d at 552–53 (cleaned up).

Upon careful review of the totality of the circumstances, it is readily apparent that “the State presented sufficient evidence of incriminating circumstances” for the trial court to submit the question of Defendant’s guilt to the jury. *Rice*, 252 N.C. App. at 484, 798 S.E.2d at 435 (citation omitted). Accordingly, the court did not err by denying Defendant’s motion to dismiss.

III. Conclusion

For the foregoing reasons, Defendant received a fair trial, free from error.

NO ERROR.

Chief Judge DILLON and Judge STROUD concur.

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[298 N.C. App. 420 (2025)]

STATE OF NORTH CAROLINA

v.

SHAJUAN DWATRAY ERVIN

No. COA24-650

Filed 2 April 2025

1. Homicide—first-degree murder—motion to dismiss—sufficient evidence of premeditation and deliberation

In a prosecution for first-degree murder arising from defendant shooting and killing his girlfriend's brother following a physical conflict between defendant and the victim (over whether defendant had treated the victim and his family with disrespect), the trial court did not err in denying defendant's motion to dismiss where the evidence of premeditation and deliberation, viewed in the light most favorable to the state—including that defendant had walked away from a physical confrontation with the victim (which took place on the first floor of the townhome where defendant, his girlfriend, his sister, the victim, and others resided), went to the third floor to retrieve his gun, descended to the second floor where he spoke with his sister for some period of time, then returned to the first floor and shot the victim three times—was sufficient to send the charge to the jury.

2. Evidence—testimony regarding defendant's prior violent behavior—properly admitted under Evidence Rules

In a prosecution for first-degree murder arising from defendant shooting and killing his girlfriend's brother following a physical conflict between defendant and the victim (over whether defendant had treated the victim and his family with disrespect), the trial court did not err or abuse its discretion in admitting testimony from defendant's girlfriend regarding three incidents in which defendant was violent toward her, where two of the incidents involved defendant brandishing a gun and all three incidents occurred during the time period when defendant, his girlfriend, and the victim were residing together. The evidence was properly admitted under Evidence Rules 401, 402, 403, and 404 because it: was relevant to the context of the parties' relationships and conflicts; demonstrated defendant's motive, intent, opportunity, and preparation to use the gun involved in the shooting; and had probative value that was not substantially outweighed by its prejudice to defendant.

3. Criminal Law—prosecutor's arguments—confusing or erroneous statement of law—cured by jury instruction

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In a prosecution for first-degree murder arising from defendant shooting and killing his girlfriend's brother following a physical conflict between defendant and the victim (over whether defendant had treated the victim and his family with disrespect), any error in the prosecutor's confusing-at-best, legally-incorrect-at-worst, statement during closing arguments—"Even if it is reasonable, the defendant never has a right to use excessive force"—was cured by the trial court's proper instruction to the jury regarding the law of self-defense.

4. Evidence—victim's alleged gang involvement—exclusion—no error or abuse of discretion shown

In a prosecution for first-degree murder arising from defendant shooting and killing his girlfriend's brother following a physical conflict between defendant and the victim (over whether defendant had treated the victim and his family with disrespect), the trial court did not err or abuse its discretion in excluding evidence of the victim's alleged gang involvement where, even if it was relevant, the trial court determined that the probative value of the evidence to defendant's self-defense theory of the case was substantially outweighed by the danger of unfair prejudice.

Appeal by Defendant from judgment entered 22 November 2022 by Judge James E. Hardin Jr. in Durham County Superior Court. Heard in the Court of Appeals 12 February 2025.

Attorney General Jeff Jackson, by Special Deputy Attorney General Robert C. Montgomery, for the State-Appellee.

William D. Spence for Defendant-Appellant.

COLLINS, Judge.

Defendant Shajuan Dwatray Ervin appeals from a judgment entered upon a jury's guilty verdict of first-degree murder. Defendant argues that the trial court erred by denying his motion to dismiss the charge of first-degree murder, admitting testimony of several of his prior violent acts, overruling his objection to the State's closing argument, and excluding evidence surrounding the victim's alleged gang involvement. For the following reasons, we find no error.

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I. Background

Defendant was charged with first-degree murder for a shooting that occurred in the early morning hours of 19 March 2019. The State's evidence at trial tended to show the following:

Defendant lived in a three-story townhouse in Durham, North Carolina with the following individuals: Defendant's girlfriend, Akira Jackson; Defendant and Akira's six-month-old child; Akira's brother, Marcus Jackson; Marcus' girlfriend, Kayla Tripp; and Defendant's sister, Domilege Hunter.

Several months before the shooting, Akira learned that another woman was pregnant with Defendant's child. This news caused tension between Defendant and Akira and between Defendant and Marcus. Two weeks before the shooting, Defendant and Akira got into a physical altercation during which Defendant punched Akira repeatedly in the thigh. After this incident, Defendant began sleeping on the first floor of the townhouse on an air mattress.

On the morning of 18 March 2019, Akira called her mother, Nicole Elliott, to talk about her relationship with Defendant. Concerned for her daughter, Elliott suggested that Defendant move out of the townhouse. Defendant, listening to the conversation on speakerphone, began yelling and cursing at Elliott and Akira. Later that day, Marcus learned of Defendant's outburst.

When Defendant arrived home from work later that evening, Marcus confronted Defendant. Defendant and Marcus were on the first floor; Akira, her baby, Tripp, and Hunter were all upstairs in their respective bedrooms. At some point, the confrontation between Defendant and Marcus became physical. Tripp, in her room on the second floor, heard "yelling" and "backs hitting the wall" coming from the first floor. Akira also heard the commotion and ran downstairs. She found Defendant on top of Marcus, pinning him to the ground. Marcus explained that he had confronted Defendant about Defendant's disrespect of Elliott.

After Akira convinced Defendant to get off Marcus, Akira and Marcus walked upstairs to Marcus' room for a short time before walking outside. A few minutes later, Defendant went to Hunter's room, carrying his baby and the gun he owned. He gave Hunter the baby and told her that Marcus had "jumped on him." According to Hunter, Defendant had scratches and blood on his face.

While standing outside in front of the townhouse, Marcus texted Defendant, "Backyard, let me get my one." Defendant immediately responded, "You brave, come on in." A few minutes later, Marcus again

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texted Defendant, “Out here,” and Defendant responded, “Come on in, you brave.” Marcus then walked around the townhouse and stood directly outside the back door.

Akira walked inside and went into Hunter’s room. She got her baby from Hunter and, as she walked out of the room, saw Defendant walking behind her with a gun in his hands. Defendant was yelling for Marcus. Tripp heard the yelling and walked out of her room to find Defendant and Akira standing in the hallway. Akira and Tripp tried to stop Defendant from going downstairs with the gun, to no avail. Tripp attempted to block Defendant by standing in between him and the stairwell, but Defendant pushed her down the stairs. At this point, Akira called the police.

Once downstairs, Tripp saw Marcus standing near the sliding doors at the back of the townhouse. Defendant initially walked toward the front door, but he quickly turned around and walked through the kitchen toward the back, shooting at Marcus as he walked. After Marcus fell face-down onto the floor, Defendant turned around and walked out the front door.

Upon arriving at the scene, Officer Cassen Bolick of the Durham Police Department found Defendant standing in the townhouse parking lot with his hands up. He told Officer Bolick that he had a firearm in his right pocket and ammunition in his left pocket. Officer Bolick immediately placed Defendant into custody. Defendant told law enforcement that Marcus had “jumped him,” and when Defendant was asked about the blood on his clothes, Defendant said “[a]t least you know he was close.” Defendant maintained that he shot Marcus in self-defense and that Marcus had told him, “I’m drunk, so if you going to kill me, you better kill me before I kill you.”

Marcus had three gunshot wounds and was declared deceased shortly after being transported to the hospital. Two of Marcus’ gunshot wounds had stippling, indicating that Defendant was less than three feet away from Marcus when he inflicted those wounds.

Defendant testified on his own behalf. According to Defendant, Marcus attacked him because he had “disrespected” Marcus and Akira’s mother. After their initial physical altercation, Defendant went upstairs to retrieve his gun because Marcus had threatened, “kill me before I kill you.” As Defendant walked back downstairs, Tripp opened the front door and, in a matter of seconds, Marcus charged Defendant. Defendant testified, “He lunged out at me. And I don’t know if he was trying to, you know, grab the gun, grab me, whatever, but I shot him.” According to Defendant, he was still standing on the stairs when he shot Marcus.

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The jury convicted Defendant of first-degree murder, and the trial court sentenced Defendant to life imprisonment without the possibility of parole. Defendant appeals.

II. Discussion**A. Defendant's Motion to Dismiss**

[1] Defendant first argues that the trial court erred by denying his motion to dismiss the charge of first-degree murder because the State failed to present sufficient evidence that Defendant acted with premeditation and deliberation when he shot and killed Marcus.

Upon a defendant's motion to dismiss, the trial court must determine "whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense." *State v. Fritsch*, 351 N.C. 373, 378 (2000) (citation omitted). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79 (1980) (citations omitted).

In reviewing challenges to the sufficiency of evidence, we must view the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences. Contradictions and discrepancies do not warrant dismissal of the case but are for the jury to resolve. The test for sufficiency of the evidence is the same whether the evidence is direct or circumstantial or both. Circumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence. If the evidence presented is circumstantial, the court must consider whether a reasonable inference of defendant's guilt may be drawn from the circumstances.

State v. Ingram, 283 N.C. App. 85, 88 (2022) (citation omitted).

"First-degree murder is the intentional and unlawful killing of a human being with malice and premeditation and deliberation." *State v. Leazer*, 353 N.C. 234, 237 (2000) (citation omitted). "Premeditation means that the act was thought over beforehand for some length of time, however short." *Id.* at 238 (quotation marks and citation omitted). "Deliberation means an intent to kill, carried out in a cool state of blood, in furtherance of a fixed design for revenge or to accomplish an unlawful purpose and not under the influence of a violent passion, suddenly

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aroused by legal provocation or lawful or just cause.” *State v. Thomas*, 350 N.C. 315, 347 (1999) (citation omitted).

Premeditation and deliberation are often proved by circumstantial evidence. *State v. Taylor*, 362 N.C. 514, 531 (2008). Evidence that the defendant entered the site of the murder with a deadly weapon, for example, supports an inference of premeditation and deliberation because such evidence “indicates the defendant anticipated a confrontation and was prepared to use deadly force to resolve it[.]” *Id.* (citations omitted); see, e.g., *Leazer*, 353 N.C. at 239. Premeditation and deliberation can also be shown through evidence that the defendant “fir[ed] multiple shots, because some amount of time, however brief, for thought and deliberation must elapse between each pull of the trigger[.]” *Taylor*, 362 N.C. at 531 (quotation marks and citations omitted); see *State v. Austin*, 320 N.C. 276, 295 (1987) (“[T]he premise of the ‘felled victim’ theory of premeditation and deliberation is that when numerous wounds are inflicted, the defendant has the opportunity to premeditate and deliberate from one shot to the next.”).

Here, the evidence presented, viewed in the light most favorable to the State, is sufficient as to the challenged elements of premeditation and deliberation. Although Marcus and Defendant engaged in a physical altercation the night of the shooting, Defendant walked away from this fight on his own accord. He walked up two flights of stairs, retrieved his gun, walked down to the second floor, talked with his sister for a period of time, and then walked back down to the first floor. This evidence shows that Defendant anticipated another confrontation with Marcus and “had given some forethought to how he would resolve that confrontation.” *State v. Ginyard*, 334 N.C. 155, 159 (1993).

The evidence also shows that Defendant inflicted multiple gunshot wounds on Marcus. Regardless of Defendant’s intent when he fired his first shot, there was adequate time between each shot for Defendant to think through his actions. See *Austin*, 320 N.C. at 295 (noting that even though a gun “is capable of being fired rapidly, some amount of time, however brief, for thought and deliberation must elapse between each pull of the trigger”). When viewed in the light most favorable to the State, this evidence indicates that Defendant had thought through his actions before retrieving the gun and intentionally using deadly force. Thus, there was sufficient evidence of premeditation and deliberation.

Defendant also argues that the State failed to present sufficient evidence that Defendant did not act in self-defense. This argument is meritless. Evidence was presented showing that when Defendant arrived on the first floor, Marcus did not charge him; rather, Defendant began

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walking toward the front door, turned around, and shot Marcus as Defendant walked through the house toward the back door, where Marcus was standing. Although Defendant offered a somewhat conflicting account of what occurred and indicated that he acted in self-defense, “contradictions in the evidence remain for the jurors to resolve.” *State v. Revels*, 153 N.C. App. 163, 168 (2002) (citation omitted).

Accordingly, as the State presented sufficient evidence of each essential element of first-degree murder, the trial court did not err by denying Defendant’s motion to dismiss the charge.

B. Evidence of Defendant’s Prior Violent Behavior

[2] Defendant next argues that the trial court erred by admitting testimony of his prior violent behavior because the admission of the evidence violated Rules of Evidence 401, 402, 403, and 404(b). Specifically, Defendant objects to Akira’s testimony regarding three prior incidents where Defendant was violent toward her.

1. Rules 401 and 402

Rules 401 and 402 govern the relevancy of evidence. “‘Relevant evidence’ means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” N.C. Gen. Stat. § 8C-1, Rule 401 (2023). All relevant evidence is admissible so long as it comports with the United States Constitution, the North Carolina Constitution, Acts by the United States Congress, Acts by the North Carolina General Assembly, and any other rules of evidence. N.C. Gen. Stat. § 8C-1, Rule 402 (2023). “Evidence which is not relevant is not admissible.” *Id.*

[I]n a criminal case every circumstance calculated to throw any light upon the supposed crime is admissible and permissible. It is not required that evidence bear directly on the question in issue, and evidence is competent and relevant if it is one of the circumstances surrounding the parties, and necessary to be known, to properly understand their conduct or motives, or if it reasonably allows the jury to draw an inference as to a disputed fact.

State v. Riddick, 316 N.C. 127, 137 (1986) (citation omitted).

This Court “review[s] relevancy determinations by the trial court de novo” *State v. Triplett*, 368 N.C. 172, 175 (2015). “Although the trial court’s rulings on relevancy technically are not discretionary . . . , such

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rulings are given great deference on appeal.” *State v. Davis*, 237 N.C. App. 481, 485 (2014) (citation omitted).

Here, Defendant challenges Akira’s testimony regarding three incidents: In the first incident, Defendant cornered Akira against a wall and repeatedly punched her in the thigh. Akira called out to Marcus, who came to help. Defendant told Marcus, “I’ll beat your ass,” before walking out of the townhouse. In the second incident, which occurred several months before the shooting, Akira found Defendant in their bed with another woman and Akira hit him in the head. Defendant threatened Akira by placing his gun in his lap before telling her not to hit him again. In the third incident, Defendant threatened Akira by placing a gun to her head after she had upset him.

All three incidents involved Defendant’s violence toward Akira, the victim’s sister, when Defendant and Akira were living in the same home with Marcus. This evidence provides context as to “circumstances surrounding the parties” and the relationship between Defendant, Akira, and Marcus leading up to the shooting. *Riddick*, 316 N.C. at 137 (citation omitted). Accordingly, the trial court did not err by admitting this evidence under Rules 401 and 402.

2. Rule 404(b)

Defendant also contends that this challenged evidence constitutes inadmissible character evidence and should have been excluded under Rule 404(b).

This Court reviews “de novo the legal conclusion that the evidence is, or is not, within the coverage of Rule 404(b).” *State v. Beckelheimer*, 366 N.C. 127, 130 (2012) (citations omitted). “Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal.” *State v. Williams*, 362 N.C. 628, 632 33 (2008) (quotation marks and citation omitted).

“Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith.” N.C. Gen. Stat. § 8C-1, Rule 404(b) (2023). Such evidence may, however, “be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.” *Id.*

“Rule 404(b) has three requirements for the admission of evidence. First, relevant evidence of the past acts by a defendant must have probative value beyond showing the defendant has the propensity or disposition to commit an offense of the nature of the crime charged.” *State*

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v. Jones, 288 N.C. App. 175, 181 (2023) (quotation marks and citation omitted). Rule 404(b) is a rule of inclusion. *State v. Coffey*, 326 N.C. 268, 278-79 (1990). Even though some evidence of prior acts may tend to show a defendant's propensity to commit the charged crime, such evidence is admissible under Rule 404(b) so long as it is used for some other purpose. *State v. Bagley*, 321 N.C. 201, 206 (1987). For example, evidence of prior acts "may be admissible under Rule 404(b) if it establishes the chain of circumstances or context of the charged crime." *State v. White*, 340 N.C. 264, 284 (1995) (citation omitted). "Such evidence is admissible if the evidence of other [acts] serves to enhance the natural development of the facts or is necessary to complete the story of the charged crime for the jury." *Id.* (citation omitted).

"Second, the past act must be similar enough to the charged crime to distinguish the acts from any generalized commission of the crime." *Jones*, 288 N.C. App. at 181 (quotation marks, brackets, and citation omitted). The similarities need not "rise to the level of the unique and bizarre;" rather, "prior acts are considered sufficiently similar under Rule 404(b) if there are some unusual facts present in both [acts] that would indicate that the same person committed them." *Id.* (quotation marks and citations omitted).

"Third, the past act must be temporally proximate to the presently charged act." *Id.* (citation omitted). "[R]emoteness in time is less significant when the prior conduct is used to show intent, motive, knowledge, or lack of accident; remoteness in time generally affects only the weight to be given such evidence, not its admissibility." *State v. Stager*, 329 N.C. 278, 307 (1991) (citation omitted).

Here, the trial court found this evidence to be admissible under Rule 404(b) to show "motive, opportunity to use the weapon in the subject of this action[, i]ntent, which is a necessary element of the crime charged in this case, and preparation to use the weapon that was used in this incident." We agree.

The evidence in question shows that in the weeks and months leading up to the shooting, Defendant had been violent toward Akira. He had thrown car keys at her, punched her repeatedly in the leg, and threatened her on multiple occasions with his gun. During at least one of the instances, Akira called out to Marcus for help. This evidence, therefore, shows that Marcus, who lived under the same roof as Defendant and Akira, had become aware of the nature of Defendant and Akira's relationship and the problems involved. Not only does this evidence help establish "the chain of circumstances or context of the charged crime," but it indicates Defendant's motive and intent to kill Marcus. *White*, 340

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N.C. at 284 (citation omitted); *see State v. White*, 349 N.C. 535, 552 (1998) (determining that the defendant's prior violent acts toward the victim's family member were admissible under Rule 404(b) because, even though it was not part of the crimes charged, it "pertained to the chain of events explaining the context, motive and set-up of the crime") (brackets and citation omitted); *see also State v. Blalock*, 77 N.C. App. 201, 204 (1985) (determining that the evidence of defendant's prior assaults on members of the victim's family was admissible under Rule 404(b) because it "was relevant and competent to show his intent or motive").

The evidence in question is also sufficiently similar and temporally proximate to the charged crime. All of the events testified to by Akira involved violent acts committed by Defendant, who committed the charged crime of first-degree murder. This evidence also demonstrates Defendant's prior use of his gun—the same gun he used to shoot and kill Marcus. Furthermore, these prior acts occurred not long before the shooting. Even so, any remoteness in time to the charged crime is less significant because the evidence of these prior acts was used in part to show Defendant's motive and intent to kill Marcus. *See Stager*, 329 N.C. at 307.

Accordingly, all three requirements for evidence to be admissible under Rule 404(b) were met, and the trial court did not err by admitting the evidence of Defendant's prior violent acts toward Akira under Rule 404(b).

3. Rule 403

Defendant further argues that the challenged evidence should have been excluded under Rule 403. This Court reviews Rule 403 rulings for abuse of discretion, which "results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Hennis*, 323 N.C. 279, 285 (1988) (citation omitted).

Rule 403 provides that otherwise relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." N.C. Gen. Stat. § 8C-1, Rule 403 (2023). "While all evidence offered against a party involves some prejudicial effect, the fact that evidence is prejudicial does not mean that it is necessarily unfairly prejudicial." *State v. Rainey*, 198 N.C. App. 427, 433 (2009) (citations omitted).

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In reviewing evidence of prior acts admissible under Rule 404(b), this Court's Rule 403 inquiry has two elements. First, the Court must consider the probative value of the Rule 404(b) evidence. *Jones*, 288 N.C. App. at 185. This requires the reviewing court to "consider the similarities between the prior conduct and charged conduct." *Id.* (citation omitted); *see, e.g., State v. Magnum*, 242 N.C. App. 202, 213-14 (2015) (determining that the trial court did not abuse its discretion due in part to the "significant points of commonality between the Rule 404(b) evidence and the offense charged") (citation omitted).

Second, the Court must consider the danger of the evidence causing unfair prejudice. *Jones*, 288 N.C. App. at 185-86. Unfair prejudice, in the context of Rule 403, means "an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, as an emotional one." *State v. Buchanan*, 288 N.C. App. 44, 48 (2023) (quotation marks and citation omitted). In the context of admitting Rule 404(b) evidence, this requires considering "whether the trial court 'carefully handled the process.'" *Jones*, 288 N.C. App. at 185 (brackets and citation omitted); *see, e.g., Beckelheimer*, 366 N.C. at 133 (determining that the trial court did not abuse its discretion due in part to its "careful handling of the process"). For example, the reviewing court shall examine whether the trial court "first heard the testimony of the 404(b) witness outside the presence of the jury to help rule on its admissibility; excluded testimony about any incidents without sufficient similarity; and gave limiting instructions to the jury." *Id.* (quotation marks and citations omitted).

Here, as discussed above, the evidence of Defendant's prior violent acts toward Akira provides context surrounding the nature of Defendant's relationship with Akira and Marcus in the weeks leading up to the shooting. The evidence was also used by the State to show Defendant's motive, intent, and opportunity to use his gun to kill Marcus. As such, Defendant's prior violent acts toward Akira were probative.

Furthermore, the admission of this evidence was not unfairly prejudicial to Defendant. The trial court, aware of the potential danger of unfair prejudice to Defendant, exercised its due diligence by first hearing Akira's testimony regarding these incidents outside the presence of the jury. After considering the arguments made by both parties, the trial court conducted the proper balancing test required under Rule 403 to determine the evidence's admissibility. Accordingly, the trial court did not abuse its discretion by admitting the evidence of Defendant's prior violent acts toward Akira under Rule 403.

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C. The State's Closing Argument

[3] Defendant next argues that a portion of the State's closing argument was an improper misstatement of the law. Specifically, Defendant contends that it was error for the State to argue, over objection, that the law of self-defense does not apply because Defendant shot an unarmed man.

"The standard of review for improper closing arguments that provoke timely objection from opposing counsel is whether the trial court abused its discretion by failing to sustain the objection." *State v. Jones*, 355 N.C. 117, 131 (2002) (citations omitted). Under this standard of review, this Court "first determines if the remarks were improper." *Id.* Second, this Court determines "if the remarks were of such a magnitude that their inclusion prejudiced defendant, and thus should have been excluded by the trial court." *Id.* (citations omitted).

Prosecutors generally are "allowed wide latitude in argument to the jury and may argue all of the evidence which has been presented as well as reasonable inferences which arise therefrom." *State v. Guevara*, 349 N.C. 243, 257 (1998) (citation omitted). An incorrect statement of law in closing argument is improper. *State v. Ratliff*, 341 N.C. 610, 616-17 (1995). A prosecutor's misstatement of the law, however, "may be cured by the trial court's subsequent correct instructions." *Taylor*, 362 N.C. at 546 (citation omitted).

Here, the State argued to the jury that it was unreasonable for Defendant to believe that by shooting Marcus multiple times, he was protecting himself from imminent bodily injury or death. The State further argued, "Even if it is reasonable, the defendant never has a right to use excessive force." This statement is confusing at best.

Despite this statement, however, the State argued at length that Defendant's use of deadly force against Marcus was unreasonable. Furthermore, the State told the jury that the trial court would instruct them on the law of self-defense and, following the State's closing argument, the trial court instructed that

A defendant does not have the right to use excessive force. A defendant uses excessive force if the defendant uses more force than reasonably appeared to the defendant to be necessary at the time of the killing.

It is for you, the jury, to determine the reasonableness of the force used by the defendant under all the circumstances as they appeared to the defendant at the time.

This instruction was proper.

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Accordingly, the State's confusing statement, even if improper, was cured by the trial court's subsequent correct instructions, *Taylor*, 362 N.C. at 546, and the trial court did not abuse its discretion by failing to sustain the objection, *Jones*, 355 N.C. at 131.

D. Evidence of Victim's Alleged Gang Involvement

[4] Defendant argues that the trial court erred by refusing to allow evidence of Marcus' alleged gang involvement to be admitted. Specifically, Defendant argues that this evidence was relevant to show Defendant's state of mind during his altercation with Marcus. Defendant's argument is meritless.

A trial court's relevancy determination, although reviewed de novo, is still "given great deference on appeal." *Davis*, 237 N.C. App. at 485 (citation omitted). Any balancing done by the trial court pursuant to Rule 403 is reviewed for abuse of discretion. *Triplett*, 368 N.C. at 175. "Abuse of discretion occurs where the court's ruling is manifestly unsupported by reason or is so arbitrary it could not have been the result of a reasoned decision." *State v. Syriani*, 333 N.C. 350, 379 (1993) (citation omitted). Under this standard, "[r]eversal is appropriate only if the trial judge's ruling was outside the bounds of reason." *Buchanan*, 288 N.C. App. at 48 (quotation marks and citation omitted).

"Evidence is relevant if it has any logical tendency to prove a fact at issue in a case, . . . and in a criminal case every circumstance calculated to throw any light upon the supposed crime is admissible and permissible." *Riddick*, 316 N.C. at 137 (citation omitted). The bar for evidence being relevant is low; "evidence is competent and relevant if it is one of the circumstances surrounding the parties, and necessary to be known, to properly understand their conduct or motives, or if it reasonably allows the jury to draw an inference as to a disputed fact." *Id.*

Relevant evidence, however, "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." N.C. Gen. Stat. § 8C-1, Rule 403. As stated above, unfair prejudice means "an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, as an emotional one." *Buchanan*, 288 N.C. App. at 48 (quotation marks and citation omitted).

Here, Defendant attempted to introduce evidence that Marcus was involved with a gang through the testimony of Defendant's psychiatrist and a video allegedly showing Marcus making hand signals consistent

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with gang membership. The trial court determined that evidence of Marcus' alleged gang membership was irrelevant, and even if it was relevant, its probative value was substantially outweighed by the danger of unfair prejudice.

Even if relevant, we agree with the trial court that its probative value was substantially outweighed by the danger of unfair prejudice. Evidence that Defendant feared for his life because Marcus belonged to a gang does little to support his theory of self-defense, and such evidence would have had "an undue tendency to suggest decision on an improper basis." *Id.* The trial court's decision to exclude this evidence was not "so arbitrary that it could not have been the result of a reasoned decision." *Syriani*, 333 N.C. at 379 (citation omitted). Accordingly, the trial court did not abuse its discretion in excluding Defendant's evidence of Marcus' alleged gang involvement.

III. Conclusion

For the foregoing reasons, we find no error.

NO ERROR.

Chief Judge DILLON and Judge FLOOD concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 2 APRIL 2025)

COWEE MOUNTAIN IMPROVEMENT ASS'N, INC. v. MURRAH No. 24-760	Macon (18CVS000428)	Affirmed
GOLDEN v. ARGILA No. 24-337	Durham (07CVD583)	Affirmed.
HAMILTON v. FEDEX GROUND PACKAGE SYS., INC. No. 24-727	Mecklenburg (23CVS011522-590)	Affirmed
IN RE J.M. No. 24-146	Johnston (18JT189)	Affirmed
IN RE K.F.M. No. 23-834	Brunswick (14JT65)	Affirmed
IN RE K.M. No. 24-593	Onslow (16JA000200) (16JA000201)	Affirmed
IN RE P.J. No. 24-155	Mecklenburg (22JA000465-590)	Affirmed in Part; Vacated and Remanded in Part
IN RE R.A.C. No. 24-768	Mecklenburg (20JT000363-590)	Affirmed
IN RE R.E. No. 24-782	Iredell (23JA000289) (23JA000290)	Affirmed
MURRAH v. COWEE MOUNTAIN IMPROVEMENT ASS'N, INC. No. 24-761	Macon (19CVS000265)	Affirmed
ROBERTS v. ROBERTS No. 24-354	Durham (22CVS3267)	Affirmed
STATE v. BULLOCK No. 24-94	Wake (20CRS208545-46)	No Plain Error
STATE v. GARLINS No. 24-374	Mecklenburg (21CRS002206-590) (21CRS002207-590)	Dismissed
STATE v. HAMILTON No. 22-847-2	Davidson (17CRS51616)	No Plain Error

STATE v. HARVELL No. 24-268	Cabarrus (18CRS55192)	No Error
STATE v. HEARNE No. 24-998	Stanly (19CRS050475)	No Error
STATE v. JOHNSON No. 24-682	Franklin (18CRS052378,) (20CRS050452,) (23CRS000234)	No Error
STATE v. McBRYDE No. 24-657	Hoke (17CRS051516,) (17CRS051660)	No Error
STATE v. ROBERSON No. 24-392	Mecklenburg (20CR237181-590) (20CR237182-590) (20CR237184-590)	Judgment Vacated; Remanded for New Trial
STATE v. ROSEMAN No. 24-629	Davidson (23CRS000279) (23CRS000280) (23CRS243405) (23CRS367463)	No Prejudicial Error
STATE v. SMITH No. 24-642	Wilkes (23CRS701192)	New Trial
STATE v. STOCKWELL No. 24-549	Randolph (22CRS052814)	Affirmed
STATE v. WATTS No. 24-641	Mecklenburg (17CR014938-590) (17CR014939-590) (17CR213783-590) (17CR213784-590) (17CR213785-590) (17CR213786-590) (19CR207918-590) (19CR207919-590) (19CR207920-590) (19CR207921-590)	No Error

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JEFFERSON GRIFFIN, PETITIONER

v.

NORTH CAROLINA STATE BOARD OF ELECTIONS, RESPONDENT

AND

ALLISON RIGGS, INTERVENOR-RESPONDENT

No. COA25-181

Filed 4 April 2025

1. Elections—post-election protest filing—statutory requirements—adequate notice—dismissals reversed

In post-election protest proceedings brought by plaintiff (a candidate for a seat on the North Carolina Supreme Court who lost the election by 734 votes) in regard to three groups of challenged voters—voters with incomplete voter registration, overseas voters who failed to include a copy of photo identification or an exception form with their ballots, and voters who never domiciled or resided in North Carolina but whose parents or guardians were eligible North Carolina voters—the dismissals of plaintiff’s protests by the State Board of Elections on the basis of his failure to satisfy statutory notice requirements set forth in the Board’s Election Protest Form (plaintiff had mailed postcards with a quick response (QR) code to potentially affected voters) were reversed where the relevant statutes (N.C.G.S. §§ 163-182.9 and 163-182.10) required county boards of elections—rather than a protester such as plaintiff—to provide notice of hearings, and then only once the need for an evidentiary hearing had been established following a preliminary hearing—for which no notice to affected voters was required.

2. Elections—post-election protest filing—statutory requirements—probable cause of election violations shown

In post-election protest proceedings brought by plaintiff (a candidate for a seat on the North Carolina Supreme Court who lost the election by 734 votes) in regard to three groups of challenged voters—voters with incomplete voter registration, overseas voters who failed to include a copy of photo identification or an exception form with their ballots, and voters who never domiciled or resided in North Carolina but whose parents or guardians were eligible North Carolina voters—after reversing the State Board of Elections’ dismissals of plaintiff’s protests on notice grounds, the Court of Appeals further determined that probable cause existed to believe that election violations had occurred and, accordingly, reached the merits of plaintiff’s challenges to each of the three voter groups.

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The matters were remanded as to the voters with incomplete registrations and the overseas voters, with instructions for the Board to notify affected voters and provide them 15 days to cure the deficiencies in their registrations. Voters in the final group, who never domiciled or resided in North Carolina, were ruled ineligible to vote in North Carolina, non-federal elections, and the Board was instructed to remove their votes from the Supreme Court election count.

Judge HAMPSON dissenting.

Appeal by petitioner from orders entered 7 February 2025 by Judge William R. Pittman in Wake County Superior Court. Heard in the Court of Appeals 21 March 2025.

Dowling PLLC, by W. Michael Dowling, Troy D. Shelton, and Craig D. Schauer, and Chalmers, Adams, Backer & Kaufman, PLLC, by Philip R. Thomas, for petitioner-appellant Jefferson Griffin.

North Carolina Department of Justice, by Solicitor General Ryan Y. Park, Deputy Solicitor General Nicholas S. Brod, Deputy Solicitor General James W. Doggett, Special Deputy Attorney General Terence Steed, Solicitor General Fellow Trey A. Ellis, Solicitor General Fellow Kaeli E. Czosek, Assistant Deputy Attorney General Marc D. Brunton, for respondent-appellee North Carolina State Board of Elections.

Womble Bond Dickinson (US) LLP, by Raymond M. Bennett and Samuel B. Hartzell, for intervenor-respondent-appellee Allison Riggs.

Tharrington Smith, L.L.P., by Colin A. Shive and Stephen G. Rawson, for amici curiae Dane C. Beavers, Deborah J. Bedford, Debra B. Blanton, et al. (Former Directors of County Boards of Elections).

Milberg Coleman Bryson Phillips Grossman PLLC, by Lucy Inman and Eric Steber, and Campaign Legal Center, by Danielle Lang, Brent Ferguson, Valencia Richardson, Heather Szilagyi, and Rachel Appel, for amici curiae Secure Families Initiative and Count Every Hero, an unincorporated association.

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Southern Coalition for Social Justice, by Jeffrey Loperfido, Hilary Harris Klein, Christopher Shenton, and Mitchell Brown, and Forward Justice, by Caitlin A. Swain, Kathleen Roblez, and Ashley Mitchell, and Irving Joyner, for amici curiae Raim Allston, Cindy Oates Anthony, Rachel Arnold, Danielle Brown, Amy Bryant, Denise Carman, Jean Cary, Louanne Caspar, Alexia Chavis, Carrie Conley, Jose Benito Del Pliego, Sofia Dib-Gomez, Mary Kay Heling, Wesley Hogan-Philipsen, Elizabeth Hunter Kesling, Kevin Hunter Kesling, Lesley-Anne Leonard, Gaynelle Little, Jenna Marrocco, Audrey Meigs, Brooklyn Miller, Dirk Philipsen, Larry Repanes, Anna Richards, Lila Richardson, Lyse Rochleder, Kemeka Sidbury, Sophia “Felix” Soto, Alexa Adamo Valverde, Diane Wynne, Phoebe Zerwick, North Carolina State Conference of the NAACP, North Carolina Black Alliance, Common Cause Education Fund, Democracy North Carolina, El Pueblo, North Carolina Asian Americans Together, and North Carolina Poor People’s Campaign.

Ballew Puryear PLLC, by Zachary R. Kaplan, Trent N. Turk, Matthew D. Ballew, and Paul J. Puryear, and Brennan Center for Justice, by Eliza Sweren-Becker and Justin Lam, for amici curiae U.S. Vote Foundation, Association of Americans Resident Overseas, and Impacted Voters Linda K. Berkeley, Nikita Berry, Colin Beveridge, Robert John Brightwell, Karen Brightwell, and Nicholas Ahmed De Laczkovich-Siddiqi.

ACLU of North Carolina Legal Foundation, by Krisi Graunke, and American Civil Liberties Union Foundation, by Matthew Segal and Bridget Lavender, for amici curiae American Civil Liberties Union of North Carolina and American Civil Liberties Union.

Patterson Harkavy LLP, by Narendra K. Ghosh, and Elias Law Group LLP, by Lalitha D. Madduri, Christopher D. Dodge, Tina Meng Morrison, Julie A. Zuckerbrod, and James J. Pinchak, for proposed-intervenors North Carolina Alliance for Retired Americans, VoteVets Action Fund, Juanita Anderson, and Tanya Webster-Durham.

Jay Norman Delancy for amici curiae Voter Integrity Project.

PER CURIAM.

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I. Background

Petitioner, Jefferson Griffin (“Griffin”), and intervenor-respondent, Allison Riggs (“Riggs”), were both candidates for Seat 6 on the Supreme Court of North Carolina in the 2024 general election. Riggs is the incumbent. Griffin is a judge on the North Carolina Court of Appeals.

Election day was held on 5 November 2024. At the end of the canvassing period, Riggs led by 734 votes, having received 2,770,412 votes (50.01%) to Griffin’s 2,769,678 votes (49.99%).

On 19 November 2024, Griffin filed six categories of election protests with the county boards of elections in each of North Carolina’s one hundred counties, three of which are relevant to this appeal.

The first of these three categories is the “Incomplete Voter Registrations,” in which Griffin challenges ballots cast by voters who are not properly registered, because they purportedly have never provided either their driver’s license numbers or the last four digits of their social security numbers with their registration.

The second category is the “Lack of Photo Identification for Overseas Voters,” wherein Griffin challenges ballots of certain citizens living overseas and of certain members of the military, their spouses, and dependents, which were cast pursuant to General Statutes Chapter 163, Article 21A, for failing to include a copy of their photo identification or an “Identification Exception Form” with their respective ballot. *See* N.C. Gen. Stat. § 163-230.1(a)(4) (2023) (requiring absentee voters under Article 20 to provide a copy of their photographic identification as described in N.C. Gen. Stat. § 163-166.16(a) or an affidavit as described in N.C. Gen. Stat. § 163-166.16(d) with their absentee ballots).

The third category is the “Never Residents” category. Griffin challenges the eligibility of overseas citizens who voted but were never domiciled or resided in North Carolina and have never indicated they intend live in this state, but whose parents or legal guardians were purportedly registered or eligible North Carolina voters prior to leaving the United States.

Post-election protests seek “to balance the public’s interest in achieving accurate election results with the need to finalize those results in a short period of time.” *Bouvier v. Porter*, 386 N.C. 1, 4, 900 S.E.2d 838, 843 (2024). Election protests are typically adjudicated by individual county boards of elections. *See* N.C. Gen. Stat. § 163-182.10(a) (2023) (stating the procedure for handling protests at the county boards of elections). On 20 November 2024, the day after Griffin filed his protests, the

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North Carolina State Board of Elections (“Board”) held an emergency meeting and voted unanimously to remove jurisdiction from the county boards regarding these three protest categories, which presented uniform legal questions of statewide significance pursuant to N.C. Gen. Stat. § 163-182.12 (2023), “in the interest of the efficient administration of justice[.]” The Board adopted the protest procedures under N.C. Gen. Stat. § 163-182.10(a) (2023).

Griffin’s campaign had sought and previously received from county boards their lists of those identified voters who those boards indicated fell within one of the three challenged categories. The campaign mailed postcards to each voter identified by county boards at their listed addresses to notify them of the challenges. On 11 December 2024, the Board held a hearing to preliminarily consider these three protest categories.

Under the Board’s procedures, the Board is required to resolve two preliminary considerations. *Id.* The Board must first determine whether the protest “substantially complies” with the filing requirements in N.C. Gen. Stat. § 163-182.9 (2023). The Board must determine whether the substance of the protest meets the pleading threshold. N.C. Gen. Stat. § 163-182.10(a) (2023).

The General Assembly has directed the Board to consider whether the protest “establishes probable cause to believe that a violation of election law or irregularity or misconduct has occurred.” *Id.* This inquiry involves both a legal question of whether the allegations would constitute a violation of the law and a factual question of whether probable cause supports whether an alleged violation actually occurred. If the protest satisfies both of these preliminary considerations, then the protest advances to an evidentiary hearing. *Id.*

On 13 December 2024, the Board entered its “Decision and Order,” dismissing all three protests without an evidentiary hearing. The Board determined “the protests did not substantially comply with the service requirements and did not establish probable cause to believe that a violation of election law or irregularity or misconduct occurred in the protested elections.” In other words, the Board concluded Griffin’s protests had failed to satisfy the preliminary considerations, meaning: (1) Griffin did not satisfy the notice requirements; and, (2) Griffin had failed to establish probable cause that an election violation occurred. Griffin timely appealed the Board’s order.

On 18 December 2024, Griffin filed a petition for a writ of prohibition with the Supreme Court of North Carolina, petitioning the Court

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to prohibit the Board from counting the challenged votes. Griffin also sought an order from the Court staying the Board's certification of the election results for Supreme Court Seat 6.

Before our Supreme Court acted, the Board removed the petition to the United States District Court for the Eastern District of North Carolina. The Board asserted Griffin's claims arose under federal law, providing the federal court with original jurisdiction over the claims.

On 20 December 2024, Griffin filed three separate petitions for judicial review in Wake County Superior Court, one for each of the three protest categories dismissed two days earlier by the Board. *See* N.C. Gen. Stat. § 163-22(1) (2023) (providing that judicial review of Board orders must be filed in Wake County Superior Court). In these petitions, Griffin sought a temporary restraining order, preliminary injunction, and/or for a stay of the Board's certification of the election. That same day, the Board also filed to remove the three petitions from Wake County Superior Court to the United States District Court for the Eastern District of North Carolina.

On 6 January 2025, the United States District Court issued an order holding it has jurisdiction under 28 U.S.C. § 1443(2) (2024), but abstained from hearing the case under *Burford v. Sun Oil Co.*, 319 U.S. 315, 87 L. Ed. 1424 (1943). That same day, the District Court remanded the case to the Supreme Court of North Carolina and *sua sponte* remanded the Board's removal to Wake County Superior Court.

Following remand, the Supreme Court of North Carolina issued an order on 22 January 2025, dismissing Griffin's petition for a writ of prohibition and directing the Superior Court to review Griffin's appeal from the Board. The Supreme Court also stayed certification of the election until all appeals are completed and ordered the Wake County Superior Court "to proceed expeditiously." *See Griffin v. N.C. State Bd. of Elections*, 387 N.C. 395, 396, 910 S.E.2d 348, 349 (2025). Riggs filed a consent motion to intervene in Wake County Superior Court on 3 February 2025.

The Board had appealed the District Court's remand order to the United States Court of Appeals for the Fourth Circuit ("Fourth Circuit"). Riggs also moved to intervene at the Fourth Circuit, which was granted, and she also appealed the remand of the petition for writ of prohibition.

The Fourth Circuit heard oral arguments on 27 January 2025 and issued an unpublished *per curiam* opinion on 4 February 2025. The Fourth Circuit ordered the District Court to modify its remand order,

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and held the “more appropriate theory” for abstaining from federal jurisdiction arises under *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496, 85 L. Ed. 971 (1941). The Fourth Circuit further directed the District Court to modify its order to retain jurisdiction of the federal issues should those issues remain after resolution of the state law and state court proceedings. The Board and Riggs filed notice of the Fourth Circuit ruling and asserted an England reservation. *See generally England v. La. State Bd. of Med. Exam’rs*, 375 U.S. 411, 11 L. Ed.2d 440 (1964).

On 7 February 2025, the Wake County Superior Court held a hearing on Griffin’s appeals from the Board’s 13 December 2024 dismissals of his three protests. Later that day, the Superior Court entered three separate one-page orders affirming the Board’s dismissal decisions.

Griffin appealed the three Wake County Superior Court’s orders to this Court on 10 February 2025. On 13 February 2025, this Court allowed a motion to expedite the appeal. On 25 February 2025, Riggs filed two motions in this Court: (1) a motion for Judge Thomas Murry to recuse; and, (2) a motion for initial *en banc* consideration. On 14 March 2025, this Court denied the motion for initial *en banc* consideration. The motion to recuse was dismissed, as Judge Murry is not a member of the panel assigned to hear the appeal. This Court allowed all motions to file amicus briefs from multiple third parties. Oral arguments were held on 21 March 2025.

II. Jurisdiction

The three Superior Court orders entered 7 February 2025, which affirmed the Board’s 13 December 2024 dismissals of Griffin’s three challenges, are final judgments. This Court possesses jurisdiction pursuant to N.C. Gen. Stat. § 7A-27(b)(1) (2023).

III. Issues

Griffin seeks review of whether the Superior Court properly affirmed the Board’s dismissal of all three protests after a preliminary consideration. The two conclusions made by the Board and affirmed by the Superior Court are: (1) whether sufficient and adequate notice was provided to the voters whose votes were being challenged; and, (2) whether probable cause exists of an election law violation.

IV. Standard of Review

“The standard and scope of review for the trial court of an order of the State Board is found in the provisions of Chapter 150B of the

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General Statutes, the Administrative Procedure Act.” *Appeal of Harper*, 118 N.C. App. 698, 700, 456 S.E.2d 878, 879 (1995) (citing *In re Brown*, 56 N.C. App. 629, 630, 289 S.E.2d 626, 626–27 (1982)).

The Board does not have the authority to ignore or declare an act of the General Assembly unconstitutional. *In re Redmond*, 369 N.C. 490, 493, 797 S.E.2d 275, 277 (2017) (“[I]t is a well-settled rule that a statute’s constitutionality shall be determined by the judiciary, not an administrative board.”). The Superior Court did not rule upon the constitutional question. Accordingly, we review these issues *de novo*.

The North Carolina Administrative Procedure Act (“NCAPA”) outlines two separate standards of review to apply when reviewing an agency decision. Which standard of review to apply depends upon the appealing party’s alleged errors and arguments before this Court. N.C. Gen. Stat. § 150B-51 (2023).

A *de novo* standard of review is applied if a party argues the agency’s “findings, inferences, conclusions, or decisions are: (1) In violation of constitutional provisions; (2) In excess of the statutory authority or jurisdiction of the agency or administrative law judge; (3) Made upon unlawful procedure; [or] (4) Affected by other error of law[.]” N.C. Gen. Stat. § 150B-51(b)(1)-(4) and 51(c) (2023).

If the appealing party argues the agency’s decision was “(5) Unsupported by substantial evidence admissible . . . in view of the entire record as submitted; or (6) Arbitrary, capricious, or an abuse of discretion[.]” this Court must apply the “whole record” test. N.C. Gen. Stat. § 150B-51(b)(5)-(6) and 51(c) (2023).

Griffin argues the Board exceeded and acted contrary to its statutory authority and violated constitutional provisions, which are categories of arguments outlined in N.C. Gen. Stat. § 150B-51(b)(1)-(2). We review the Board’s decision *de novo*. N.C. Gen. Stat. §§ 150B-51(b)(1)-(4) and 51(c) (2023).

V. Analysis

Our analysis when reviewing a post-election protest challenge is guided by certain core premises:

The overriding issue that has been thrust upon this Court in the present case, and the concern of this Court is not the ultimate outcome of the [election]. Rather, the sole issue and concern for this Court in this matter is whether the . . . election[] w[as] conducted in accord with the will

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of the people of North Carolina, as expressed by them in their Constitution and in their statutes as enacted by their representatives.

James v. Bartlett, 359 N.C. 260, 292, 607 S.E.2d 638, 639 (2005).

“The right to vote on equal terms in representative elections—a one-person, one-vote standard—is a fundamental right.” *Blankenship v. Bartlett*, 363 N.C. 518, 522, 681 S.E. 2d 759, 762–63 (2009). A voter’s eligibility to lawfully vote in an election is based upon their status as of Election Day, here 5 November 2024, even if the voter cast an identifiable absentee or provisional ballot on an earlier date. *See* N.C. Gen. Stat. § 163-82.1 (2023).

“To permit unlawful votes to be counted along with lawful ballots in contested elections effectively ‘disenfranchises’ those voters who cast legal ballots, at least where the counting of unlawful votes determines an election’s outcome.” *James*, 359 N.C. at 270, 607 S.E.2d at 644. In reviewing this case, the Court is not concerned with the race, sex, age, or party affiliation of any contested voter or the outcome. *Id.* at 292, 607 S.E.2d at 639.

The Supreme Court of the United States has also repeatedly addressed the fundamental right of voting and upheld the sanctity of lawfully-conducted elections. “It is beyond cavil that voting is of the most fundamental significance under our constitutional structure.” *Burdick v. Takushi*, 504 U.S. 428, 433, 119 L. Ed. 2d 245, 252 (1992) (quoting *Ill. St. Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184, 59 L. Ed.2d 230, 241 (1979)).

“The right to vote freely for the candidate of one’s choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government,” while the Supreme Court also confirmed requiring all voters are eligible to vote is of great national importance. *Reynolds v. Sims*, 377 U.S. 533, 555, 12 L. Ed. 2d 506, 523 (1964). “Confidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy.” *Purcell v. Gonzalez*, 549 U.S. 1, 4, 166 L. Ed. 2d 1, 4 (2006) (per curiam).

The Board was preliminarily tasked with determining whether Griffin had complied with the post-election protest filing requirements of N.C. Gen. Stat. §§ 163-182.9 and 163-182.10 (2023). The Board found and concluded: (1) Petitioner had failed to serve voters affected by his protest with adequate notice; and, (2) Petitioner had failed to establish probable cause of an election-law violation. We will address the Board’s analysis of each determination in turn.

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A. Adequate Notice

[1] The Board concluded Griffin had failed to serve affected voters that had been identified by various county boards as falling into one of the challenged categories with notice in compliance with instructions provided on the Election Protest Form. The Board concluded the notification Griffin’s campaign mailed to affected voters at their board-listed address was an invalid method of providing notice and dismissed all three protests for lack of notice. Griffin’s campaign mailed a postcard to each potentially affected voter with the message “your vote may be affected by one or more protests filed in relation to the 2024 General Election” and a quick response or “QR” code to view his protest filings.

The Board concluded Griffin had failed to provide proper notice, relying upon instructions on the Election Protest Form:

You must serve copies of all filings on every person with a direct stake in the outcome of this protest (“Affected Parties”). . . . If a protest concerns the eligibility or ineligibility of particular voters, all such voters are Affected Parties and must be served. Address information for registered voters is available from the county board of elections or using the Voter Lookup at www.ncsbe.gov.

Materials may be served by personal delivery, transmittal through U.S. Mail or commercial carrier service to the Affected Party’s mailing address of record on file with the county board of elections or the State Board, or by any other means affirmatively authorized by the Affected Party. . . . It is [the protester’s] responsibility to ensure service is made on all Affected Parties.

Although the Board’s Election Protest Form asserts it is the protester’s responsibility to provide notice to potentially affected parties, North Carolina’s General Statutes mandate it is “[t]he *county board [who]* shall give notice of the protest hearing to the protester . . . and those persons likely to have a significant interest in the resolution of the protest.” N.C. Gen. Stat. § 163-182.10(b) (2023) (emphasis supplied). The statute states, “[e]ach person given notice shall also be given a copy of the protest or a summary of its allegations.” *Id.*

While the Board is permitted to provide forms for a protester to fill out to initiate a protest under N.C. Gen. Stat. § 163-182.9(c) (2023), those forms are not the exclusive means to initiate a valid protest. This statute does not allow the Board to create new or contrary rules for protesters

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to initiate this process. The Election Protest Form instructions directly conflict with N.C. Gen. Stat. § 163-182.10(b) (2023), which states “[the board] *shall* give notice *of a hearing*.” (emphasis supplied).

Our General Statutes also clearly provide notice does not need to be given to any affected party until *after* it has been established an evidentiary hearing is set to take place. *Id.* A preliminary hearing is limited to determine: “whether the protest *substantially complies with G.S. 163-182.9* and whether it establishes probable cause to believe that a violation of election law or irregularity or misconduct has occurred.” N.C. Gen. Stat. § 163-182.10(a)(1) (2023) (emphasis supplied). An agency’s form cannot conflict with the North Carolina General Statutes. *See James*, 359 N.C. at 270, 607 S.E.2d at 644. Because the Election Protest Form created instructions purportedly requiring the protester, as opposed to the county boards, to provide notice *before* it is statutorily required, the Election Protest Form’s notice instructions directly conflict with the General Statutes, which require “substantial compliance” to file a valid protest, and are void. N.C. Gen. Stat. § 163-182.10(b) (2023).

Even if the Board could require Griffin to provide notice, Griffin’s campaign satisfied the purported notice requirement. Griffin’s campaign used a notice method to mail postcards to listed addresses with notice of his challenges and a quick response or “QR” reference code to access additional materials to each potentially affected voter, which the Board itself had previously used to notify voters. *See* N.C. Gen. Stat. § 163-82.8(c) (2023) (providing county boards may mail voters their voter registration cards or mail voters a replacement registration card “to verify change of address, change of name, or change of party affiliation”); N.C. Gen. Stat. § 163-82.14(d)(2) (2024) (“Following each congressional election, the county board of elections shall send to each registered voter who has not voted or confirmed the voter’s address by another means a confirmation mailing.”).

In addition, when sending the statutorily mandated Judicial Voter Guide statewide to each registered voter in this and previous elections, the Board used electronic hyperlinks and bulk mail to send printed versions of the Judicial Voter Guide addressed to “Residential Customer” with QR codes. The Guide was not individually addressed to any specific voter. *See* N.C. Gen. Stat. § 163-278.69(a) (2023) (providing the Board “shall publish a Judicial Voter Guide” explaining “the functions of the appellate courts and the laws concerning the election of appellate judges” as well as “the laws concerning voter registration” and that the Board “shall distribute the Guide to as many voting-age individuals in the State as practical, through a mailing to all residences or other means it

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deems effective”). *See also Online Judicial Voter Guide Now Available for 2024 General Election*, North Carolina State Bd. of Elections (Aug. 9, 2024), <https://www.ncsbe.gov/news/press-releases/2024/08/09/online-judicial-voter-guide-now-available-2024-general-election>.

Pages twelve through eighteen of the Board’s “2024 Judicial Voter Guide,” pertinent to this election, entitled “Voting 101: 8 Tips for NC Voters,” contain six QR codes to enable a voter to seek additional information.

To condemn a non-statutory and voluntary method of notice and means to seek additional information, which the Board has repeatedly used, is essentially throwing stones while sitting inside a glass house. Benjamin Franklin, *Poor Richard’s Almanack* (1732).

We conclude the Board erred by dismissing all three protests based on a failure to provide adequate notice.

B. Probable Cause of an Election-Law Violation

[2] When a protest is filed, the Board is statutorily required to conduct a preliminary consideration of the protest to determine whether the protest “substantially complies with G.S. 163-182.9” and whether there is “probable cause to believe that a violation of election law or irregularity or misconduct has occurred.” N.C. Gen. Stat. § 163-182.10(a)(1) (2023).

Allegations of violations are sufficient to raise probable cause and proof of “violation . . . or irregularity or misconduct” are required at the evidentiary hearing. *Id.* As the Board explained in its Decision and Order, probable cause is a “commonsense, practical standard.” *Illinois v. Gates*, 462 U.S. 213, 230, 76 L. Ed. 2d 527, 543 (1983). The probable cause standard is satisfied when allegations and the material submitted by the protester are sufficient for a reasonable and prudent person to believe that election law violations, irregularities, and misconduct occurred in the conduct of the election. Probable cause does not require such a belief to be necessarily correct or more likely to be true than false. *Texas v. Brown*, 460 U.S. 730, 742, 75 L. Ed. 2d 502, 514 (1983). A probability of an irregularity in the conduct of the election is sufficient. *See Adams v. City of Raleigh*, 245 N.C. App. 330, 336–37, 782 S.E.2d 108, 113–14 (2016).

“Whether probable cause exists is a mixed question of law and fact, but where the facts are admitted or established, the existence of probable cause is a question of law for the court.” *Best v. Duke Univ.*, 337 N.C. 742, 750, 448 S.E.2d 506, 510 (1994) (citation omitted).

Although the Board’s Decision and Order dismissed the protests solely on the basis of inadequate notice, the Board’s forty-three-page

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Order also addressed and analyzed the potential merits of the protests to address the probable cause requirement as a preliminary consideration and dismissed all claims. Decision & Order at 40, *In re Election Protests of Jefferson Griffin, Ashlee Adams, Frank Sossamon, and Stacie McGinn*, N.C. State Bd. of Elections (Dec. 13, 2024) (“Even if the voters challenged in these protests had received adequate notice, the grounds for these protests are legally invalid for the reasons outline[d] in this decision.”).

Our Supreme Court has stated, “[t]o permit unlawful votes to be counted along with lawful ballots in contested elections effectively ‘disenfranchises’ those voters who cast legal ballots, at least where the counting of unlawful votes determines an election’s outcome.” *James*, 359 N.C. at 270, 607 S.E.2d at 644.

More recently, our Supreme Court stated, “votes are not accurately counted if ineligible voters’ ballots are included in the election results.” *Bouvier*, 386 N.C. at 3, 900 S.E.2d at 842. “A free ballot and a fair count must be held inviolable to preserve our democracy.” *Swaringen v. Poplin*, 211 N.C. 700, 702, 191 S.E. 746, 747 (1937). Free elections under art. I, § 10 of the North Carolina Constitution include the right to an accurate counting of votes. *Harper v. Hall*, 384 N.C. 292, 363, 886 S.E.2d 393, 439 (2023). Griffin has a legal right to inquire into this outcome through the statutorily-enacted and post-election procedures available to him. *See generally* N.C. Gen. Stat. §§ 163-182.9 to 182.15; N.C. Const. art. I, § 18. Even though the Board dismissed the protests solely for the purported lack of notice, which is not statutorily required, we review the Board’s analysis on the issues raised by the protests.

In January 2025, the Supreme Court issued a temporary stay barring the Board from certifying the election results. One of the factors considered in issuing a stay is the likelihood the petitioner will prevail on the merits. “Briefly stated, a party seeking a stay must show (1) that he will likely prevail on the merits of the appeal, (2) that he will suffer irreparable injury if the stay is denied, (3) that other parties will not be substantially harmed by the stay, and (4) that the public interest will be served by granting the stay.” *Long v. Robinson*, 432 F.2d 977, 979 (4th Cir. 1970). *See also Ridge Cmty. Invs., Inc. v. Berry*, 293 N.C. 688, 701, 239 S.E.2d 566, 574 (1977) (recognizing that the likelihood of the movant’s success on the merits is considered when granting injunctive relief).

As was cited during oral arguments, the Fourth Circuit recently adjudicated on similar issues: “North Carolina has been flooded with dozens of challenges to the State’s electoral regulations.” *Sharma*

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v. Hirsch, 121 F.4th 1033, 1043 (4th Cir. 2024). The Fourth Circuit added these challenges “are reasonably grounded in the law, and their gravity should not be understated[,]” and these challenges and uncertainty “is not conducive to the most efficient administration of elections.” *Id.*

These observations and statements by the Fourth Circuit, combined with the Supreme Court’s decision to issue a stay of certification, are evidence of probable cause to warrant review on the merits. *Id.*

1. Incomplete Voter Registrations

We first address Griffin’s challenge to votes cast by individuals who failed to properly register by not providing either their driver’s license numbers or the last four digits of their social security numbers.

a. Legally Registered

The North Carolina Constitution mandates a person must be legally registered to vote in order to cast a lawful vote in an election and empowers the General Assembly to enact laws governing required registration. N.C. Const. art. VI, § 3(1) (“Every person offering to vote shall be at the time legally registered as a voter as herein prescribed and in the manner provided by law. The General Assembly shall enact general laws governing the registration of voters.”).

In compliance with this Constitutional mandate, the General Assembly enacted N.C. Gen. Stat. § 163-54 declaring: “Only such persons as are legally registered shall be entitled to vote in any primary or election held under this Chapter.” N.C. Gen. Stat. § 163-82.1(a) also admonishes: “No person shall be permitted to vote who has not been registered under the provisions of this Article or registered as previously provided by law.” N.C. Gen. Stat. §§ 163-54 and 82.1(a) (2023).

Our Supreme Court long ago stated the importance of voter registration laws:

The registration of voters is essential and very important. As was stated in [*McDowell v. Rutherford Ry. Constr. Co.*, 96 N.C. 514, 530, 2 S.E. 351, 358 (1887)], the purpose of it is to ascertain who is entitled to vote, and to facilitate the exercise of the elective franchise by citizens so entitled, and to prevent unlawful voting, fraud and confusion in all elections by the people. . . . *The statutory regulations in such respects are not simply directory; they are in their substance mandatory as well. They do not imply discretion in those authorities charged with the execution of them[.]*

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Smith v. City of Wilmington, 98 N.C. 343, 348, 4 S.E. 489, 492 (1887) (emphasis supplied).

b. N.C. Gen. Stat. § 163-82

To enable eligible voters to lawfully register, the Board is statutorily tasked to develop a voter registration application form. N.C. Gen. Stat. § 163-82.3 (2023). The voter registration application form shall contain certain information to be provided by the voter applicant to lawfully register, including the applicant's "[d]rivers license number or, if the applicant does not have a drivers license number, the last four digits of the applicant's social security number[.]" N.C. Gen. Stat. § 163-82.4(a)(11) (2023).

If the voter applicant has neither a current and valid driver's license, nor a social security number, the Board must assign the applicant a "unique identifier number" which "shall serve to identify that applicant for voter registration purposes." N.C. Gen. Stat. § 163-82.4(b) (2023).

The General Assembly enacted this requirement in 2004 to comply with the federal Help America Vote Act ("HAVA"), 52 U.S.C. § 21083 (2024), and to provide a corresponding state mandate. N.C. Sess. Law 2003-226, § 9 (amending N.C. Gen. Stat. § 163-82.4), § 22 (amendment effective 1 January 2004). This legislation was enacted, and the statute became law, with bipartisan support during the administration of an elected Democrat governor and while elected Democrats constituted the majorities in both chambers in the General Assembly.

The Board failed to amend the voter registration application form to obtain this information required by the 2004 law from new voter applicants until 2023. Nearly twenty years later, in 2023 after more litigation, the Board amended its voter registration application to require *new* voter applicants to provide either their valid driver's license number or the last four digits of their social security number, or, without either, the Board would assign a unique identifier number for that voter. Order at 4, *In re: HAVA Complaint of Carol Snow*, N.C. State Bd. of Elections (Dec. 6, 2023).

The information statutorily required since 2004 to enable a North Carolina voter to lawfully register applied to the 2024 primary and general elections and remains in effect.

The General Assembly also mandated it is the Board's duty to notify voter registration applicants of their failure to provide and include the required information and their opportunity to cure:

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If the voter fails to complete any required item on the voter registration form but provides enough information on the form to enable the county board of elections to identify and contact the voter, the *voter shall be notified of the omission and given the opportunity to complete the form* at least by 5:00 P.M. on the day before the county canvass as set in G.S. 163-182.5(b). If the voter corrects that omission within that time and is determined by the county board of elections to be eligible to vote, the county board shall permit the voter to vote. *If the information is not corrected by election day, the voter shall be allowed to vote a provisional official ballot. If the correct information is provided to the county board of elections by at least 5:00 P.M. on the day before the county canvass, the board shall count any portion of the provisional ballot that the voter is eligible to vote.*

N.C. Gen. Stat. § 163-82.4(f) (2023) (emphasis supplied).

The Board and the county boards of election are also statutorily required to regularly review, update, and maintain the list of lawfully registered voters. N.C. Gen. Stat. § 163-2.14 (2024). The Board and county boards failed in their duty to contact existing improperly registered voters whose electronic records omitted or did not show a driver's license number or social security number to cure the information deficiency.

As noted during oral arguments, pending litigation in federal court challenges the Board's alleged noncompliance with HAVA's requirement for a voter applicant to provide a drivers license, and if not, the last four digits of a social security number. *See Republican Nat'l Comm. v. N.C. State Bd. of Elections*, 120 F.4th 390, 395 (2024).

In August 2024, the Republican National Committee and the North Carolina Republican Party filed a complaint in the United States District Court for the Eastern District of North Carolina ("Eastern District"), seeking for the court to direct and order the Board to remedy its alleged violations of HAVA and the state statute by:

identifying all ineligible registrants and removing them from the state's voter registration lists in a manner consistent with state and federal law, and to the extent such removal is not feasible prior to the date set forth herein, then direct [the Board] to require all individuals who failed to provide necessary HAVA identification information but were still registered to vote under the state's prior

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registration form, to cast a provisional ballot in upcoming elections pending [the Board]’s receipt and confirmation of the required HAVA information[.]

Complaint at 19–20, *Republican Nat’l Comm.*, 120 F.4th 390 (Nos. 24-2044-45).

As with the case before us, the Board removed that case to federal court. *Id.* at 394. The Eastern District granted the Board’s motion to dismiss the HAVA statutory claim, agreeing HAVA did not provide for a private right of action. *Id.* The Eastern District also remanded the constitutional claim to state court. *Id.* However, the Fourth Circuit reversed and remanded on 29 October 2024, over a week prior to the 2024 General Election. *Republican Nat’l Comm.*, 120 F.4th at 395. On remand, the suit remains pending in the Eastern District.

The Board was on notice over a week prior to the 2024 general election that the HAVA case had been reversed in favor of the Plaintiffs and remanded to be heard in the Eastern District. *See id.*

Griffin contends under both federal law and state statutes, it is unlawful for the Board to count the votes of purported voters who did not lawfully register to vote by their failure to provide the statutorily-required information on their registration application. At oral arguments, Griffin’s attorneys conceded his protests are not challenging eligible voters who registered prior to HAVA or the enactment of N.C. Gen. Stat. § 163-82.4 in 2004.

The Board argues Griffin has failed to show violations of election law based on alleged incomplete voter registration. The General Assembly, not the Board, is constitutionally empowered to “enact general laws governing the registration of voters.” N.C. Const. art. VI, § 3(1). We conclude any voter who registered since the adoption of N.C. Gen. Stat. § 163-82.4(a)(11), but who failed to provide their drivers license number or their social security number’s last four digits or, in the absence thereof, otherwise was not properly assigned a unique number by the Board, is not lawfully registered to vote in North Carolina elections. *Id.*

In *James*, the Supreme Court disallowed votes cast based upon the unlawful advice of the Board. *James*, 359 N.C. at 269–70, 607 S.E.2d at 644. *See also Smith*, 98 N.C. at 348, 4 S.E. at 492.

Even though this Court has authority under *James* to disallow the votes cast by voters with incomplete voter registration forms, the absence of this information is curable and we elect to reverse the Superior Court’s order with instructions upon issuance of the

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mandate to remand to the Board with instructions to notify and allow the affected voters fifteen (15) business days after notice to provide this required information to cure their ballots. N.C. Gen. Stat. § 163-82.4(f) (2023) (requiring the Board to notify voters if their registration forms lack required information and to allow voters the opportunity to correct omissions). This statutory cure remedy is more than three times the number of days allowed in the statute and is without the pressure for the boards to complete the canvass and certify. *Id.* Any ballots cast by voters whose registrations are cured and verified by the boards within this period shall be counted. *Id.*

2. Lack of Photo Identification for Military and Overseas Voters

We next address Griffin’s challenge to absentee votes cast by military and overseas voters pursuant to Article 21A of Chapter 163, but who failed to include a copy of a photo identification or to otherwise submit an Identification Exception Form. The protest seeks to enforce the requirement contained in Article 20 of Chapter 163 compelling absentee voters to include a photocopy of their valid identification or an Identification Exception Form with their ballots. Article 21A does not expressly address a military or overseas voter’s obligation to include a copy of their photo identification or an Identification Exception Form with their absentee ballot.

The North Carolina Constitution provides: “Every person offering to vote shall be at the time legally registered as a voter as herein prescribed and in the manner provided by law. The General Assembly shall enact general laws governing the registration of voters.” N.C. Const. art. VI, § 3(1). To comply with this Constitutional mandate, the General Assembly enacted North Carolina General Statutes Chapter 163 to govern elections and to state who is qualified to vote in North Carolina elections and the procedures to lawfully register. N.C. Gen. Stat. §§ 163-54 to 163-91 (2023).

A voter’s ability to lawfully vote in an election is based upon their eligibility status as of Election Day, here 5 November 2024, even if the voter cast an eligible or lawful absentee or provisional ballot on an earlier date. *See* N.C. Gen. Stat. § 163-82.1 (2023). If a person is not an eligible and registered voter on Election Day, the statutes deem them to be not registered and ineligible to vote. N.C. Gen. Stat. § 163-82.1(c)(2) (“The registrant becomes disqualified through death, conviction of a felony, or removal out of the county[.]”).

Subchapter VII of § 163 is entitled “Absentee Voting” and contains only two articles: (1) Article 20, entitled “Absentee Ballot”; and, (2) Article 21A, entitled “Uniform Military and Overseas Voters Act.”

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a. Articles 20 and 21A – Absentee Ballot

Article 20 was enacted during the last century and mandates the procedures for absentee voting. *See* N.C. Gen. Stat. §§ 163-226 to 163-239 (2023).

Article 21A, also known as the Uniform Military and Overseas Voters Act (“UMOVA”), was enacted in 2011 and provides additional or alternative procedures for two categories of absentee voters: (1) North Carolina registered absentee voters who reside outside the United States; and, (2) absentee voters who qualify as “uniform-service voters” if their voting residence is North Carolina and they otherwise satisfy North Carolina’s voter eligibility requirements. N.C. Gen. Stat. § 163-258.2(1) (2023). This latter category of “uniform-service voters” includes uniform-service voters’ spouses and dependents. N.C. Gen. Stat. § 163-258.2(7)(d) (2023).

Article 20 requires eligible and registered absentee voters to provide photographic identification with their absentee ballots. N.C. Gen. Stat. §§ 163-230.1(a)(4), (b)(4), (e1)(3), (f1) (2023). *See also* N.C. Gen. Stat. § 163-166.16 (2023) (providing in-person voters must also show photographic identification when casting their ballots).

In 2018, the General Assembly amended Article 20 to require absentee voters to either include a photocopy of a permitted identification or to complete and submit a “Reasonable Impediment Declaration Form” (“photo ID requirement”) with their ballots.

Article 21A does not contain an express provision regarding a photo ID requirement or lack thereof for voters casting ballots under this Article. The Board issued an administrative rule purportedly exempting all Article 21A UMOVA voters from the photo ID requirement. 08 N.C. Admin. Code 17.0109(d).

Griffin argues the statutory absentee ballots procedures under Article 20 and Article 21A must be read together, and Article 21A absentee voters must comply with the requirements for absentee voting contained in Article 20, including the photo ID requirement or substitute. Article 21A voters are referenced throughout Article 20. *See, e.g.*, N.C. Gen. Stat. §§ 263-231(b)(1); 163-234 (2023). Article 21A also refers to the requirements of Article 20. *See, e.g.*, N.C. Gen. Stat. § 163-258.7(f) (2023) (“This Article does not preclude a covered voter from voting an absentee ballot under Article 20 of this Chapter.”).

The statute specifically provides Article 21A “shall not apply to or modify” Article 20. The plain language of this statute provides, in relevant part, except as provided in Article 21A, that the Article shall not

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modify the requirements set forth for absentee voters in Article 20, which includes the photo ID requirement. This language shows the General Assembly intended for Article 21A to be read in conjunction and in addition to Article 20. These two parts of Subchapter VII of Section 163 must be read together. *See In re R.L.C.*, 361 N.C. 287, 294, 643 S.E.2d 920, 924 (2007) (“When determining the meaning of a statute, the purpose of viewing the statute *in pari materia* with other statutes is to harmonize statutes of like subject matter and, if at all possible, give effect to each.”).

The Board allowed individuals living in foreign countries, who vote in North Carolina elections, to be exempt from our State’s voter ID laws, to which all North Carolina voters are bound. The Board argues the photo ID requirement is a means of “authenticating” a ballot, not for identifying the individual who is voting, and Article 21A contains an “authenticating” requirement which does not include a photo ID requirement and purportedly modifies the photo ID requirement contained in Article 20. *Compare* 8 N.C. Admin. Code § 17.0109(d) *with* N.C. Gen. Stat. §§ 163-166.16, 230.1(f1), and 239 (2023). The Board’s interpretation runs counter to the General Assembly’s express purpose in enacting the photo ID requirement, to minimize the risk of voter fraud, *see, e.g., Holmes*, 384 N.C. at 434, 886 S.E.2d at 128, by imposing the photo ID requirement only on domestic absentee and election day voters while not also requiring identification verification for individuals casting votes from another country.

We conclude that Articles 20 and 21A require all voters voting absentee in a non-federal election in North Carolina to comply with the photo ID requirement. As with the “Incomplete Voter Registration” category discussed above, we reverse the Superior Court’s order and, upon this Court’s mandate, remand with instructions to the Board to immediately notify affected voters whose votes were challenged for failing to include a photocopy of their approved identification or a Reasonable Impediment Declaration Form. N.C. Gen. Stat. §§ 163-226 to 163-239 (2023).

Those voters are also provided fifteen (15) business days after notice from the Board to provide photographic identification to the Board, or a Reasonable Impediment Declaration Form to cure their ballot’s curable deficiencies and, upon receipt of which and verification thereof, the Board shall count their votes.

3. Never Residents

In Griffin’s final challenge, he protests votes cast by individuals who have never resided in North Carolina and who have not indicated they

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intend to reside in North Carolina. In arguing these “Never Resident” voters are eligible to vote in North Carolina elections, the Board relies on a provision in Article 21A, which defines a “covered voter” to include “[a]n overseas voter who was born outside the United States, . . . , and, *except for a State residency requirement*, otherwise satisfies this State’s voter eligibility requirements[.]” N.C. Gen. Stat. § 163-258.2(1)(e) (2023) (emphasis supplied).

The North Carolina Constitution provides only lawful residents of North Carolina, who are eligible and properly registered to vote, are entitled to vote in our state and non-federal elections:

Residence period for State elections. – Any person who has resided in the State of North Carolina for one year and in the precinct . . . for 30 days next preceding an election, . . . , shall be entitled to vote at any election held in this State. Removal from one precinct . . . to another in this State shall not deprive a person of the right to vote in the precinct . . . from which that person has removed until 30 days after the removal.

N.C. Const. art. VI, § 2.

The General Assembly has enacted statutes to implement this Constitutional mandate by limiting voting to only North Carolina residents. N.C. Gen. Stat. § 163-55(a) (2023). The statute defines residency as the place in North Carolina where the voter lives or, if absent from the State, intends to return, N.C. Gen. Stat. § 163-57 (2023). This statutory definition is consistent with our Supreme Court precedent equating residency under our state constitution with domicile. *See Hannon v. Grizzard*, 89 N.C. 115, 120 (1883) (providing residency includes the place where an absent voter intends to return). Residency for an absent, non-dependent, and emancipated adult is not inherited. *Id.*

Over 100 years ago, our Supreme Court held North Carolina recognizes three types of domicile: “domicile of origin, domicile of choice, and domicile by operation of law.” *Thayer v. Thayer*, 187 N.C. 573, 574, 122 S.E.2d 307, 308 (1924). An emancipated adult not born in North Carolina and who is not “legally dependent” on a North Carolina resident cannot maintain domicile of origin. “As a general rule the domicile of every person at his birth is the domicile of the person on whom he is legally dependent.” *Thayer*, 187 N.C. at 574, 122 S.E. at 308. The totality of the circumstances indicates the domicile of the parents of these absentee, “Never Resident” voters was overseas. These “Never Resident” voters, who were born to parents overseas, were never brought to North

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Carolina to reside during the entirety of their eighteen-year dependency as minors, and their domicile is overseas. *See, e.g., Hall v. Wake Cnty. Bd. of Elections*, 280 N.C. 600, 609, 187 S.E.2d 52, 57 (1972) (noting a person’s domicile for voting purposes is determined by reviewing “the surrounding circumstances and the conduct of the person”); *Coury v. Prot*, 85 F.3d 244, 250 (5th Cir. 1996) (recognizing that an adult United States citizen may be domiciled in a foreign country).

An absent person, who has never lived in North Carolina, cannot make North Carolina their domicile of choice. *Thayer*, 187 N.C. at 574, 122 S.E. at 308. An emancipated adult affirmatively establishes a domicile of choice by having no intent to return to North Carolina, with residence in a new place, and an intent to make that new place their permanent home. *See Hall*, 280 N.C. at 608–09, 187 S.E.2d at 57. Notably, here, the “Never Resident” voters cannot show an intent to “return” to North Carolina, as they have never resided in North Carolina.

“A domicile by operation of law is one which the law determines or attributes to a person without regard to his intention or the place where he is actually living.” *Thayer*, 187 N.C. at 574, 122 S.E.2d at 308. We conclude the challenged “Never Resident” voters are ineligible to vote in non-federal North Carolina elections. N.C. Gen. Stat. §§ 163-57; 258.2(1)(e) (2023).

VI. Conclusion

The post-election protest process preserves the fundamental right to vote in free elections “on equal terms.” *See* N.C. Const. art. I, § 10. “It is well settled in this State that” this fundamental right includes “‘the right to vote on equal terms,’ ” and “to participate in an electoral process that is necessarily structured to maintain the integrity of the democratic system.” *James*, 359 N.C. at 270, 607 S.E.2d at 644 (quoting *Northampton Cnty. Drainage Dist. No. One v. Bailey*, 326 N.C. 742, 747, 392 S.E.2d 352, 356 (1990)).

This right is violated when “votes are not accurately counted [because] [unlawful] [] ballots are included in the election results.” *Bouvier*, 386 N.C. at 3, 900 S.E.2d at 842. The inclusion of even one unlawful ballot in a vote total dilutes the lawful votes and “effectively ‘disenfranchises’ ” lawful voters. *James*, 359 N.C. at 270, 607 S.E.2d at 644.

Post-election protests protect against this risk of vote dilution by enabling candidates and voters to rigorously investigate the election process, identify and challenge unlawful ballots, and ensure those ballots are not counted. *See* N.C. Gen. Stat. § 163-182.10(d)(2)(e) (2023)

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(providing that the remedy for a meritorious election protest may be correction of the vote total).

As was noted in oral arguments, the Fourth Circuit recently observed: “North Carolina has been flooded with dozens of challenges to the State’s electoral regulations.” *Sharma v. Hirsch*, 121 F.4th 1033, 1043 (4th Cir. 2024). The Fourth Circuit added these challenges “are reasonably grounded in the law, and their gravity should not be understated,” and repeated litigation fosters uncertainty that “is not conducive to the most efficient administration of elections.” *Id.*

As to the “Incomplete Voter Registration” voters—those who registered after the effective date of N.C. Gen. Stat. § 163-82.4 in 2004 who have not provided their county boards with their drivers license numbers or the last four digits of their social security numbers or who otherwise have not been provided with a unique identifier number by their county boards—have not qualified as eligible voters in the 2024 election. Based on precedent from the Supreme Court of North Carolina, this Court could order that those voters are without a remedy to cure their incomplete registrations. *See James*, 359 N.C. at 269-71, 607 S.E.2d at 644-45.

However, because the Board and the county boards did not comply with their statutory obligations to notify these voters who have “provide[d] enough information on the form to enable the county board to identify and contact the voter” of the information defect in their registrations, N.C. Gen. Stat. § 163-82.4(f), we conclude these voters should be allowed a period of fifteen (15) business days after notice to cure their defective registrations. Upon receipt of the order of remand from the Superior Court, the Board shall immediately require the county boards to provide notice to these challenged voters of their ability to cure their registrations, and upon verification, their votes may be counted. The Superior Court’s order in 24CV040620-910 affirming the Board’s dismissal of Griffin’s protest as to these voters is reversed with instructions upon mandate to remand the matter to the Board. Upon remand, the Board is instructed to immediately direct the county boards in all one hundred counties to expeditiously identify the challenged “Incomplete Voter Registration” voters and notify said voters of their registration defects, to allow said voters fifteen (15) business days from the mailing of the notice to cure the defect, and upon verification to include in the count of this challenged election the votes of those voters who timely cure their registration defects and to omit from the final count the votes of those voters who fail to timely cure their registration defects. *Id.*

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As to the military and overseas voters under Article 21A—North Carolina residents who cast votes in this non-federal, Supreme Court election under Article 21A but failed to comply with the voter ID requirement—their ballots have not been properly cast. Again, based on *James*, this Court could order that those voters are without a remedy to cure their failure to comply with the photo ID requirement. *See James*, 359 N.C. at 269-71, 607 S.E.2d at 644-45.

Our General Assembly has identified the failure to comply with the photo ID requirement as a “curable deficiency,” and N.C. Gen. Stat. § 163-82.4(f) requires the county board to promptly notify the voter of the deficiency and the manner in which the voter may cure the deficiency. *See* N.C. Gen. Stat. § 163-230.1(e)(1) (Supp. 2024). The Superior Court’s order in 24CV040622-910 affirming the Board’s dismissal of Griffin’s protest as to these voters is reversed with instructions to remand the matter to the Board.

Upon remand, the Board is instructed to immediately direct the county boards to expeditiously identify the military and overseas voters challenged under this protest and notify said voters of their failure to abide by the photo ID requirement or equivalent, to allow said voters fifteen (15) business days from the mailing of the notice to cure the defect, and upon verification, to include in the count of this challenged election the votes of those voters who timely cure their failure to abide by the photo ID requirement and to omit from the final count the votes of those voters who fail to timely cure their deficiencies.

Finally, as to the “Never Residents” voters, we conclude these purported voters are not eligible to vote in North Carolina, non-federal elections, and the votes cast by these purported voters are not to be included in the final count in the 2024 election for Seat 6. The Superior Court’s order in 24CV040619-910, affirming the Board’s dismissal of Griffin’s protest as to these purported voters is reversed with instructions to remand the matter to the Board to direct the county boards to identify the votes from “Never Residents” and remove them from the final count of the 2024 election for Supreme Court Seat 6.

The Clerk of this Court is ordered to issue this Court’s mandate on Monday, 7 April 2025 at 5 P.M. *It is so ordered.*

REVERSED AND REMANDED.

Panel consisting of:

Judges TYSON, HAMPSON, and GORE.

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Judge HAMPSON dissents by separate opinion.

HAMPSON, Judge, dissenting.

To be clear: on the Record before us, Petitioner has yet to identify a single voter—among the tens of thousands Petitioner challenges in this appeal—who was, in fact, ineligible to vote in the 2024 General Election under the statutes, rules, and regulations in place in November 2024 governing that election. Every single voter challenged by Petitioner in this appeal, both here and abroad, cast their absentee, early, or overseas ballot by following every instruction they were given to do so. Their ballots were accepted. Their ballots were counted. The results were canvassed. None of these challenged voters was given any reason to believe their vote would not be counted on election day or included in the final tallies. The diligent actions these voters undertook to exercise their sacred fundamental right to vote was, indeed, the same as every other similarly situated voter exercising their voting right in the very same election. Changing the rules by which these lawful voters took part in our electoral process after the election to discard their otherwise valid votes in an attempt to alter the outcome of only one race among many on the ballot is directly counter to law, equity, and the Constitution.

This alone supports the Board's ultimate conclusion Petitioner failed to establish probable cause to believe there was any violation of law, irregularity, or misconduct in the administration of the 2024 General Election for Associate Justice of the North Carolina Supreme Court. *Appeal of Harper*, 118 N.C. App. 698, 702, 456 S.E.2d 878, 880 (1995) ("When an unsuccessful candidate seeks to invalidate an election, the burden of proof is on him to show that he would have been successful had the irregularities not occurred."). To accept Petitioner's indiscriminate efforts to call into doubt the votes of tens of thousands of otherwise eligible voters, without any showing any challenged voter was disqualified under existing law from voting is to elevate speculation and surmise over evidence and reason. *See id.* at 704, 456 S.E.2d at 881 (Greene, J., concurring) ("To concede our inability to [sort out truthful and untruthful testimony] would require new elections in every case upon a mere showing that there has been some irregularity that may possibly have affected the election. This, in my opinion, would not represent sound public policy. Furthermore, it is inconsistent with the law of this state which holds that evidence based on 'conjecture, surmise and speculation' is not sufficient to support a verdict.").

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Nor is the remedy invented by the majority in accord with North Carolina law or appropriate to the situation. The majority orders the Board allow a 15-day “cure period” for the majority of challenged voters. The proposition that a significant portion of these 61,682 voters will receive notice and timely take curative measures is a fiction that does not disguise the act of mass disenfranchisement the majority’s decision represents.

While the majority’s opinion is unsigned, I note this decision is not *per curiam* and I dissent in full. The Board’s conclusion was correct. The Superior Court correctly affirmed the Board’s decision. Under any rational analysis, we should do the same and affirm the Orders of the Superior Court. This is so for a number of reasons: (I) faithful application of the standard of review on judicial review of the Board’s administrative decision compels affirmance of the Superior Court’s Orders; (II) Petitioner’s postcards to challenged voters providing only a QR code denied voters’ right to notice of the proceeding; (III) the *Purcell* principle and other equitable principles demand we do not change the rules of an election midstream or after votes are tallied to disenfranchise qualified North Carolina voters; (IV) under long-standing law, qualified voters whose voter registration data may be incomplete are not disqualified from voting; (V) military and overseas voters are not subject to constitutional or statutory voter identification requirements and are governed by a separate statute designed to promote uniformity across the states and federal elections; (VI) U.S. citizens living overseas who meet North Carolina residency requirements through their parents or guardians have a right to vote in North Carolina elections; (VII) fundamental principles of equal protection demand these absentee and early votes be counted in this election; and (VIII) remanding this matter to the Board is improvident where Petitioner has not met his burden of proof to demonstrate any factual issue that would result in altering the outcome of his election under existing rules.

I. The Superior Court Properly Reviewed the Final Decision of the Board De Novo and Correctly Affirmed the Board Applying that Standard.

Petitioner presents a single issue for this Court’s review: “Did the superior court err in affirming the State Board?” What this barebones generic issue statement lacks in appellate advocacy nous, is made up for by squarely placing this case in its proper procedural posture. The Superior Court was functioning as an appellate court to judicially review a final decision of an executive branch administrative agency sitting in its quasi-judicial capacity. *See* N.C. Gen. Stat. § 163-182.14 (2023). The task of this Court in reviewing the trial court is to determine (1) whether

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the trial court exercised the appropriate scope of review and, if so, (2) whether the trial court did so properly. *Harper*, 118 N.C. App. at 701, 456 S.E.2d at 880.

Here, the parties agree the Superior Court sitting in judicial review appropriately exercised de novo review to the Board's Final Decision. The remaining question is simply whether it did so properly. While the Superior Court's orders themselves do not offer detailed analysis, none was necessary because the Superior Court functionally adopted the Board's reasoning in affirming the Final Decision. *See Thompson v. Union Cnty.*, 283 N.C. App. 547, 553, 874 S.E.2d 623, 628 (2022) ("The trial court, when sitting as an appellate court to review an administrative agency's decision, must only set forth sufficient information in its order to reveal the scope of review utilized and the application of that review." (quoting *Sutton v. N.C. Dep't of Lab.*, 132 N.C. App. 387, 389, 511 S.E.2d 340, 342 (1999))).

In its section discussing probable cause, the majority makes the unfounded assertion that another court's observations about the number of challenges to North Carolina election regulations coupled with our Supreme Court's issuance of a stay in this case are sufficient evidence of probable cause. This is not true. And, in fact, despite the citation to a Fourth Circuit case—*Sharma v. Hirsch*, 121 F.4th 1033, 1043 (4th Cir. 2024)—that opinion does not say or even suggest that its musings could support a finding of probable cause. Petitioner does not raise this argument nor even cite to this case in briefing to this Court. Further, the majority's discussion of probable cause tellingly obfuscates the fact that it is *Petitioner's burden* to satisfy the probable cause standard. *See Clay Cnty. Gen. Election*, 45 N.C. App. 556, 570, 264 S.E.2d 338, 345-46 (1980) ("Clearly, if an unsuccessful candidate seeks to invalidate an election, he must be able to show that he would have been successful had the irregularities not occurred." (citations omitted)). And in any event, it is not the role of this Court to invent arguments for any party. *Matter of R.A.F.*, 384 N.C. 505, 512, 886 S.E.2d 159, 164 (2023) ("Further, the Court of Appeals may not address an issue not raised or argued by [a party] for '[i]t is not the role of the appellate courts . . . to create an appeal for an appellant.'" (quoting *Viar v. N.C. Dep't of Transp.*, 359 N.C. 400, 402, 610 S.E.2d 360 (2005))).

Ultimately, it is the Board's Final Decision for us to review de novo. The Final Decision itself provides ample basis for determining the Superior Court correctly applied the de novo standard of review in affirming the ruling of the Board.

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II. Expecting Voters to Scan an Anonymous QR Code on a Bulk-Mail Postcard Cannot Reasonably Constitute Service in Compliance with their Due Process Rights.

The first time—if at all—any challenged voter would have learned their right to vote was being challenged would have been if they happened to scan a QR code on a postcard “Paid for by the North Carolina Republican Party”—not a candidate or candidate committee—addressed to them “or current resident” and which merely seemed to carry a generalized threat that “your vote may be affected by one or more protests filed in relation to the 2024 General Election” without specifying any candidate or protest. Even if the voter (a) received this postcard; (b) did not simply discard it as another piece of political junk mail; and (c) happened to scan the QR code, they were directed to a North Carolina Republican Party website listing challenges by four different candidates and including dozens and dozens of protests under different counties and categories of protest, which in turn led to multiple spreadsheets of thousands upon thousands of challenged voters listed in non-alphabetical order.

This is so even though when filing his protests on the required forms promulgated by the Board, Petitioner took an oath affirming specifically he understood he “must timely serve all Affected Parties.” This is consistent with the Board’s administrative regulation regarding protest forms which instruct protestors:

You must serve copies of all filings on every person with a direct stake in the outcome of this protest (“Affected Parties”). Affected Parties include every candidate seeking nomination or election in the protested contest(s) . . . , not only the apparent winner and runner-up. *If a protest concerns the eligibility or ineligibility of particular voters, all such voters are Affected Parties and must be served.*

8 N.C. Admin. Code 2.0111 (emphasis added).

That Petitioner did not comply with the requirements of the Board’s service requirement is indisputable. Certainly, challenged voters were not provided copies of the protests impacting them. Indeed, Petitioner does not claim he did. Instead, Petitioner contends that the Board did not have statutory authority to promulgate its service rule—and thus claims he had no obligation at all to inform the voters he challenges of his efforts to discount their votes. Petitioner further argues his service by bulk-mail postcard should be deemed compliant because the

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Board uses postcards in totally different circumstances. Additionally, Petitioner claims that, in any event, his postcards should be held sufficient to meet minimum constitutional standards of service. Each one of Petitioner's efforts to excuse serving the voters he challenges fails.

A. *The Board is Authorized by Statute to Promulgate Rules for Notice to Parties.*

First, the Board is, in fact, statutorily authorized to promulgate rules related to election protests. As Petitioner concedes, N.C. Gen. Stat. § 163-182.9(c) expressly requires "The State Board of Elections shall prescribe forms for filing protests." Petitioner asserts, however, that only County Boards of Election are tasked with serving notice under N.C. Gen. Stat. § 163-182.10(b). The majority adopts this reasoning. By its very terms, however, Section 163-182.10(b) applies to notice of the *hearing* by the County Board, which also requires parties given notice of the hearing must also be given a copy of the protest or a summary of its allegations. It makes absolute sense that a Notice of Hearing would not be issued or required until an actual hearing is set by the County Board—which would occur after a County Board makes its preliminary determination as to a protest's viability. However, this is easily distinguishable from requiring a protestor to serve what is effectively a pleading in a quasi-judicial proceeding providing basic due process for affected parties at the outset of the proceeding. *See Bouvier v. Porter*, 386 N.C. 1, 8, 900 S.E.2d 838, 845 (2024); *see also Little River, LLC v. Lee Cnty.*, 257 N.C. App. 55, 68, 809 S.E.2d 42, 51 (2017) ("A Board 'conducting a quasi-judicial hearing, can dispense with no essential element of a fair trial[.]'" (quoting *Humble Oil & Refin. Co. v. Bd. of Aldermen of the Town of Chapel Hill*, 284 N.C. 458, 470, 202 S.E.2d 129, 137 (1974))).

Moreover, Petitioner ignores entirely N.C. Gen. Stat. § 163-182.10(e), which expressly provides: "The State Board of Elections shall promulgate rules providing for adequate notice to parties, scheduling of hearings, and the timing of deliberations and issuance of decision." This statute unambiguously provides additional and independent support for the Board's promulgation of rules regarding service on affected voters. In sum, the Board is statutorily permitted to promulgate rules prescribing the required forms for voter protests and, further, to provide for adequate notice to parties, scheduling of hearings, and the timing of deliberations. The majority's declaration of the Board's service rule as "void" is bereft of support.

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B. The Board's Use of Postcards and QR Codes in Other Mailings does not Excuse Petitioner's Failure to Adequately Notify Affected Voters of the Efforts to Discount their Votes.

Second, the Board's use of postcards in completely different contexts does not absolve Petitioner of compliance with the unambiguous service requirements for quasi-judicial election protests on affected voters. Petitioner points to N.C. Gen. Stat. § 163-82.8 permitting the County Boards to mail voter registration cards to voters. Petitioner also cites N.C. Gen. Stat. § 163-82.14(d)(2) related to updating registration records and allowing for the confirming of a voter's address using confirmation mailings that include: "a postage prepaid and preaddressed return card, sent by *forwardable* mail" (emphasis added).¹ Finally, Petitioner references informational mailings from the Board which use QR codes. These examples only underscore the differences. Unlike voter registration cards and address verification forms, there is no statutory authority for service of election protests by postcard. Likewise, informational postcards informing voters about new voter identification rules are just that: informational. Here, Petitioner was initiating a quasi-judicial proceeding which threatens each voter's fundamental constitutional right to vote. There is simply no comparison.

The majority offers another equally flawed example: voter guides mailed to voters. The majority asserts because these informational voter guides include QR codes, this use of QR codes to serve election protests on voters must be sufficient—if not surplus to requirements. While it is true these guides include QR codes linking to the Board's website, these guides also include helpful informational text about various subjects—a point illustrated by the fact the majority cites seven pages of the guide. Further, each section also provides a website URL—such that a voter may access the information without the need to scan a QR code. The voter guide is clearly addressed from a government agency—not a political party. More to the point, a failure to use the QR code does not carry with it the potential penalty of disenfranchising the voter. Any comparison between the two documents is a false equivalence and entirely out of touch.² The point is voter information guides serve a

1. Even by contrast here, Petitioner's postcards were deliverable to "current resident."

2. It bears mentioning, a panel of our Court, prior to this election, barred UNC students from using a secured digital identification card stored on a student's mobile device—likening these digital cards to photocopies or photos. *See Republican Nat'l Comm. v. N.C. State Bd. of Elections*, Amended Order dated 30 September 2024 (COA P24-660) (enjoining Board from accepting UNC's Mobile One Card or any other "image of a photo ID, either

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completely different purpose than service of quasi-judicial election protests. Conflation of the two only serves to denigrate the importance of the constitutional right to vote and right to have one's vote count at the ballot box.

C. Petitioner's Postcards Fail to Provide Basic Due Process to Voters.

Third, Petitioner's postcards simply do not pass constitutional muster—even under his own standard. Petitioner asks us to apply *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S. Ct. 652, 94 L. Ed. 865 (1950). *Mullane* provides some helpful principles that should guide our analysis. “The fundamental requisite of due process of law is the opportunity to be heard. This right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest.” *Id.* at 314, 70 S. Ct. at 657 (citation omitted) (internal quotations omitted).

An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. The notice must be of such nature as reasonably to convey the required information . . . and it must afford a reasonable time for those interested to make their appearance But if with due regard for the practicalities and peculiarities of the case these conditions are reasonably met the constitutional requirements are satisfied.

Id. at 314-15, 70 S. Ct. at 657 (citations omitted).

But when notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it. The reasonableness and hence the constitutional validity of any chosen method may be defended on the ground that it is in itself

as a photocopy or a photo on a mobile device.”). Now, this same Court demands voters—including voters who may have no access to a mobile device, have a healthy distrust of unknown and anonymous QR codes, or are simply not as technologically savvy as others—scan a seemingly random QR code on a bulk-mail postcard to save their right to vote. The contradiction is plain. These rulings are, however, consistent in one significant way: they both—by judicial fiat—create obstacles to qualified voters having their votes counted.

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reasonably certain to inform those affected, . . . or, where conditions do not reasonably permit such notice, that the form chosen is not substantially less likely to bring home notice than other of the feasible and customary substitutes.

Id. at 315, 70 S. Ct. at 657-58 (citations omitted). The teaching from these principles is that while there is some flexibility in the manner and nature of service, which might still conform to constitutional due process requirements, notice must be more than a mere gesture and reasonably certain to inform those affected.

Here, Petitioner's postcards are nothing more than a mere gesture. Certainly, as underscored by Petitioner's arguments, the means employed were certainly not "as one desirous of actually informing" the voter of the specific protest. The postcards do not identify a protestor or campaign committee, do not provide for forwarding, and, ultimately, provide no indication a quasi-judicial election protest has, in fact, been instituted involving the recipient. Forcing voters to have the technological means, ability, or trust to not only scan a QR code—sent anonymously through the mail—but to then be directed to a partisan website in order to sift through dozens of challenges and thousands of names, which were not even listed in alphabetical order, cannot be said to be reasonably calculated or certain to inform those affected voters. *Cf. id.* at 320, 70 S. Ct. at 660 ("Publication may theoretically be available for all the world to see, but it is too much in our day to suppose that each or any individual beneficiary does or could examine all that is published to see if something may be tucked away in it that affects his property interests. We have before indicated in reference to notice by publication that, 'Great caution should be used not to let fiction deny the fair play that can be secured only by a pretty close adhesion to fact.' " (citation omitted)).

Thus, the Board properly concluded Petitioner's protests were not properly served on the affected parties as required by law—challenged voters whose ballots Petitioner seeks to discount. Therefore, the Board did not err in dismissing Petitioner's protests on this basis. Consequently, the Superior Court properly affirmed the Board.

III. Changing the Rules of an Election During an Election and After Ballots are Counted Violates Basic Concepts of Equity including Laches, the Purcell Principle, and Common Sense.

Petitioner asks the Board and our Courts to retroactively change the rules which applied to the election in hopes those rule changes will alter the result and lead to Petitioner being judicially declared the winner of an election he would otherwise lose based on the vote tally. Under

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settled principles of equity and fair play, Petitioner's contentions should be rejected as untimely as applied to the 2024 General Election. This provides a separate basis for affirming the Superior Court's Orders in this case, which in turn affirmed the Board's Final Decision rejecting Petitioner's protests covered by this appeal.

Efforts to change the rules under which an election is conducted—either during the election or after valid votes have been cast—should be viewed with great skepticism. This is why courts are reluctant to insert themselves into election matters when the election is at hand or in the balance. “Call it what you will—laches, the *Purcell* principle, or common sense—the idea is that courts will not disrupt imminent elections absent a powerful reason for doing so.” *Crookston v. Johnson*, 841 F.3d 396, 398 (6th Cir. 2016).

The Supreme Court of the United States recognized in *Purcell v. Gonzalez*: “Court orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase.” 549 U.S. 1, 4-5, 127 S. Ct. 5, 7, 166 L. Ed. 2d 1 (2006). “That principle—known as the *Purcell* principle—reflects a bedrock tenet of election law: When an election is close at hand, the rules of the road must be clear and settled. Late judicial tinkering with election laws can lead to disruption and to unanticipated and unfair consequences for candidates, political parties, and voters, among others.” *Merrill v. Milligan*, 142 S. Ct. 879, 880-81 (2022) (Mem.) (Kavanaugh, J., concurring in grant of applications for stays).

A similar principle applies to prevent parties from bringing late challenges to election laws in a manner that would disrupt the established rules of an election. “The obligation to seek injunctive relief in a timely manner in the election context is hardly a new concept. We previously have suggested that claims must be brought expeditiously, to afford the district court sufficient time in advance of an election to rule without disruption of the electoral cycle[.]” *Jones v. Markiewicz-Qualkinbush*, 842 F.3d 1053, 1060-61 (7th Cir. 2016) (citations and quotation marks omitted). “Courts have imposed a duty on parties having grievances based on election laws to bring their complaints forward for pre-election adjudication when possible. They have reasoned that failure to require pre-election adjudication would ‘permit, if not encourage, parties who could raise a claim ‘to lay by and gamble upon receiving a favorable decision of the electorate’ and then, upon losing, seek to undo the ballot results in a court action.’ ” *Hendon v. N.C. State Bd. of Elections*, 710 F.2d 177, 182 (4th Cir. 1983) (citations omitted) (quoting *Toney v. White*, 488 F.2d 310, 314 (5th Cir. 1973)).

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The same is true even after the results have been tallied. For example, in applying the doctrine of laches—the equitable principle that a party may not sit on their rights and unreasonably delay asserting those rights to the detriment of others—to challenges brought against the 2020 election results in Wisconsin, the Wisconsin Supreme Court emphasized:

Parties bringing election-related claims have a special duty to bring their claims in a timely manner. Unreasonable delay in the election context poses a particular danger—not just to municipalities, candidates, and voters, but to the entire administration of justice. The issues raised in this case, had they been pressed earlier, could have been resolved long before the election. Failure to do so affects everyone, causing needless litigation and undermining confidence in the election results. It also puts courts in a difficult spot. Interpreting complicated election statutes in days is not consistent with best judicial practices. These issues could have been brought weeks, months, or even years earlier. The resulting emergency we are asked to unravel is one of the Campaign’s own making.

Trump v. Biden, 2020 WI 91, ¶ 30, 394 Wis. 2d 629, 645-46, 951 N.W.2d 568, 577 (footnote omitted). The Court further noted:

In each category of ballots challenged, voters followed every procedure and policy communicated to them, and election officials . . . followed the advice of [the Wisconsin Elections Commission] where given. Striking these votes now—after the election, and in only two of Wisconsin’s 72 counties when the disputed practices were followed by hundreds of thousands of absentee voters statewide—would be an extraordinary step for this court to take. We will not do so.

Id. at ¶ 31, 394 Wis. 2d at 646, 951 N.W.2d at 577 (footnote omitted). Ultimately, in concluding the Plaintiffs in that case were not entitled to relief, the Court acknowledged:

Our laws allow the challenge flag to be thrown regarding various aspects of election administration. The challenges raised by the Campaign in this case, however, come long after the last play or even the last game; the Campaign is challenging the rulebook adopted before the season began. Election claims of this type must be brought expeditiously. The Campaign waited until after the election to

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raise selective challenges that could have been raised long before the election.

Id. at ¶ 32, 394 Wis. 2d at 647, 951 N.W.2d at 577. One may quite easily see how these equitable principles squarely apply to bar Petitioner's arguments in the present case.

Petitioner, however, asserts that we ourselves are barred from applying these principles of equity and fairness. Petitioner claims the Board did not base its decision on these principles because it did not cite *Purcell* in its Final Decision. Therefore, citing *Godfrey v. Zoning Board of Adjustment*, 317 N.C. 51, 344 S.E.2d 272 (1986), Petitioner argues we are not permitted to affirm the Board's decision on an alternative basis.

Even if, for the sake of argument, one adopts Petitioner's application of *Godfrey* to this case, it fails. With respect to each category of challenged ballots, the Board, in fact, did apply these principles in its decision. First, with respect to the voters with allegedly incomplete registrations, the Board expressly invoked the principle of laches as barring Petitioner's claim. Second, with respect to U.S. citizens residing overseas, the Board expressly noted the applicable statutes had been in place for thirteen years and applied in 43 different elections. The Board further observed that applying a newly announced rule of law retroactively to ballots cast in reliance on the existing law would impair constitutional rights. Third, with respect to overseas voters under Article 21A of Chapter 163 who did not provide photo identification with their ballots, the Board expressly noted the fact the rule Petitioner challenges went through the administrative rule-making process—including through the Rules Review Commission and public comment—and that nowhere during or after the adoption of the rules regarding overseas voters did Petitioner or his party challenge the validity of the rule prior to the 2024 election. It is, thus, evident that the Board's Final Decision was, in fact, grounded in relevant part on the equitable doctrine of laches and principles emanating from *Purcell*: that challenges to established election laws and regulations should—where possible—be brought prior to an election and not in its midst.³

While North Carolina has not invoked the *Purcell* principle by name, the same concepts are found in North Carolina law. For example, in *Pender County v. Bartlett*, our Supreme Court struck down a legislative

3. That the Board also couched these principles in constitutional terms should be no surprise. These equitable principles are applied for the purpose of preserving the fundamental constitutional right to vote.

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district prior to the 2008 election. 361 N.C. 491, 510, 649 S.E.2d 364, 376 (2007), *aff'd sub nom. Bartlett v. Strickland*, 556 U.S. 1, 129 S. Ct. 1231, 173 L. Ed. 2d 173 (2009). However, that Court expressly stayed its mandate requiring the drawing of new legislative districts until after the 2008 election to “minimize disruption to the ongoing election cycle[.]” *Id.* (citing *Reynolds v. Sims*, 377 U.S. 533, 585, 84 S. Ct. 1362, 1394, 12 L. Ed. 2d 506 (1964)). The Court cited the United States Supreme Court’s decision in *Reynolds v. Sims* for its proposition. That Court noted:

However, under certain circumstances, such as where an impending election is imminent and a State’s election machinery is already in progress, equitable considerations might justify a court in withholding the granting of immediately effective relief in a legislative apportionment case, even though the existing apportionment scheme was found invalid. In awarding or withholding immediate relief, a court is entitled to and should consider the proximity of a forthcoming election and the mechanics and complexities of state election laws, and should act and rely upon general equitable principles. With respect to the timing of relief, a court can reasonably endeavor to avoid a disruption of the election process which might result from requiring precipitate changes that could make unreasonable or embarrassing demands on a State in adjusting to the requirements of the court’s decree.

Reynolds v. Sims, 377 U.S. at 585, 84 S. Ct. at 1393-94. Indeed, our Courts have long recognized we should be wary of judicial intervention into elections and election results. *See Burgin v. N.C. State Bd. of Elections*, 214 N.C. 140, 145, 198 S.E. 592, 595 (1938) (“Nor will the courts undertake to control the State Board in the exercise of its duty of general supervision so long as such supervision conforms to the rudiments of fair play and the statutes on the subject.”); *Gardner v. City of Reidsville*, 269 N.C. 581, 585, 153 S.E.2d 139, 144 (1967) (“Every reasonable presumption will be indulged in favor of the validity of an election.” (citation omitted)).

Contrary to Petitioner’s arguments in this case, *James v. Bartlett*, where our Supreme Court declared after an election provisional ballots cast within a voter’s county of residence but outside of the voter’s precinct should not be counted, is consistent with application of *Purcell* and other related equitable principles to elections. 359 N.C. 260, 271, 607 S.E.2d 638, 645 (2005). First, the Supreme Court expressly addressed the issue of whether the protests of those provisional ballots were timely.

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There, respondents contended the challenge to permitting out-of-precinct provisional ballots should have been brought prior to the election. *Id.* at 265, 607 S.E.2d at 641. The Court, however, determined the challenge was timely: “The response of the Board’s general counsel failed to indicate that the State Board of Elections would count out-of-precinct provisional ballots. This response, coupled with the absence of any clear statutory or regulatory directive that such action would be taken, failed to provide plaintiffs with adequate notice that election officials would count the . . . ballots now at issue.” *Id.* The Court then determined by allowing provisional ballots cast outside a voter’s precinct to be counted, the Board had acted contrary to both the existing statute and its own established rules. *Id.* at 267-69, 607 S.E.2d at 643-44.

Even so, the Court expressed its wariness of intruding itself into electoral results: “Mindful of these concerns, and attendant to our unique role as North Carolina’s court of last resort, we cannot allow our reluctance to order the discounting of ballots to cause us to shirk our responsibility to say what the law is.” *Id.* at 270, 607 S.E.2d at 644 (citation and quotation marks omitted). Ultimately, the Court did not expressly order the provisional ballots immediately discounted but, instead, remanded the matter to the trial court for further proceedings consistent with its opinion. *Id.* at 271, 607 S.E.2d at 645.

Thus, *James* is perfectly consistent with the *Purcell* principle and other equitable principles, including *Pender County*. The challenge in *James* was unable to be made prior to the election and was premised not on a challenge to existing rules and regulations, but on challenges to actions in violation of those existing rules and regulations. Nevertheless, the Court was reluctant to order discounting of ballots. Instead, it remanded the matter to the trial court for further proceedings to determine what should be done.⁴ *Id.*

4. It bears mentioning that, in fact, these votes were *not* discounted in the 2004 election. The General Assembly enacted legislation clarifying that it had not intended to prohibit provisional ballots cast out-of-precinct but in the correct county applicable to the 2004 election. The General Assembly noted:

It would be fundamentally unfair to discount the provisional official ballots cast by properly registered and duly qualified voters voting and acting in reliance on the statutes adopted by the General Assembly and administered by the State Board of Elections in accordance with its intent. Moreover, to subtract such ballots only from the count for the General Election of 2004 without also doing so for the First or Second Primaries of 2004 would create a bizarre result in which out-of-precinct provisional ballots are allowed to count for some elections but not

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Here, unlike *James*, this case does not involve ballots cast contrary to the laws existing at the time of the election. Instead, Petitioner selectively challenges voter registration data-keeping for early and absentee voters and the statutes and regulations applicable to military and overseas voters. To be clear, application of equitable principles to discourage judicial intervention in ongoing elections is not designed to prevent election protests—which determine whether the election was conducted according to the laws and regulations in place. Rather, these principles disapprove of judicial action or remedies which alter the rules during or after a valid election. Petitioner’s ultimate goal is to have otherwise valid votes discounted in hopes that might change the outcome of the election. This is exactly the type of remedy and result *Purcell* and other equitable principles serve to prevent. See *Hendon*, 710 F.2d at 182. Petitioner’s challenges to otherwise qualified and eligible North Carolina voters should be dismissed.

Thus, the Board did not err in determining Petitioner’s protests were legally invalid. Therefore, the Board did not err in dismissing Petitioner’s protests on this basis. Consequently, the Superior Court properly affirmed the Board.

IV. Lawfully Registered Absentee and Early Voters Cannot be Disenfranchised for Allegedly Incomplete Registration Data.

Petitioner has identified 60,273 votes cast by registered voters who do not have a drivers license or the last four digits of their social security number recorded in their voter registration record—and contends these votes were illegally cast. Yet, every vote Petitioner challenges was cast by a registered voter listed on the official voter rolls. Each voter previously submitted an application, created by the Board, to register to vote. All at some point received a notice in the mail informing them their receipt of that notice meant their County Board would register them to

others. The General Assembly did not and does not now intend to create such a system.

2005 N.C. Sess. Laws 2, §1(11). The General Assembly also enacted a separate law providing that election protest decisions by the Board in General Assembly and Executive Branch Offices would be appealable to the General Assembly. N.C. Gen. Stat. § 163-182.14(c). This legislation abated the protest and judicial proceedings in the case. See *In re Election Protest of Fletcher*, 175 N.C. App. 755, 758, 625 S.E.2d 564, 566 (2006). The fact the General Assembly felt obliged to step in and remedy the potential result in *James* should only underscore the need for judicial restraint in election matters concerning the counting of ballots—and calls the continued viability of *James* into question.

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vote. All submitted a ballot in the 2024 General Election. Nonetheless, according to Petitioner, these voters are “unlawfully registered” and thus it is “unlawful” to count their votes. Petitioner requests these purportedly unlawful votes be thrown out—but only as to his race.

Indeed, our Constitution provides that “[e]very person offering to vote shall be at the time legally registered as a voter as herein prescribed and in the manner provided by law.” N.C. Const. art. VI, § 3(1). *See also* N.C. Gen. Stat. § 163-54 (“Only such persons as are legally registered shall be entitled to vote in any primary or election held under this Chapter.”).

It is the Board’s responsibility to “develop an application form for voter registration.” *Id.* § 163-82.3(a). “Any person may use the form to . . . [r]egister to vote.” *Id.* § 163-82.3(a)(1). Section 163-82.4, enacted in 2004 and incorporating the registration requirements of the Help America Vote Act of 2002 (HAVA), 52 U.S.C. §§ 20901-21145, governs the contents of the application form. That section sets out eleven different items the registration form shall request from an applicant, including their “[d]rivers license number or, if the applicant does not have a drivers license number, the last four digits of the applicant’s social security number[.]”⁵ N.C. Gen. Stat. § 163-82.4(a)(11).

Section 163-82.4(b) permits applicants who have not been issued a current and valid drivers license or social security number to register without one. Instead, that individual is assigned a “unique identifier number” which serves to identify them for voter registration purposes. *Id.* § 163-82.4(b).

If an applicant does not include a drivers license or social security number and does not otherwise indicate they are exempt from providing that information under Section 163-82.4(b), the burden is on the County Boards to reach out to the voter to collect the missing information:

If the voter fails to complete any required item on the voter registration form but provides enough information on the form to enable the county board to identify and contact the voter, the voter shall be notified of the omission and given the opportunity to complete the form at least by 12:00 P.M. on the third business day after the

5. Any contention by Petitioner and the majority that the Board simply never requested this information from applicants is incorrect. The voter registration application form has provided fields for an applicant to provide their drivers license or social security number since as early as 2003.

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election. If the voter corrects that omission within that time and is determined by the county board to be eligible to vote, the county board shall permit the voter to vote. If the information is not corrected by election day, the voter shall be allowed to vote [with] a provisional official ballot. If the correct information is provided to the county board by at least 12:00 P.M. on the third business day after the election, the county board shall count any portion of the provisional official ballot that the voter is eligible to vote.

Id. § 163-82.4(f).

If an individual supplies the information on their application but it cannot be validated by the County Board, the individual must submit additional photo identification and a current utility bill, bank statement, or other government document showing their name and address. *Id.* § 163-166.12(d) (explaining, “[r]egardless of whether an individual has registered by mail or by another method,” a voter whose drivers license or social security number does not validate must provide supplemental identification the first time they vote). “If that identification is provided no later than 12:00 P.M. on the third business day after the election and the county board does not determine that the individual is otherwise ineligible to vote a ballot, the failure of identification numbers to match shall not prevent that individual from registering to vote and having that individual’s vote counted.” *Id.*

The Board has explained a drivers license or social security number that does not validate is not retained in the registrant’s voter record. Consequently, an individual whose drivers license or social security number does not validate will not have that information recorded in their voter registration record, despite having provided the information when they submitted their application.⁶ Thus, contrary to Petitioner’s contentions, that an individual does not have a drivers license or social security number recorded in their voter registration record is not dispositive that they never supplied one.

And, according to the Board, there are many reasons why an applicant’s drivers license or social security number might not validate: the applicant incorrectly copied the information onto their application, the

6. The State Board also offers that a voter may be missing the information from their registration record because they registered prior to the effective date of HAVA but a new registration was created for them that is not linked to that older registration, or because they supplied the information in a previous application under a different registration record than the one Petitioner has challenged.

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County Board incorrectly entered the information from the application into the computer system, or there are discrepancies across databases in the applicant's name—e.g., differences between married and maiden names or hyphenated last names.

Ultimately, it is the County Boards' responsibility to approve or deny applications and register qualified applicants. N.C. Gen. Stat. § 163-82.7. Even assuming, without deciding, the County Boards improperly registered individuals who failed to provide a drivers license or social security number, we have long held "the mistake, or even the willful misconduct, of election officials in performing the duty cast upon them" does not "permit[] the disenfranchisement of innocent voters[.]" *Owens v. Chaplin*, 228 N.C. 705, 711, 47 S.E.2d 12, 17 (1948) (citation and quotation marks omitted). To be sure, even if there has been some error by the Board in collecting voter registration information, the remedy is not disenfranchising tens of thousands of innocent voters in this singular election.

In *Gibson v. Board of Commissioners of Scotland County*, our Supreme Court held qualified voters who were "inadvertent[ly]" registered could not have their votes discounted. 163 N.C. 510, 513, 79 S.E. 976, 977 (1913). There, election officials had failed to administer an oath to each voter, as required by statute, before each was registered and cast their vote. *Id.* at 511, 79 S.E. at 976. The Court stated "[a] constitutional or statutory provision that no one shall be entitled to register without first taking an oath to support the Constitution of the state and that of the United States is directed to the registrars and to them alone; and if they through inadvertence register a qualified voter, who is entitled to register and vote[,] without administering the prescribed oath to him, he cannot be deprived of his right to vote through this negligence of the officers." *Id.* at 513, 79 S.E. at 977.

Several years later, in *Woodall v. Western Wake Highway Commission*, the Court, relying in part on *Gibson*, held: "Where a voter has registered, but the registration books show that he had not complied with all the minutiae of the registration law, his vote will not be rejected." 176 N.C. 377, 389, 97 S.E. 226, 232 (1918). The Court explained a ballot may be refused *prior* to being cast for not complying with the registration law, "but if the party is allowed to vote and his vote is received and deposited, it will not afterwards be held to be illegal, if he is otherwise qualified to vote." *Id.* at 389, 97 S.E. at 232 (citation omitted).

Since then, our Courts have continued to reaffirm the principle that irregularities arising out of the conduct of election officials will not

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vitiating an election—particularly where ballots have already been cast. *See Owens*, 228 N.C. at 711, 47 S.E.2d at 17 (citation omitted); *Davis v. Bd. of Ed.*, 186 N.C. 227, 233, 119 S.E. 372, 375 (1923) (“A ballot cast by an elector in good faith should not be rejected for failure to comply with the law in matters over which the elector had no control[.]” (citation and quotation marks omitted)); *Plott v. Bd. of Comm’rs*, 187 N.C. 125, 131, 121 S.E. 190, 193 (1924) (citing *Davis* for the principle that “a mere irregularity in registration will not vitiate an election”); *In re Brown*, 56 N.C. App. 629, 631-32, 289 S.E.2d 626, 627 (1982) (affirming certification of election where the State Board found certain irregularities to have occurred on the part of election officials but there was no evidence of fraud, corruption, or a material effect on the results of the election).

Petitioner believes this line of caselaw does not apply here,⁷ and instead incorrectly asserts the facts before us are indistinguishable from those of *James v. Bartlett*. There, the validity of provisional ballots cast out-of-precinct was at issue, and the Court observed our General Statutes were clear and unambiguous a voter must vote in the precinct where he resides. 359 N.C. at 267, 607 S.E.2d at 642. Here, by contrast, it was not clear and unambiguous voters were required to have a drivers license or social security number in their registration record in order to cast a ballot in this election. Indeed, many of the voters whose ballots are challenged have been voting without issue for *years* without this information in their record. Adding to this apparent confusion is the fact that HAVA, which does not govern this election, “requires” the applicant to provide a drivers license or social security number, whereas N.C. Gen. Stat. § 163-82.4, which *does* apply to this election, merely “requests” it.⁸ *See* 52 U.S.C. § 21083(a)(5)(A)(i)(I), (II) (Unless an applicant does not have a current and valid drivers license or social security number, “an application for voter registration for an election for Federal office *may not* be accepted or processed by a State unless the application includes [that information].” (emphasis added)); N.C. Gen. Stat. § 163-82.4 (“The form required by G.S. 163-82.3(a) shall *request* the applicant’s . . . [d]rivers license number or . . . the last four digits of the applicant’s social security number[.]” (emphasis added)).

7. The majority inexplicably avoids discussion of these cases altogether.

8. The only information expressly required under North Carolina law is whether an applicant is already currently registered to vote. N.C. Gen. Stat. § 163-82.4(a) (“The form shall require the applicant to state whether currently registered to vote anywhere, and at what address, so that any prior registration can be cancelled.”).

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Of additional concern—and further distinguishing the facts before us from *James*—is the lack of notice to over 60,000 voters: not one of these voters had notice their vote might be discounted solely in this specific election for lack of a drivers license or social security number in their voter registration record. Unlike the ballots contested here, the ballots cast in *James* were provisional—thus, those voters were on notice that their votes might be discounted. The Court in *James* was very clear that the substantive issue before it was limited to “whether a provisional ballot cast on election day at a precinct other than the voter’s correct precinct of residence may be lawfully counted in final election tallies.” *Id.* at 263, 607 S.E.2d at 640 (footnote omitted). Here, Petitioner challenges votes made on a standard, official ballot by otherwise qualified, registered voters. These voters had every right to believe they were lawfully registered to vote—because they are. And an alleged irregularity in the registration of an otherwise eligible, registered voter—who has already cast their ballot—cannot warrant the voter’s disenfranchisement.⁹ See *Owens*, 228 N.C. at 711, 47 S.E.2d at 17 (citation omitted); *Woodall*, 176 N.C. at 377, 97 S.E. at 232 (“But what may be a good reason for not allowing a party to register is not always a good reason for rejecting his vote after it has been cast.”).

At oral argument, Petitioner requested each “illegally cast ballot[]” be thrown out—exclusively as to his race. It is Petitioner’s burden, however, to establish probable cause to obtain such relief, and Petitioner has not shown that even one of the 60,273 challenged ballots was cast “illegally” or by an “unlawfully registered” voter. See *Clay Cnty. Gen. Election*, 45 N.C. App. at 570, 264 S.E.2d at 345-46. “A vote received and deposited by the judges of the election is *presumed to be a legal vote*, although the voter may not actually have complied entirely with the requirements of the registration law; and it then devolves upon the party contesting to show that it was an illegal vote, and *this cannot be shown by proving merely that the registration law had not been complied with.*” *Woodall*, 176 N.C. at 377, 97 S.E. at 232 (emphasis added) (citation omitted). Petitioner simply has not shown any of the votes he challenges were illegal; an alleged error by the Board in collecting voter data is not enough. See *id.* at 389, 97 S.E. at 232; *Gibson*, 163 N.C. at 513, 79 S.E. at 977. Every challenged vote was cast by a voter listed on North

9. By proclaiming any voter who registered since the adoption of N.C. Gen. Stat. § 163-82.4(a)(11) but who failed to provide their drivers license or social security number “is not lawfully registered to vote in North Carolina elections[.]” the majority completely disregards this line of precedent and single-handedly eviscerates the voting rights of countless North Carolinians.

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Carolina's voter rolls; each voter's application to vote has been processed and approved by their respective County Board; and each voter is, for all intents and purposes, a registered voter. Thus, the challenged votes were not cast by "purported voters," as the majority characterizes them, but by lawfully registered voters—whose votes have already been counted as to every other race in the 2024 General Election.

Despite the General Assembly's clear direction that registering and maintaining the list of eligible voters is the duty of the Board and County Boards, Petitioner blames the voters for the alleged discrepancies in their voter registration records. Petitioner, attempting to distinguish this case from *Woodall*, argues the fact that the County Boards may have registered these voters without ensuring the voters had provided a drivers license or social security number does not excuse the voters of their duty to have provided the information in the first place—a failure which, according to Petitioner, warrants their disenfranchisement.¹⁰ Indeed, in *Woodall*, it was the election officials' duty to administer the oath to each voter before registering the voter and allowing them to cast their votes. *Woodall*, 176 N.C. App. at 390-91, 97 S.E. at 233. And here, it is no different—it is the duty of the County Boards to register voters. N.C. Gen. Stat. § 163-82.7. *See also id.* § 163-82.14(a) (requiring the Board and County Boards to maintain the list of eligible voters); *id.* § 163-82.6 (directing the County Boards to accept voter registration applications); *id.* § 163-82.4(a), (f) (providing procedures for County Boards to follow if an applicant omits information on their registration form).

Petitioner's assertion these voters "never provided" the missing information goes too far. As explained at length, there are many reasons why an individual who provided a drivers license or social security number nonetheless might not have that information recorded in their voter registration. Petitioner has not shown even one of the 60,273 challenged votes was cast by a voter who failed to provide a drivers license or social security number to their County Board.¹¹ Indeed, the burden of proof lies with Petitioner—not only to establish probable cause these voters were "unlawfully registered," but also to show the outcome of the election would have been different absent the irregularities. *Clay Cnty. Gen.*

10. Petitioner assumes without explanation that if a voter is missing a drivers license or social security number in their registration record, they never supplied one.

11. In fact, although there is no burden on the Board to counter Petitioner's claims, the Board has nonetheless produced evidence tending to show at least 28,803 of the challenged voters did, in fact, supply a drivers license or social security number when they registered to vote.

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Election, 45 N.C. App. at 570, 264 S.E.2d at 345-46 (citations omitted); *In re Brown*, 56 N.C. App. at 632, 289 S.E.2d at 627 (“It is settled law that an election will not be disturbed for irregularities where it is not shown that such irregularities are sufficient to alter the result.”).

The duty to “properly” register voters lies with the Board and County Boards—and we have been clear that irregularities arising out of the Board’s conduct do not warrant the disenfranchisement of otherwise qualified, legally registered voters who have already cast their ballots. *See Gibson*, 163 N.C. at 513, 79 S.E. at 977 (citation omitted); *Woodall*, 176 N.C. at 389, 97 S.E. at 232 (citation omitted); *Owens*, 228 N.C. at 711, 47 S.E.2d at 17 (citation omitted). Petitioner asks we discard the votes of potentially over 60,000 registered voters—despite doing everything asked of them to register and cast their votes—because whether through clerical error, administrative oversight, sincere mistake, or even willful misconduct, the Board and County Boards did not ensure each voter’s record contained a drivers license or social security number.

Petitioner characterizes his challenge as one to the election itself, rather than to the voters’ registrations—despite blaming the voters for being allegedly unlawfully registered and threatening the status of their registrations.¹² As to challenges to voters, the General Assembly has instructed: “Challenges shall not be made indiscriminately and may only be made if the challenger knows, suspects or reasonably believes such a person not to be qualified and entitled to vote.” N.C. Gen. Stat. § 163-90.1(a). Additionally, “[n]o challenge shall be sustained unless the challenge is substantiated by affirmative proof. In the absence of such proof, the presumption shall be that the voter is properly registered or affiliated.” *Id.* § 163-90.1(b). While this statute may not apply directly to the challenge at hand, it is telling that the General Assembly would implement such a strenuous burden of proof where a voter is placed at risk of being disenfranchised.

Nonetheless, Petitioner has not met even the more flexible probable cause standard. In a misleading redirection of our attention towards the Board, Petitioner contends the Board’s “explanation for the thousands of missing numbers, [is] at this point, speculation.” But, even if so, the Board’s explanation is no more speculative than Petitioner’s own

12. Petitioner has stated he is not seeking removal of the voters from the voter registration rolls as part of his requested relief. Nonetheless, his challenge ultimately calls the validity of these voters’ registrations into question and inescapably sets the stage for their further disenfranchisement: removal from the voter rolls altogether.

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assertion that, because the numbers are missing from the voting registration records, the voters never supplied that information and were unlawfully registered—and, as explained, the burden to establish probable cause of an election violation lies with Petitioner. *See Clay Cnty. Gen. Election*, 45 N.C. App. at 570, 264 S.E.2d at 345-46 (citations omitted).

More to the point, it is Petitioner's challenge that is entirely speculative. In fact, Petitioner does not allege any of the votes were cast by a voter *ineligible* to vote in this election. Rather, Petitioner challenges the lawfulness of the voters' registration. And this distinction is not a minor one. To be *eligible* to vote, a voter must meet the requirements of Sections 1 and 2 of Article 6 of our Constitution. *See* N.C. Const. art. VI, § 1 ("Only a citizen of the United States who is 18 years of age and possessing the qualifications set out in this Article, shall be entitled to vote at any election by the people of the State[.]"); *id.*, § 2 (Any person who meets certain residency requirements, has not been convicted of a felony, and presents photo identification if voting in person "shall be entitled to vote at any election held in this State."). Any individual who is eligible to vote must then *register* to vote in order to exercise that right. *See id.*, § 3. *See also Bouvier*, 386 N.C. at 4 n.2, 900 S.E.2d at 843 n.2 ("Even if a prospective voter meets all eligibility requirements, he or she must also be 'legally registered' to vote." (citing N.C. Gen. Stat. §§ 163-54, -82.1(a))). And every voter who cast a vote in this election was eligible *and* registered to vote. Instead, Petitioner's challenge as to this category of votes is based entirely on allegedly missing pieces of information in the voters' registration records. No principle supports the disenfranchisement of tens of thousands of voters on the basis of an alleged clerical error—but this is exactly what Petitioner requests.

The trial court properly affirmed the Board's decision because Petitioner has not shown probable cause of an election violation. The majority's discussion of litigation pending in federal court challenging the Board's alleged noncompliance with HAVA's registration requirements is, frankly, wholly irrelevant here.¹³ HAVA, as all parties concede, does not apply to state elections. *See James*, 359 N.C. at 268, 607 S.E.2d at 643 ("HAVA, which does not apply to state and local elections, was initiated in the wake of allegations of irregularity and fraud in the 2000 presidential election." (emphasis added)). Thus, whatever the results of that litigation, on the merits of which we express no opinion, it does not bear on the issue before us: whether the superior court correctly

13. In fact, the majority's analysis throughout the opinion likely creates more issues of federal law than it solves.

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affirmed the Board's conclusion Petitioner has not established probable cause that allegedly missing information from voter registration records resulted in an election violation or created an irregularity which would change the outcome of the election. The answer is clear: Petitioner has not met this burden.

Further, each of the 60,273 votes Petitioner challenges were cast early or by absentee ballot. This concentrated selectivity only serves to highlight the attenuated nature of the challenge's merits. Had these voters waited until election day to cast their vote—rather than voting early or by absentee ballot—their vote would not be subject to Petitioner's challenge and, thus, not currently at risk of being discounted. The practical effect of Petitioner's challenge is to punish voters for voting early or absentee—voters who had no notice their ballot might go uncounted because of a purported discrepancy in their registration record. This cannot be the solution to Petitioner's problem.

Thus, Petitioner has not established that any one of the ballots he challenges was cast by an unlawfully registered voter. Therefore, Petitioner has not met his burden of establishing probable cause to believe a violation of election law has occurred. Consequently, the trial court did not err in affirming the Board on this ground.

V. Military Voters and Overseas Voters Should not be Disenfranchised by Petitioner where those Voters Complied with Statutes Designed to Promote Uniformity Amongst the States in Administering Elections.

Petitioner challenges the votes of 1,409 military and overseas voters in Guilford County, arguing a photo identification requirement put into place for domestic absentee voters applies to these voters as well. Petitioner's challenge fails because military and overseas voters are governed by an entirely separate statutory scheme from domestic absentee voters. The majority allows Petitioner's challenge, subverting the purpose of this statutory scheme, based on a misinterpretation of a single separate statutory provision. In so doing, the majority ignores the deliberate choice by the General Assembly to enact model legislation that guarantees military and overseas ballots are processed in the same way from state to state. This purpose is defeated by reading a separate statute's photo identification requirement into the process mandated for overseas and military ballots.

1. *Absentee Ballots in North Carolina*

The General Assembly has enacted two distinct processes for the submission of absentee ballots, each governed by a separate Article of

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Chapter 163 of our General Statutes. Article 20 provides procedures by which “any qualified voter” may obtain and submit an absentee ballot. N.C. Gen. Stat. § 163-226. In 2011, the General Assembly codified as Article 21A the Uniform Military and Overseas Voters Act (UMOVA), model legislation which provides procedures for overseas and military voters to do the same. This model legislation was originally drafted by the Uniform Law Commission for two primary purposes: (1) to extend to state elections the assistance and protections found in federal law; and (2) “to bring greater uniformity to the military and overseas voting processes.” UMOVA, Prefatory Note 2.

Military and overseas voters may choose to cast absentee ballots under either Article 21A or Article 20. N.C. Gen. Stat. § 163-258.7(f). Each provides a comprehensive set of procedures for distributing and processing absentee ballots. Among other provisions, Article 20 creates procedures for requesting and issuing absentee ballots (§§ 163.230.1-2), voting and transmitting ballots to the County Board (§ 163-231), and for the County Board to count those ballots (§ 163-234). Article 21A likewise creates procedures for applying for a military-overseas ballot (§ 163-258.7), transmission of those ballots to covered voters (§ 163-258.9), casting ballots (§ 163-258.10), receipt of ballots by local election offices (§ 163-258.12), and requirements for accepting and interpreting ballots (§ 163-258.17).

In 2019, the General Assembly amended Article 20 to require absentee ballots submitted under its provisions to be accompanied by a copy of the voter’s photo identification: “Each container-return envelope returned to the county board with application and voted ballots under this section shall be accompanied by a photocopy of identification described in G.S. 163-166.16(a) or an affidavit as described in G.S. 163-166.16(d)(1), (d)(2), or (d)(3).” N.C. Gen. Stat. § 163-230.1(f1); 2019 N.C. Sess. Laws 239. Petitioner argues this requirement applies to ballots submitted under Article 21A as well, and challenges 1,409 ballots submitted by military and overseas voters in Guilford County that were not accompanied by identification.¹⁴ However, Articles 20 and 21A are separate statutory schemes that create parallel processes for requesting, distributing, and accepting two different types of absentee ballots. Their separate enactment and the purpose of Article 21A—creating a

14. Petitioner filed protests challenging Article 21A voters in six counties. At the time of the protest, Guilford County had provided a list of such voters, which was included in the protest. Petitioner later filed lists of Article 21A voters in Durham, Forsyth, and Buncombe counties, but the Board declined to determine whether such supplementations were allowed because it held the protest was legally insufficient.

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streamlined, uniform absentee voting process for military and overseas voters—show the General Assembly did not intend the Article 20 photo identification provision to apply to Article 21A ballots.

2. *Incorporating Article 20's Identification Requirement would Defeat the Purpose of Article 21A.*

The General Assembly chose not to apply a photo identification requirement to military and overseas voters because such a requirement would undermine the first of two primary purposes of UMOVA and Article 21A: creating a uniform set of procedures by which all states process these ballots. Although Petitioner argues there was no rational basis to distinguish between domestic absentee ballots and those covered by Article 21A, the passage of UMOVA shows the General Assembly considers military and overseas voters in need of special protections.

The preface to the model legislation describes its purpose and gives insight into the General Assembly's goals in passing it. Military personnel have historically faced significant obstacles to voting: while they are registered at similar rates to the general population, they are half as likely to cast a vote. UMOVA, Prefatory Note 1. “[O]nly 25% of overseas and military voters who requested an absentee ballot in 2006 completed and returned one, compared to 85% of all voters who requested an absentee ballot. Meanwhile, more than one in five ballots cast by military service members were rejected.” *Id.*

Passage of this legislation indicates the General Assembly's interest in countering these problems. In order to do so, UMOVA seeks to “bring greater uniformity to the military and overseas voting processes” administered by the several states. *Id.* at 2. Maintaining that uniformity is key to accomplishing the stated goals of the legislation. “Without uniform state legislation, military and overseas voters will continue to confront a panoply of diverging voting requirements.” *Id.* “This lack of uniformity complicates any federal effort, such as the [The Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA)], to assist these voters to surmount the other major obstacles that they face.” *Id.*¹⁵ “Variations across states both complicate the procedures developed under the UOCAVA to help overseas and military voters, and make it difficult for consular officials, the U.S. military, and non-governmental voting assistance groups

15. UOCAVA provides protections for military and overseas voters in federal elections. UMOVA and Article 21A apply these protections to state elections.

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to give standard advice to these voters.” UMOVA therefore creates a uniform set of procedures for states to adopt as a whole to reduce confusion for military and overseas voters: the purpose of the act “can *only* be achieved through uniform state legislation.” *Id.* (emphasis added). The General Assembly chose to participate in achieving this common goal by enacting the model legislation as Article 21A.

Accordingly, individual states applying piecemeal changes to its process is directly at odds with the purpose of UMOVA. Requiring North Carolina residents to submit photo identification when residents of other UMOVA states are not so required creates the exact “lack of uniformity” the legislation is intended to eliminate. This philosophy is clearly noted in Article 21A itself: “In applying and construing this uniform act, consideration shall be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.” N.C. Gen. Stat. § 163-258.19.

In considering this need to promote uniformity, we cannot understand the identification requirement, added to Article 20 and limited by its own terms to that Article, as modifying Article 21A. If the goal of the legislation can *only* be achieved by uniformity with the other states, it defies reason to infer a change that destroys that uniformity.

3. *Articles 20 and 21A are Separate Statutory Schemes.*

In accordance with this goal, the General Assembly codified the procedures for military and overseas ballots separately from those for domestic absentee ballots. When the General Assembly modifies one statute and not another, we do not infer it intended the change to apply to both. “By enacting two separate statutes, the legislature clearly intended that two distinct standards be applied.” *Insulation Sys., Inc. v. Fisher*, 197 N.C. App. 386, 391, 678 S.E.2d 357, 360 (2009). Unless the General Assembly makes clear its intent to change multiple statutes, we read a modification as only applying to the indicated provision:

Ordinarily, the enactment of a law will not be held to have changed a statute that the legislature did not have under consideration at the time of enacting such law; and implied amendments cannot arise merely out of supposed legislative intent in no way expressed, however necessary or proper it may seem to be. An intent to amend a statute will not be imputed to the legislature unless such intention is manifestly clear from the context of the legislation; and an amendment by implication, or a modification of, or exception to, existing law by a later act, can occur only

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where the terms of a later statute are so repugnant to an earlier statute that they cannot stand together.

In re Halifax Paper Co., 259 N.C. 589, 594, 131 S.E.2d 441, 445 (1963) (quoting 82 C.J.S. Statutes, § 252, at 419-20 (1953)).

Articles 20 and 21A provide two exclusive processes for the distribution and collection of absentee ballots. This is clear from the General Assembly's codification of these processes in separate Articles, the distinct procedures contained in each, and the comprehensive nature of each set of procedures. A photo identification requirement for the submission of domestic absentee ballots is not "repugnant" to a policy of not requiring the same for military and overseas ballots. The two processes serve different purposes and their procedures reflect this.

There are significant differences between the two processes. Article 21A serves a smaller group of voters who have historically faced obstacles in voting and attempts to address their specific needs. Absentee ballots under Article 21A may be submitted electronically, whereas Article 20 ballots must be delivered physically. N.C. Gen. Stat. § 163-231(b). Absentee ballots under Article 20 must be authenticated by two witnesses or a notary, while those under Article 21A are authenticated by a signed declaration made under penalty of perjury. *Id.* §§ 163-231(a)(6), -258.13. The two have different submission deadlines—Article 20 ballots must be received by 7:30 p.m. on the day of the election, while an electronically transmitted Article 21A ballot must be submitted by 12:01 a.m. on the date of the election and received prior to the end of business on the business day prior to the date of canvass. *Id.* §§ 163-231(b)(2), -258.10, -258.12.

Articles 20 and 21A thus each set out a separate, comprehensive process for distributing and collecting absentee ballots for their respective voter groups. Petitioner argues because Article 20 "has many general provisions about absentee voting," all of its provisions apply to Article 21A ballots unless expressly disclaimed. However, the provisions identified by Petitioner include those governing who may vote in a partisan primary, criminal liability for certain acts, public records requirements, and the retention of applications for absentee ballots by the County Boards. These are provisions relating to the administration of the election, but they do not directly impact the process of an individual voter requesting and submitting an absentee ballot, which is Article 21A's entire remit.

When Article 20 procedures apply to Article 21A ballots, the General Assembly notes that specifically. For example, all physical ballots must be received by 7:30 p.m. on election day, and the Article 20 provision

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specifies this requirement applies to “[a]ll ballots submitted under the provisions of this Article *and Article 21a*.” *Id.* § 163-231(b)(1) (emphasis added). By contrast, Article 20’s photo identification requirement mandates: “Each container-return envelope returned to the county board with application and voted ballots *under this section* shall be accompanied by a photocopy of identification[.]” *Id.* § 163-230.1(f1) (emphasis added).¹⁶ Article 21A mandates instead that a voter swear under penalty of perjury “specific representations pertaining to the voter’s identity, eligibility to vote, status as a covered worker, and timely and proper completion of an overseas-military ballot.” *Id.* § 163-258.4(e). Further authentication “is not required for execution of a document under this Article.” *Id.* § 163-258.17(b).

The General Assembly placed the identification requirement in an entirely different Article governing separate procedures from Article 21A and specified this requirement applied only to ballots submitted “under this section.” A provision of Article 21A instructs us when interpreting it to consider “the need to promote uniformity of the law with respect to its subject matter among states that enact it.” *Id.* § 163-258.19. If this is insufficient to show the General Assembly did not intend the photo identification requirement be applied to military and overseas voters, it is difficult to understand how the General Assembly could be expected to demonstrate that intent.

4. *Potential Conflict with Federal Law*

The General Assembly may also have chosen to apply photo identification requirements to only domestic ballots to avoid a likely conflict with federal law. In 2017, Virginia’s legislature considered implementing a photo identification requirement for absentee ballots. The Director of the Federal Voting Assistance Program issued a letter advising the proposed bill was likely in conflict with 52 U.S.C. § 21083(b)(3)(C), which exempts UOCAVA voters (military and overseas voters participating in federal elections) from state photo identification requirements, explaining:

UOCAVA voters, particularly those stationed or residing overseas, face complexities in the voting process that in-person or State absentee voters do not face. The original intent of the FPCA was to allow UOCAVA voters to simultaneously register and request an absentee ballot. By

16. I note additionally that electronically submitted Article 21A ballots have no “container-return envelope” to accompany with a photocopy of identification.

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swearing to the oath on the form prescribed by FVAP, voters would meet minimum qualifications to vote in federal elections. Requiring additional identification or proof of eligibility, in addition to the information provided on the FPCA, adds to the burden UOCAVA voters face when attempting to vote in federal elections. The voter would be forced to locate documents and the equipment necessary to photocopy and submit those additional documents to their local election official, a condition difficult to achieve depending on their geographic location and available infrastructure.¹⁷

The photo identification law the Virginia legislature ultimately passed (which was vetoed by the Virginia Governor) included an exception for overseas, military, and disabled voters. Senate Bill 872 (2017 Va.). Two years later, in 2019, our General Assembly likewise considered and passed into law a requirement that certain absentee ballots be accompanied by photo identification. By choosing not to apply this requirement to Article 21A ballots, it both avoided this conflict with federal law and allowed Article 21A to continue to achieve its second primary purpose: “to extend to state elections the assistance and protections for military and overseas voters currently found in federal law.” UMOVA, Prefatory Note 2.

5. *Absentee Ballots are Excepted from Constitutional Identification Requirement.*

In 2018, Article VI of the North Carolina Constitution was amended to require those who vote in person to present photo identification. This was a legislatively referred constitutional amendment approved by ballot measure, by which the people approved the measure contained in Senate Bill 824. 2018 N.C. Sess. Laws 144. This amendment applied a photo identification requirement only to in-person voting and did not affect absentee voters. This limitation indicates the General Assembly, shortly before it amended Article 20 in 2019, was not specifically concerned with a lack of photo identification from military and overseas voters.

6. *8 N.C. Admin Code § 17.0109(d)*

After the General Assembly amended Article 20 to require photo identification, the Board promulgated a Rule stating Article 21A voters were “not required to submit a photocopy of acceptable photo identification.”

17. Letter to Commissioner Cortes, Va. Dep’t of Election, 6 Feb. 2017; available at <https://perma.cc/2BSZ-VUJ4>.

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8 N.C. Admin Code § 17.0109(d). This Rule was re-adopted following the lifting of an injunction against the photo identification law, first as a temporary rule on 1 August 2023 and then as a permanent rule on 1 April 2024.

Petitioner argues this Rule: (1) is at odds with the statutes governing absentee ballots and (2) reflects a policy decision the General Assembly may not delegate to an administrative agency. *See Adams v. N.C. Dep't of Nat. & Econ. Res.*, 295 N.C. 683, 697-98, 249 S.E.2d 402, 411 (1978). I note Petitioner did not object to this Rule prior to the election, either during the open rulemaking process or through the judiciary.

As discussed above, this Rule does not conflict with the governing statutes, which do not require Article 21A voters provide photo identification. The Board was within its authority to issue this Rule: the General Assembly has directed the Board to “develop standardized absentee-voting materials, including . . . authentication materials and voting instructions” for Article 21A voters and mandated it “to the extent reasonably possible, shall do so in coordination with other states.” N.C. Gen. Stat. § 163-258.4(d).

Voters who participated in this election were entitled to rely on the guidance of the Board. Even if Article 20 imposes a photo identification requirement on Article 21A voters, those voters submitted their ballots in accordance with all the rules and procedures as they understood them at the time. Assuming the Board made a mistake in communicating those requirements, rejecting these ballots renders all military and overseas voters who cast their ballot in Guilford County disenfranchised, through no fault of their own. It would have been effectively impossible for these citizens, who were qualified to vote and properly registered, to cast a “valid” vote because the proper procedures were not available to them.

7. *N.C. Gen. Stat. § 163-239*

The majority’s decision to require Guilford County’s military and overseas voters to cure their ballots’ alleged deficiencies within fifteen days of mailing of notice or be disenfranchised rests entirely upon its interpretation of the final subsection of Article 20, which provides “Except as otherwise provided therein, Article 21A of this Chapter shall not apply to or modify the provisions of this Article.” N.C. Gen. Stat. § 163-239. I disagree that a provision limiting the effect of Article 21A on Article 20 procedures should instead be interpreted to mean Article 20 controls Article 21A procedures.

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Even if this provision places certain additional Article 20 requirements on Article 21A ballots, the majority ignores the unambiguous text of the specific statute in question, which applies a photo identification requirement only to ballots submitted “under this section.” *Id.* § 163-230.1(f1). It also ignores the clear purpose of Article 21A and violates its mandate that “[i]n applying and construing this uniform act, consideration shall be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.” *Id.* § 163-258.19.

The majority’s decision to allow Petitioner’s challenge frustrates legislative intent. The General Assembly recognized military and overseas voters as poorly served by existing absentee voting procedures and enacted specific protections for these voters. Requiring photo identification from them puts North Carolina out of step with other states despite the statute’s stated goal of uniformity. Requiring the challenged voters to send proof of identification or have their votes thrown away disenfranchises voters in violation of the General Assembly’s deliberate enactment of protections for them.

VI. Children of Military and Overseas Families Cannot be Unilaterally Disenfranchised.

Petitioner challenges the votes of 267 citizens living overseas—including the children of military servicemembers and other overseas families—who are domiciled in North Carolina while they reside somewhere else (Inherited Residents).¹⁸ Even if the number of voters with inherited residence is sufficient to impact the outcome of this election, Petitioner’s challenge fails on the merits.¹⁹

Article VI of the North Carolina Constitution provides “Any person who has resided in the State of North Carolina for one year and in the precinct, ward, or other election district for 30 days next preceding an election, and possesses the other qualifications set out in

18. Petitioner alleges the number of relevant voters in this category may be 405 or 516 or more, depending on evidence he does not have and that is not in the Record before us.

19. A protest should be dismissed where “there is not substantial evidence of any violation, irregularity, or misconduct sufficient to cast doubt on the results of the election.” N.C. Gen. Stat. § 163-182.10(d)(2)(c). *See also Appeal of Ramseur*, 120 N.C. App. 521, 525, 463 S.E.2d 254, 256 (1995) (“North Carolina law on this issue is well settled. An election or referendum result will not be disturbed for irregularities absent a showing that the irregularities are sufficient to alter the result.” (citations omitted)). The margin between the candidates here is 734 votes—well above even the highest tally Petitioner asserts.

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this Article, shall be entitled to vote at any election held in this State.” N.C. Const. art. VI, § 2(1). Petitioner mistakenly equates “resided” with “lived” despite consistent, clear precedent from the North Carolina Supreme Court. That Court has repeatedly held “without variation that residence within the purview of this constitutional provision [Article VI] is synonymous with domicile[.]” *Owens*, 228 N.C. at 708, 47 S.E.2d at 15; *see also Hall v. Wake Cnty. Bd. of Elections*, 280 N.C. 600, 605, 187 S.E.2d 52, 55 (1972) (“Residence as used in Article VI of the North Carolina Constitution of 1970 continues to mean domicile.”); *Farnsworth v. Jones*, 114 N.C. App. 182, 186, 441 S.E.2d 597, 600 (1994) (“The term ‘residence,’ as used in our State’s election laws, is synonymous with legal domicile.” (citations omitted)).

Precisely speaking, *residence* and *domicile* are not convertible terms. A person may have his residence in one place and his domicile in another. Residence simply indicates a person’s actual place of abode, whether permanent or temporary. Domicile denotes one’s permanent, established home as distinguished from a temporary, although actual, place of residence.

Farnsworth, 114 N.C. App. at 186, 441 S.E.2d at 600 (quoting *Hall*, 280 N.C. at 605, 187 S.E.2d at 55 (emphasis in original)). Thus, “[i]t is quite clear that residence, when used in election law, means domicile.” *Hall*, 280 N.C. at 606, 187 S.E.2d at 55.

North Carolina law recognizes three types of domicile: “domicile of origin, domicile of choice, and domicile by operation of law.” *Thayer v. Thayer*, 187 N.C. 573, 574, 122 S.E.2d 307, 308 (1924). While a person who has never lived in North Carolina cannot make North Carolina his domicile of choice, North Carolina may nevertheless be their domicile of origin or by operation of law.

Bouvier does not change this. In *Bouvier v. Porter*, 386 N.C. 1, 900 S.E.2d 838 (2024), our Supreme Court considered whether attorneys have absolute immunity for allegedly defamatory statements made about voters they claimed were ineligible to vote in the 2016 North Carolina Gubernatorial Election. In a footnote accompanying a general paragraph about election protests, the Court wrote that certain groups of individuals are “categorically ineligible to vote,” including “noncitizens”. *Id.* at 4 n.2, 900 S.E.2d at 843 n.2. This statement is not the smoking gun Petitioner makes it out to be. As the above discussion makes clear, residence for purposes of elections in this State means domicile. Nowhere in *Bouvier* does the Court address domicile at all. Reading that

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opinion to wholly change our longstanding precedent would be radical, to say the least.

Contrary to Petitioner’s assertions, it is not the Board that has permitted Inherited Residents to vote in our elections; rather, it is the General Assembly who enacted the statute that plainly allows such individuals to vote in North Carolina. UMOVA provides multiple methods for “covered voters” to register to vote. *See* N.C. Gen. Stat. § 163-258.6(a)-(c). Under this statute, a “covered voter” includes

[a]n overseas voter who was born outside the United States, is not described in sub-subdivision c. or d. of this subdivision, and, *except for a State residency requirement*, otherwise satisfies this State’s voter eligibility requirements, if:

1. The last place where a parent or legal guardian of the voter was, or under this Article would have been, eligible to vote before leaving the United States is within this State; and
2. The voter has not previously registered to vote in any other state.

N.C. Gen. Stat. § 163-258.2(1)(e).

“As a general rule the domicile of every person at his birth is the domicile of the person on whom he is legally dependent[.]” *Thayer*, 187 N.C. at 574, 122 S.E. at 308. This concept is well established under both North Carolina and federal law. *See In re Ellis’ Will*, 187 N.C. 840, 843, 123 S.E. 82, 84 (1924) (quoting *Thayer*, 187 N.C. at 574, 122 S.E. at 308); *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 48, 109 S. Ct. 1597, 1608, 104 L. Ed. 2d 29 (1989). “Once an individual acquires a domicile, it is presumed to continue until a new domicile is established.” *Farnsworth*, 114 N.C. App. at 187, 441 S.E.2d at 600. Petitioner cites no authority—and I know of none—in support of his bare assertion that a child’s domicile of origin expires when they turn eighteen. Not only is this claim unsupported, it is antithetical to our longstanding, consistent understanding of domicile.

Petitioner asserts domicile of origin is irrelevant to this analysis because “infants can’t vote.” Although reaching the age of majority has certain legal implications, in practical terms there is nothing magical about turning eighteen. A child living with his parents at seventeen years of age is not suddenly ousted on his birthday to go out and choose his own domicile instantaneously. Indeed, many eighteen-year-olds and

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young adults continue to live with their parents for simple, mundane reasons such as the fact they have not yet completed high school or may be otherwise dependent upon their parents.²⁰ To assume a person's domicile of origin vanishes at eighteen and wherever they happen to live at that time is their domicile of choice is simply out of touch with reality.

Moreover, there is ample caselaw stating a change in domicile must be affirmatively shown in order to have effect. *See Holyfield*, 490 U.S. at 48, 109 S. Ct. at 1608 (“One acquires a ‘domicile of origin’ at birth, and that domicile continues until a new one (a ‘domicile of choice’) is acquired.” (citations omitted)). Indeed, “To effect a change of domicile there must be (1) an actual abandonment of the first domicile, accompanied by the intention not to return to it and (2) the acquisition of a new domicile by actual residence at another place, coupled with the intention of making the last acquired residence a permanent home.” *Hall*, 280 N.C. at 608-09, 187 S.E.2d at 57 (citation omitted).

Further, “[d]omicile is *necessarily a matter that must be determined on an individual basis; there is no appropriate way to make a group determination.*” *Lloyd v. Babb*, 296 N.C. 416, 428-29, 251 S.E.2d 843, 852 (1979). And, importantly, “[w]here a change of domicile is alleged, the burden of proving it rests upon the person making the allegation.” *Reynolds v. Lloyd Cotton Mills*, 177 N.C. 412, 421, 99 S.E.2d 240, 244 (1919) (quoting *Mitchell v. United States*, 88 U.S. 350, 353, 22 L. Ed. 584 (1874)). Petitioner has made no showing whatsoever that any Inherited Resident voter was not domiciled in North Carolina at the time of the election.

Those who did not obtain domicile by birth may still be domiciled in North Carolina by operation of law. “A domicile by operation of law is one which the law determines or attributes to a person without regard to his intention or the place where he is actually living.” *Thayer*, 187 N.C. at 574, 122 S.E.2d at 308. Indeed, N.C. Gen. Stat. § 163-57 defines “residence” in various contexts for the purposes of voting and registration.

The majority makes the unfounded assertion these voters “have never indicated they intend to live in this state[.]” This willfully misses the point. These voters are simply not required to make any such

20. And, in fact, our statutes reflect this. For example, in the context of child support, our statutes provide child support payments may continue after a child reaches the age of eighteen if, for one, “the child is in primary or secondary school when the child reaches age 18, [then] support payments shall continue until the child graduates, otherwise ceases to attend school on a regular basis, fails to make satisfactory academic progress toward graduation, or reaches age 20” subject to the court’s discretion. N.C. Gen. Stat. § 50-13.4(c)(2).

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indication. The majority effectively invents a new requirement for this group to fit its own agenda and gives them no opportunity to satisfy it. The voters in this group checked a box on a card indicating “I am a U.S. citizen living outside the country, and I have never lived in the United States.” No one, including Petitioner or the majority, has any idea whatsoever how many of these voters would have selected an option indicating they also intend to live in North Carolina had it been presented.

Further, the majority’s perspective entirely upends our longstanding precedent regarding domicile. Again, although an adult may not inherit domicile, a child clearly does. *Thayer*, 187 N.C. at 574, 122 S.E. at 308. And a child *retains* that domicile until they affirmatively establish a new one. *Holyfield*, 490 U.S. at 48, 109 S. Ct. at 1608. The burden to prove a change in domicile is on the person making the allegation. *Reynolds*, 177 N.C. at 421, 99 S.E.2d at 244. The “totality of the circumstances” the majority points to is essentially the fact that these voters live and have lived somewhere else—which entirely erases the distinction between domicile and residence. Our law is clear: merely living somewhere is not enough to establish domicile. *See Farnsworth*, 114 N.C. App. at 186, 441 S.E.2d at 600 (citation omitted). Parsing the word “return” as the majority does is nonsensical and a transparent attempt to avoid the conclusion our law clearly dictates.

More to the point, the General Assembly enacted legislation that, by its plain language, guarantees the right of children and dependents of North Carolinians living abroad to vote in our elections. Section 163-258.2(1)(e) expressly confirms a person “who was born outside the United States,” is not covered by another provision, and “*except for a State residency requirement*, otherwise satisfies this State’s voter eligibility requirements” is eligible to vote if their parent or legal guardian was eligible to vote in North Carolina before leaving the United States and the individual has not previously registered to vote in any other state. N.C. Gen. Stat. § 163-258.2(1)(e). Further, the General Assembly enacted legislation not only establishing domicile by operation of law, but also assigning a specific residence for these particular voters: “In registering to vote, an overseas voter who is eligible to vote in this State shall use and shall be assigned to the precinct of the address of the last place of residence of the voter in this State, or, *in the case of a voter described by G.S. 163-258.2(1)(e)*, the address of the last place of residence in this State of the parent or legal guardian of the voter.” *Id.* § 163-258.5 (emphasis added).

Petitioner’s constitutional challenges to this statute are similarly unpersuasive. Our Supreme Court has only recently affirmed “[i]n

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resolving constitutional challenges to a statute, this Court ‘begin[s] with a presumption that the laws duly enacted by the General Assembly are valid.’ ” *Fearrington v. City of Greenville*, 386 N.C. 38, 54, 900 S.E.2d 851, 867 (2024) (quoting *Hart v. State*, 368 N.C. 122, 126, 774 S.E.2d 281, 284 (2015)). While our courts “ ‘have the power, and it is their duty in proper cases, to declare an act of the General Assembly unconstitutional’ ”, it “ ‘must be plainly and clearly the case.’ ” *Id.* (quoting *City of Asheville v. State*, 369 N.C. 80, 87, 794 S.E.2d 759, 766 (2016)). Petitioner argues the canon of constitutional avoidance applies here to read Section 163-258.2(1)(e) to exempt overseas voters only from a durational residency requirement rather than a bona fide residency requirement. He cites *Lloyd v. Babb*, for the proposition that North Carolina has had and continues to have a bona fide residency requirement. But to read the statute as Petitioner suggests is simply too implausible and contrary to the text to be permissible. *See Jennings v. Rodriguez*, 583 U.S. 281, 286, 138 S. Ct. 830, 836 (2018) (determining the lower court had adopted “implausible constructions” of the provisions at issue, noting “a court relying on that canon [of constitutional avoidance] still must *interpret* the statute, not rewrite it” (emphasis in original)). Since the General Assembly enacted UMOVA, a “State residency requirement” has only been understood to mean any residency prerequisite to voting.

As Petitioner recognizes, the United States Supreme Court case addressing a residency requirement, *Dunn v. Blumstein*, 405 U.S. 330, 92 S. Ct. 995, 31 L. Ed. 2d 274 (1972), by its own terms exclusively addressed durational residency requirements—not bona fide residency requirements. *Id.* at 343-44, 92 S. Ct. at 1003-04. That case is, therefore, not particularly relevant here, and any proposed “corollary” principles are mere inferences at best. And, in fact, *Dunn* held states’ durational residency requirements to vote are invalid. *Id.* at 360, 92 S. Ct. at 1012. Analyzing and applying *Dunn*, our Supreme Court’s opinion in *Lloyd* at a minimum called into question North Carolina’s residency requirement. Although *Lloyd* noted the *Dunn* court drew a “careful distinction” between durational and bona fide residency requirements, the Court nevertheless recognized the State’s right to impose bona fide residency requirements only if they are “[a]ppropriately defined and [u]niformly applied[.]” *Lloyd*, 296 N.C. at 439-40, 251 S.E.2d at 858-59. Thus, it is unclear what meaning, if any, is to be given to the clause stating “[a]ny person who has resided in the State of North Carolina for one year . . . shall be entitled to vote at any election held in this State.” N.C. Const. art. VI, § 2(1). The General Assembly, therefore, was entitled to deem Inherited Residents as meeting a bona fide residency requirement by statute.

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As part of UMOVA, this statute also addresses significant issues regarding uniformity to alleviate some of the barriers to voting for overseas citizens. Indeed, as of this writing, fifteen other states have adopted UMOVA,²¹ including identical or nearly-identical provisions defining their own Inherited Residents as “covered voters”. *E.g.*, S.C. Code Ann. § 7-15-610(5)(e) (2023); Va. Code Ann. § 24.2-452(1)(e) (2023); Ky. Rev. Stat. Ann. § 117A.010(1)(e) (2023).

Fundamentally, Inherited Residents are United States citizens entitled to vote somewhere. *See* U.S. Const. art. I, § 2; *Yick Wo v. Hopkins*, 118 U.S. 356, 370, 6 S. Ct. 1064, 1071, 30 L. Ed. 220 (1886) (“Though not regarded as a strictly natural right, but as a privilege merely conceded by society, according to its will, under certain conditions, nevertheless [voting] is regarded as a fundamental political right, because preservative of all rights.”). Based on the plain language of the statute at issue here, this group would not be eligible to vote anywhere *except* North Carolina. The first requirement under this subsection is that the last place the individual’s parent or legal guardian was or would have been eligible to vote is North Carolina—i.e., the person’s domicile of origin is North Carolina. Second, the individual must not have previously registered to vote elsewhere. N.C. Gen. Stat. § 163-258.2(1)(e). Applying both provisions, no person under this Section would be eligible to vote in any other state. Thus, deeming them ineligible to vote in North Carolina disenfranchises them entirely.²² This cannot be the case.

The majority makes short shrift of this issue, concluding our statute defining “residency,” N.C. Gen. Stat. § 163-57, automatically disqualifies

21. *Military and Overseas Voters Act*, UNIFORM L. COMM’N, <https://www.uniformlaws.org/committees/community-home?CommunityKey=6acb3a89-34a9-4df0-a4bc-42f1b35581d8> (last visited Mar. 31, 2025).

22. The majority’s line-drawing between state and federal North Carolina elections makes no practical sense. It is the states that administer federal elections. U.S. Const. art. I, § 4, cl. 1 (“The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof[.]”). Further, the President is not chosen by popular vote but by *electors* who are selected based on the vote totals within each state. *See* U.S. Const. amend. XII (establishing the electoral college). Thus, in order to count even exclusively for federal elections, a vote must be counted in a particular state. Moreover, the majority fails to reckon with how its holding would be implemented. Will the Board now be responsible for sending these voters special ballots with only North Carolina federal races? Will it send the ballots in full with instructions these voters cannot vote in state-level races? What of an Inherited Resident who signs an affidavit stating they intend to live in North Carolina—could they vote in future state elections? Because of the majority’s cavalier approach to this mass disenfranchisement, it has not seriously addressed any of these questions. The confusion that will ensue is both predictable and avoidable.

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this group from voting. But the statute under which this group voted *expressly exempts them from a state residency requirement*—a fact the majority notes but does not contend with. N.C. Gen. Stat. § 163-258.2(1)(e). Given the United States Supreme Court’s opinion in *Dunn* invalidating durational residency requirements, like that in our Constitution, the majority could—at a minimum—explain why it believes one of our statutes implicitly invalidates another to such grave effect.

In an effort to justify disenfranchising Inherited Residents, the majority doubles down and likewise seeks to disenfranchise their parents by asserting—with absolutely no evidence—their parents are also not domiciled in North Carolina. That is not the law. There is simply no precedent setting a time limit on domicile, which is precisely what the majority invents here. The majority’s casual dismissal of the law creates alarming consequences: potentially disenfranchising individuals, including military and foreign service members who spend their careers abroad, along with their children.

Petitioner expresses indignation at the notion that an individual who has never resided in North Carolina may vote in our elections—yet that is precisely and expressly what the General Assembly enacted. It is unquestionably clear the statute at issue identifies persons not born in the United States and who cannot satisfy a residency requirement anywhere but North Carolina, and it provides a mechanism for them to register and vote. To adopt Petitioner’s interpretation would require reading this provision out of context and in willful disregard of well-established precedent. I decline to do so.

Thus, Petitioner has not met his burden to show there is probable cause to believe any violation of law, irregularity, or misconduct occurred that would cast doubt upon the outcome of this election.

VII. Equal Protection

Each of Petitioner’s challenges additionally implicates constitutional Equal Protection concerns. His challenge to voters with allegedly incomplete registration addresses only those who cast their votes early or by absentee ballot, and not voters whose records likewise did not contain validated identification numbers but cast their votes in person on election day. His challenge to military and overseas voters is limited to those ballots cast in Guilford County. And his challenge to Inherited Residents attempts to deny a category of citizens the right to vote based on where they live. Each of these voters is at risk of being disenfranchised while similarly-situated voters are not, simply because of the county in which they reside, when they cast their ballot, or their physical location.

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“Once the legal right to vote has been established, equal protection requires that the right be administered equally.” *Blankenship v. Bartlett*, 363 N.C. 518, 525, 681 S.E.2d 759, 765 (2009). The type of targeted disenfranchisement represented by these challenges not only engenders distrust in our electoral processes but also discourages participation in voting—a fundamental underpinning of our democratic system. *See Northampton Cnty. Drainage Dist. v. Bailey*, 326 N.C. 742, 747, 392 S.E.2d 352, 356 (1990) (“The right to vote on equal terms is a fundamental right.”); *Holmes v. Moore*, 384 N.C. 426, 464, 886 S.E.2d 120, 147 (2023) (Morgan, J., dissenting) (explaining that North Carolina laws authorizing early voting, out-of-precinct voting, and same-day registration have increased access to voting and “dramatically increased voter turnout, especially of Black voters.” (citation omitted)).

The practical effect of Petitioner’s challenge is to punish voters based on irrational distinctions. His challenge to early and absentee ballots from voters with allegedly incomplete registration ignores the population of election-day voters whose records likewise did not include validated identification numbers, despite both these groups of voters being both eligible and registered to vote. His challenge to only Guilford County’s overseas and military absentee ballots discriminates by residence: the majority’s remedy applies to these voters but similarly-situated voters in North Carolina’s 99 other counties who submitted absentee ballots under Article 21A will be unaffected.²³ And his challenge to Inherited Residents leaves eligible voters with no venue in which to cast their vote simply because of where they live.

Petitioner argues this unequal distribution of challenges results in part from the County Boards failing to provide data to allow him to pursue these challenges. For example, he asserts only six counties confirmed their County Board had accepted overseas ballots without requiring photo identification, and only Guilford County provided a list of such ballots before the challenge deadline, while Durham, Forsyth, and Buncombe provided this data after the deadline.

This difficulty in performing effective discovery under the tight timelines required in an election challenge is exactly why challenges to

23. While these distinctions are irrational from a constitutional standpoint, we note that Guilford, Buncombe, Durham, and Forsyth, the counties in which Petitioner attempted to challenge military and overseas ballots, are each counties which he lost by significant margins. Votes cast by absentee ballots likewise favored his opponent more than those cast in person on election day. *See* N.C. State Bd. of Elections Election Results Dashboard, available at <https://www.ncsbe.gov/results-data/election-results>.

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election rules after the fact are disfavored. There was ample time to challenge the Board's interpretation of photo identification requirements as applied to Article 21A voters prior to the election, which would not have risked disenfranchising a selection of similarly-situated voters while leaving the votes of others unaffected. Likewise, Petitioner could have challenged voter registrations or our treatment of Inherited Residents prior to election day. A post-election challenge to the rules can be difficult or impossible to resolve fairly while also providing a timely resolution to the election. "We decline to grant [a party] extraordinary relief when they are responsible for their own predicament." *Kennedy v. N.C. State Bd. of Elections*, 386 N.C. 620, 622, 905 S.E.2d 55, 57 (2024).

While Petitioner argues that as a private actor he cannot violate anyone's rights under Equal Protection, his challenges petition the Board, a state actor, to disenfranchise a selection of similarly-situated voters based only on their county of residence, physical location, or decision to cast their vote early or via absentee ballot. The Board should not be so compelled to violate the United States Constitution.

VIII. Changing the Rules of the Election and Remanding This Case Will Disenfranchise North Carolina Voters.

The majority makes much of the fact eligibility to vote is determined as of election day. Despite professing this basic tenet, the majority changes the rules of the 2024 election—and only for one race—months after election day. It does so even though there is no actual showing or forecast that any challenged voter was not registered or otherwise unqualified to vote. Worse still, with no supporting authority, the majority invents out of whole cloth an illusory 15-day "cure period" that is no remedy at all. This is truly legislating from the bench.

Petitioner's challenge and the majority's decision are the latest salvo in a continued attack on early and absentee voting, methods notably favored by disabled and minority voters. The invented cure period does not save the majority's decision from being what it is: the disenfranchisement of thousands of voters in categories selected by Petitioner in order that he may have a second chance at winning his election. Each affected voter, in order that their vote be counted, must now receive effective notice, choose to cure their ballot or registration, determine which actions are necessary, and take those actions, all within fifteen business days of the mailing of notice from their County Board. This will prevent many of these voters from exercising their right to vote, but the reality is particularly stark for overseas voters, including servicemembers, who

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are at the mercy of international post in both receiving notice and timely curing their ballots.

The majority imposes this remedy without thought or care for its impact on the people its decision truly impacts: the voters. What of voters who have died since election day? Their votes should count. What of servicemembers abroad sacrificing their lives and safety in remote locations unable to jump through the judicial hoops the majority now puts in their way? Their votes should count. What of overseas voters who only learned of this process second-hand due to lack of any service? Their votes should count. What of voters in every county of this State who may have moved, have not learned of this proceeding, or are sick, immobile, elderly, transient, away on extended business travel, traveling on school breaks with their children, or are simply overwhelmed by the unrelenting attack on their voting rights? Their votes should count. They did everything they were required to do. Their votes were accepted as valid votes on election day and through the canvassing process. Make no mistake: should the majority's decision be implemented, the impact will be to disenfranchise North Carolina voters even though they were eligible to vote on election day.

Giving Petitioner a second bite at the apple serves no legitimate purpose. Indeed, the fact the majority remands this case for a "cure period" only proves the point: there is no showing these voters were ineligible to vote. The majority skips right over the quasi-judicial evidentiary hearing process. By doing so, the majority erroneously places the burden of proof in this election protest on the individual voters and not the protestor.

At best, the majority's decision and completely unworkable remedy will lead to even more litigation—both state and federal. Tying this matter up in interminable litigation with no end in sight only results in delay, confusion, and sowing further doubt that every valid vote will be counted. This is exactly why the *Purcell* principle—largely ignored by the majority—exists.

The majority approach runs directly counter to the purpose of election protests. The election protest process seeks "to balance the public's interest in achieving accurate election results with the need to finalize those results in a short period of time." *Bouvier*, 386 N.C. at 4, 900 S.E.2d at 843. "In all election protests, however, swiftness is the order of the day. County boards of elections must expeditiously resolve election protests to facilitate appeals and the timely certification of elections. Accordingly, election protests proceed rapidly, and the process does not

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lend itself to exhaustive discovery and absolute precision.” *Id.* at 16, 900 S.E.2d at 850 (citations omitted).²⁴

Here, the public’s interest in accurate election results in a timely manner is not served by remanding this matter. To the contrary, it leads to only further delay and inevitably inaccurate election results due to undercounting valid votes. There is no probable cause to believe, even if Petitioner properly served his protests, that in any of the protests before us there was any violation of law, irregularity, or misconduct in the administration of the 2024 General Election for Associate Justice of the North Carolina Supreme Court. Thus, the Board did not err in dismissing Petitioner’s protests. Therefore, the Superior Court properly affirmed the Board’s Final Decision in each of its Orders. Consequently, the Superior Court’s Orders should be affirmed. Accordingly, for the foregoing reasons, I dissent from the majority opinion.

24. Indeed, the necessity of a swift election protest procedure was, in part, the rationale for our Supreme Court granting absolute privilege immunity to unlicensed out-of-state lawyers ghost-writing election protests which defamed North Carolina voters. *See id.* at 17, 900 S.E.2d at 851.

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