376 N.C.—No. 3 Pages 558-679

BOARD OF LAW EXAMINERS

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

APRIL 12, 2021

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OF
NORTH CAROLINA

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SUPREME COURT OF NORTH CAROLINA

CASES REPORTED

FILED 5 FEBRUARY 2021

ORDERS

PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

HEADNOTE INDEX

CONSTITUTIONAL LAW

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TERMINATION OF PARENTAL RIGHTS

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Grounds for termination—dependency—sufficiency of findings—The trial court's findings were insufficient to support its conclusion that grounds existed to terminate respondent-father's parental rights to his child based on dependency where the sole finding related to dependency—stating that there was no proper plan of care for the child during an incident in which respondent experienced a medical issue—was not supported by the evidence. There were no findings, nor evidence presented, that respondent's health prevented him from providing proper care or supervision of the child. **In re C.L.H., 614.**

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Grounds for termination—neglect—sufficiency of findings—The trial court's findings were insufficient to support its conclusion that grounds existed to terminate respondent-father's parental rights to his child based on neglect where the sole finding—stating that the child was previously neglected due to lack of care when respondent experienced a medical issue—was not supported by the evidence. Further, the findings failed to address whether the child would be neglected in the future if returned to respondent's care. **In re C.L.H., 614.**

Grounds for termination—willful failure to pay child support—sufficiency of findings—In a termination of parental rights case, the trial court's findings were insufficient to support termination on the grounds of willful failure to pay child support where they failed to address whether an enforceable child support order was in place within one year prior to the termination petition being filed. The termination order was vacated and remanded for the trial court to exercise its discretion regarding the need for new evidence and to enter an order with findings and conclusions regarding the existence of a valid support order. **In re C.L.H., 614.**

Guardian ad litem participation in hearing—appointed counsel's duties—N.C.G.S. § 7B-1101.1(d)—Respondent mother received a fundamentally fair hearing in a termination of parental rights case even though her guardian ad litem cross-examined witnesses and made arguments to the court (which was at the express direction of, or in apparent coordination with, respondent's appointed counsel). There was no violation of N.C.G.S. § 7B-1101.1(d) where counsel's actions representing respondent throughout the proceeding did not demonstrate an abdication of his responsibilities and where the clear statutory language required only that the parent's counsel and guardian ad litem not be the same person and did not constitute a prohibition against the guardian ad litem from assisting counsel as he did here. **In re J.E.B., 629.**

No-merit brief—neglect—lifetime incarceration of father—In a termination of parental rights case where respondent-father was incarcerated for life without the possibility of parole for murder and for shooting a child, counsel for respondent filed a no-merit brief pursuant to Appellate Rule 3.1(e) which conceded that counsel could find no meritorious argument to challenge termination on the ground of neglect or the conclusion that termination was in the best interests of the child. After an independent review of the entire record, the Supreme Court affirmed the trial court's termination of respondent's parental rights. **In re S.F.D., 643.**

SCHEDULE FOR HEARING APPEALS DURING 2021

NORTH CAROLINA SUPREME COURT

Appeals will be called for hearing on the following dates, which are subject to change.

January 11, 12, 13, 14
February 15, 16, 17, 18
March 22, 23, 24, 25
May 3, 4, 5, 6
August 30, 31
September 1, 2
October 4, 5, 6, 7
November 8, 9, 10

THE COMMITTEE TO ELECT DAN FOREST, A POLITICAL COMMITTEE
v.
EMPLOYEES POLITICAL ACTION COMMITTEE (EMPAC),
A POLITICAL COMMITTEE

No. 231A18

Filed 5 February 2021

Constitutional Law—North Carolina—standing—no "injury in fact" requirement—legal right arising from statute

In a case of first impression, the Supreme Court held that, unlike the federal constitution, the North Carolina Constitution does not impose an "injury in fact" requirement for standing, and therefore a committee to elect a political candidate had standing to seek statutory damages against a political action committee for running a television advertisement that allegedly violated a "stand by your ad" law, even though the candidate won his election. The Court further clarified that where a statute (such as the "stand by your ad" law) expressly confers a cause of action to a class of persons, entitling them to sue for infringement of a legal right arising from the statute, a plaintiff has standing to bring that cause of action so long as he or she belongs to that designated class of persons.

Chief Justice NEWBY concurring in the result by separate opinion.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 260 N.C. App. 1 (2018), reversing an order of summary judgment entered on 15 February 2017 by Judge Allen Baddour in Superior Court, Wake County. On 5 December 2018, the Supreme Court allowed defendant's petition for discretionary review as to additional issues. Heard in the Supreme Court on 4 November 2019.

Walker Law Firm, PLLC, by David Steven Walker, II, for plaintiff.

Stevens Martin Vaughn & Tadych, by C. Amanda Martin and Michael J. Tadych, for defendant.

HUDSON, Justice.

¶ 1 At issue here is a question of first impression for our Court: whether the North Carolina Constitution limits the jurisdiction of our courts in the same manner as the standing requirements Article III imposes

on federal courts, including the requirement that the complaining party must show she has suffered "injury in fact," even where an Act of the North Carolina General Assembly expressly confers standing to sue on a party, as it did in N.C.G.S. § 163-278.39A(f) (2011) (now repealed). We hold that it does not, and we affirm the decision of the Court of Appeals.[1]

I. Factual Background and Procedural History

¶ 2 In 2012, Linda Coleman and Dan Forest were, respectively, the Democratic and Republican candidates for Lieutenant Governor of North Carolina in the general election. The Employees Political Action Committee ("EMPAC" or "defendant"), a political action committee for the State Employees Association of North Carolina (SEANC), ran television advertisements supporting Ms. Coleman. According to plaintiff's complaint, the original version of the advertisement placed by EMPAC included a photograph of an individual that was approximately one-eighth the height of the full advertisement and, at any rate, was not a full-screen picture as then required by law. Furthermore, the individual in the picture, Dana Cope, was neither the Chief Executive Officer nor the treasurer of EMPAC as required by then-existing law.

¶ 3 After discovering the ad, the Committee to Elect Dan Forest (hereinafter, "plaintiff" or "the Committee") sent a notice and letter to the North Carolina State Board of Elections and EMPAC regarding the size of the picture. The notice did not mention that the wrong individual was pictured. EMPAC subsequently removed the advertisement and replaced it with one including a full-screen picture. The full-screen picture in the second advertisement was also of Mr. Cope, and therefore also failed to comply fully with disclosure requirements.

¶ 4 Mr. Forest ultimately won the 2012 election for Lieutenant Governor. Thereafter, on 9 March 2016, his Committee filed a complaint in the Superior Court of Wake County against EMPAC, alleging violations of N.C.G.S. § 163-278.39A.

¶ 5 In 1999, the North Carolina General Assembly enacted N.C. Session Law 1999-453, codified at N.C.G.S. § 163-278.38Z *et seq.* (2011) (hereinafter, "Disclosure Statute"), as a "Stand By Your Ad" law.[2] The Disclosure Statute provided specific requirements for television and radio ads

1. We also hold that discretionary review was improvidently allowed as to the additional issue.

2. N.C.G.S. § 163-278.39A was repealed by the General Assembly effective 1 January 2014. Session Law 2013-381, § 44.1.

placed by candidate campaign committees, political action committees, and others supporting or opposing candidates. *See generally* N.C.G.S. § 163-278.39A. In pertinent part, the Disclosure Statute provided that television ads by political action committees "shall include a disclosure statement spoken by the chief executive officer or treasurer of the political action committee and containing at least the following words: 'The [name of political action committee] political action committee sponsored this ad opposing/supporting [name of candidate] for [name of office].' " *Id.* § 163-278.39A(b)(3). Furthermore, the Disclosure Statute required that, for all ads on television falling under the statute, "an unobscured, full-screen picture containing the disclosing individual, either in photographic form or through the actual appearance of the disclosing individual on camera, shall be featured throughout the duration of the disclosure statement." *Id.* § 163-278.39A(b)(6).

¶ 6 The Disclosure Statute also included a notable enforcement mechanism. In a section entitled "Legal Remedy," it created a private cause of action as follows:

> [A] candidate for an elective office who complied with the television and radio disclosure requirements throughout that candidate's entire campaign shall have a monetary remedy in a civil action against (i) an opposing candidate or candidate committee whose television or radio advertisement violates these disclosure requirements and (ii) against any political party organization, political action committee, individual, or other sponsor whose advertisements for that elective office violates these disclosure requirements[.][3]

Id. § 163-278.39A(f). The North Carolina Court of Appeals has previously characterized the cause of action created by the General Assembly in the Disclosure Statute as "unique in the world of election law." *Friends of Joe Sam Queen v. Ralph Hise for N.C. Senate*, 223 N.C. App. 395, 403 n.7 (2012).

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3. A subsection of this section provided that, as a condition precedent to bringing suit under the statute, the complaining party must file a notice with the State Board of Elections or a county board of elections (for statewide and nonstatewide candidates, respectively) "after the airing of the advertisement but no later than the first Friday after the Tuesday on which the election occurred." N.C.G.S. § 163-278.39A(f)(1). The other subsections provided a formula for calculating damages, including treble damages in certain circumstances, and shifted attorneys' fees to a party found to be in violation of the statute. *Id.* §§ 163-278.39A(f)(2), (3).

¶ 7 Plaintiff's complaint alleged two violations of the Disclosure Statute by EMPAC: (1) from 8 October through 25 October 2012, EMPAC ran a television ad that did not include "a full-screened picture containing the disclosing individual" but a much smaller one; and (2) Mr. Cope, the individual pictured in both versions of the ad, was not in fact "the Chief Executive Officer or treasurer of EMPAC."[4] The complaint included as attachments an affidavit from Mr. Forest attesting the Committee was bringing the complaint on his behalf, records of the proposed schedule for ad run times with Time Warner Cable, the invoices for the ads, and copies of the notice and letter sent to the State Board of Elections and EMPAC. Defendant filed an answer and motion to dismiss based on lack of standing, which was denied. After failing to answer discovery, plaintiff voluntarily dismissed the lawsuit on 30 June 2015 and refiled on 9 March 2016.

¶ 8 After discovery in the case proceeded, defendant filed a motion for summary judgment on 29 June 2016, arguing the Disclosure Statute violated the First Amendment as a content-based restriction on speech. After hearing the motion on 16 August 2016, the trial court entered an order on 15 February 2017 granting defendant's motion for summary judgment, stating that "plaintiff ha[d] failed to allege any forecast of damage other than speculative damage" and that "[i]n the absence of any forecast of actual demonstrable damages, the statute at issue is unconstitutional as applied."[5] Plaintiff gave timely notice of appeal to the North Carolina Court of Appeals.

¶ 9 In a split decision issued on 19 June 2018, the Court of Appeals reversed the trial court's grant of summary judgment to EMPAC. *Comm. to Elect Dan Forest v. Employees Pol. Action Comm. (EMPAC)*, 260 N.C. App. 1, 2 (2018). The majority reasoned that by "actual demonstrable damages" the trial court meant the Committee lacked standing to sue because Mr. Forest had not shown adequate "injury." Relying on deci-

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4. In order to preserve a claim under the Disclosure Statute, the Committee was required to file a Notice of Complaint with the State Board of Elections within a certain time period after the election. N.C.G.S. § 163-278.39A(f)(1) (2011). While the Forest Committee presented evidence that it had filed such a notice in a timely manner, the notice contained only the allegation of the incorrectly-sized picture, not the allegation relating to the identity of the disclosing individual. As a result, the Committee has not preserved the claim that this aspect of the Disclosure Statute was violated.

5. We note it is not clear from the trial court's wording whether by this rationale it meant that plaintiff had not suffered injury sufficient to give it standing to sue or that the damage award imposed by the statute was constitutionally excessive without a showing of "actual demonstrable damages." The parties and the Court of Appeals addressed both of these arguments on appeal, so both arguments are preserved.

sions of this Court, the majority held the Committee had standing to sue because the Disclosure Statute creates a private right of action for a candidate against a party when that party runs an ad in the candidate's election violating the Statute and "the breach of the private right, itself, constitutes an injury which provides standing to seek recourse." *Id.* at 8. The majority further held the damages awarded under the Disclosure Statute were not unconstitutionally excessive even absent a showing of actual damages and that the Disclosure Statute did not *per se* violate the First Amendment, as EMPAC had argued on appeal. *Id.* at 11–12.

¶ 10 Chief Judge McGee dissented from the majority decision of the Court of Appeals, maintaining that plaintiff had not satisfied the condition precedent required by the Disclosure Statute and also that plaintiff lacked standing to sue because it had not shown "actual harm." *Id.* at 13 (McGee, C.J., dissenting). While noting that "North Carolina courts are not constitutionally bound by the standing jurisprudence established by the United States Supreme Court[,]" the dissent also noted that North Carolina appellate courts had previously applied United States Supreme Court decisions to questions of standing and, therefore, United States Supreme Court precedent is binding on the Court of Appeals. *Id.* at 14. The dissent noted that our courts have used the language "injury in fact" to describe the standing inquiry and then cited and extensively reviewed the recent United States Supreme Court decision in *Spokeo, Inc. v. Robins*, 136 S.Ct. 1540 (2016), to support the proposition that the North Carolina Constitution imposes the same "injury-in-fact" requirements of a "concrete" and "particularized" injury as the United States Constitution imposes on federal courts, including the implication that a statutory conferral of standing, without more, does not necessarily give a party sufficient interest to have standing to sue. *Comm. to Elect Dan Forest*, 260 N.C. App. at 14–16. The dissent concluded, following the reasoning in *Spokeo*, that a statutory grant of standing does not necessarily confer standing on a party under the North Carolina Constitution absent a concrete and particularized injury in fact and, because the interests vindicated by the statute were public and not private, the Committee had not suffered adequate harm to satisfy the injury requirements for standing. *Id.* at 19.

¶ 11 EMPAC appealed to this Court based on the dissent. This Court also granted EMPAC's petition for discretionary review of additional issues, which asked this Court to determine whether the Disclosure Statute was an unconstitutional restriction on EMPAC's free-speech rights and what standard should apply to that inquiry.

II. Standard of Review

¶ 12 We review the grant or denial of summary judgment *de novo*. *Variety Wholesalers, Inc. v. Salem Logistics Traffic Servs., LLC*, 365 N.C. 520, 523 (2012). Summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C.G.S. 1A-1, Rule 56(c) (2019). In ruling on a summary judgment motion, we "consider the evidence in the light most favorable to the non-movant, drawing all inferences in the non-movant's favor." *Morrell v. Hardin Creek, Inc.*, 371 N.C. 672, 680 (2018). "We review constitutional questions de novo." *State ex rel. McCrory v. Berger*, 368 N.C. 633, 639 (2016).

III. Analysis

¶ 13 Defendant argues plaintiff has failed to establish an "injury in fact" sufficient to have standing to sue under the North Carolina Constitution. Plaintiff argues that, unlike the United States Constitution, the North Carolina Constitution does not require a plaintiff to make an additional showing of injury where a statutory right of action is conferred by the General Assembly in order for the case to come within the power of our courts. Whether the North Carolina Constitution limits the jurisdiction of our courts in the same manner as the standing requirements Article III[6] imposes on federal courts, including the requirement that the complaining party show "injury in fact," even where an Act of the General Assembly, such as the Disclosure Statute here, expressly confers a statutory cause of action, is a question of first impression for this Court.[7] While we have held the Court of Appeals errs in relying on federal standing doctrine, and, specifically, that "[w]hile federal standing doctrine can be instructive as to general principles . . . and for comparative analysis, the nuts and bolts of North Carolina standing doctrine are not coincident with federal standing doctrine[,]" *Goldston v. State*, 361 N.C. 26, 35 (2006), we have declined to delineate those differences. Our silence on this fundamental matter has engendered substantial confusion and disagreement in the lower courts and we end it today.

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6. U.S. Const., Art. III, sec. 2.

7. We note, as Chief Judge McGee did in dissent below, our Court of Appeals has previously decided that in some circumstances the federal standing requirements also apply to North Carolina law. *See, e.g., Neuse River Foundation, Inc. v. Smithfield Foods, Inc.*, 155 N.C. App. 110, 113–15 (2002); *Coker v. DaimlerChrysler Corp.*, 172 N.C. App. 386, 390–92 (2005). This Court is not bound by those precedents.

¶ 14 North Carolina courts recognized nearly sixteen years before *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), that it is the duty of the judicial branch to interpret the law, including the North Carolina Constitution. *See Bayard v. Singleton*, 1 N.C. (Mart.) 5 (1787). This duty includes the responsibility to construe the limits on the powers of the branches of government created by our Constitution. *See*, *e.g.*, *Cooper v. Berger*, 370 N.C. 392 (2018); *State ex rel. McCrory v. Berger*, 368 N.C. 633 (2016).

A. Textual Analysis

¶ 15 As ours is a written constitution, we begin with the text. *See State ex rel. Martin v. Preston*, 325 N.C. 438, 449 (1989) ("In interpreting our Constitution—as in interpreting a statute—where the meaning is clear from the words used, we will not search for a meaning elsewhere.").

> The will of the people as expressed in the Constitution is the supreme law of the land. In searching for this will or intent all cognate provisions are to be brought into view in their entirety and so interpreted as to effectuate the manifest purposes of the instrument. The best way to ascertain the meaning of a word or sentence in the Constitution is to read it contextually and compare it with other words and sentences with which it stands connected.

Id. at 449. In construing the document, "[w]e are guided by the basic principle of constitutional construction of giving effect to the intent of the framers." *State v. Webb*, 358 N.C. 92, 94 (2004) (cleaned up). "Constitutional provisions should be construed in consonance with the objects and purposes in contemplation at the time of their adoption. To ascertain the intent of those by whom the language was used, we must consider the conditions as they then existed and the purpose sought to be accomplished." *Id.*

¶ 16 Black's Law Dictionary defines "Standing" as "[a] party's right to make a legal claim or seek judicial enforcement of a duty or right." Black's Law Dictionary (11th ed. 2019). The term does not appear in the North Carolina Constitution, nor does it appear in the United States Constitution.[8] Instead, federal courts have construed Article III's lim-

8. Indeed, the term "standing" is of relatively recent vintage. *See* Joseph Vining, *Legal Identity: The Coming of Age of Public Law* 55 (1978) ("The word *standing* is rather recent in the basic judicial vocabulary and does not appear to have been commonly used until the middle of our own century. No authority that I have found introduces the term with proper explanations and apologies and announces that henceforth *standing* should be used to

ited extension of federal "Judicial Power" to hear certain categories of "Cases" and "Controversies" as giving rise to the standing requirement. U.S. Const. Art. III, § 2; *See, e.g.*, *Flast v. Cohen*, 392 U.S. 83, 94–95 (1968). Thus, at least as a matter of federal law, standing, along with other justiciability doctrines, is a limitation on the exercise of judicial power.

¶ 17 Article IV of the North Carolina Constitution delineates the State's judicial power as follows:

> The judicial power of the State shall, except as provided in Section 3 of this Article, be vested in a Court for the Trial of Impeachments and in a General Court of Justice. The General Assembly shall have no power to deprive the judicial department of any power or jurisdiction that rightfully pertains to it as a co-ordinate department of the government, nor shall it establish or authorize any courts other than as permitted by this Article.

N.C. Const. Art. IV, § 1. As a matter of textual interpretation, we note this provision does not expressly define the term "judicial power." The provision also does not impose any express limitation on the exercise of the judicial power itself, such as the "case or controversy" requirement of the United States Constitution. To the contrary, the only limitation in the text of the provision protects the judicial power and jurisdiction of the courts from intrusion by the General Assembly except by vesting administrative agencies with judicial powers reasonably necessary to carry out their work under Article IV, Section 3. This provision was not enacted until the North Carolina Constitution of 1868, and has been readopted largely intact in subsequent versions since then.[9]

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describe who may be heard by a judge. Nor was there any sudden adoption by tacit consent. The word appears here and there, spreading very gradually with no discernible pattern. Judges and lawyers found themselves using the term and did not ask why they did so or where it came from."). One scholar's search locates the United States Supreme Court's first use of the term "standing" as an Article III limitation in *Stark v. Wickard*, 321 U.S. 288 (1944). *See* Cass R. Sunstein, *What's Standing After* Lujan*? Of Citizen Suits, "Injuries," and Article III*, 91 Mich. L. Rev. 163, 169 (1992); *see also id.* ("The explosion of judicial interest in standing as a distinct body of constitutional law is an extraordinarily recent phenomenon."). Another scholar identifies the first use of the term in this sense by a justice of that court in *Coleman v. Miller*, 307 U.S. 433, 464-68 (1939) (Frankfurter, J., concurring). *See* Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 Stan. L. Rev. 1371, 1378 (1988).

9. Although the Constitution of 1776 did not include this provision, it did provide for the appointment of judges to the "Supreme Court of Law and Equity" by the General Assembly, and the Declaration of Rights enacted at that time included the familiar

See N.C. Const. of 1868, art. IV., § 1; N.C. Const. of 1868, art. IV, § 1 (1935); N.C. Const. Art. IV, § 1 (1971).

¶ 18 This Court has previously tied another provision of our Constitution to the concept of standing: the remedy clause, an aspect of the open courts provision of Article I, Section 18, which states "every person for an injury done him in his lands, goods, person, or reputation shall have remedy by due course of law[.]" N.C. Const. Art. I, § 18; *see Mangum v. Raleigh Bd. of Adjustment*, 362 N.C. 640, 642 (2008) (quoting N.C. Const. Art. I, § 18). A version of this provision was included in the Declaration of Rights in 1776, but the current text of the provision was not enacted until the 1868 Constitution as well. *See* N.C. Const. of 1776, Dec. of Rights, § XIII (1776); N.C. Const. of 1868, art. I, § 35. While the text of this provision does refer to "injury," the plain meaning of the provision prohibits the use of government power to *withhold* a remedy to an injured party; it does not appear on its face to limit the exercise of judicial power to any particular set of circumstances.

¶ 19 If the framers of our Constitution intended any limitation on the exercise of judicial power analogous to the standing requirements imposed by the federal constitution, it is not clear from the plain meaning of the constitutional text. Therefore, to determine what the framers meant by "judicial power" and other provisions including the remedy clause, in addition to "the text of the constitution," we must examine "the historical context in which the people of North Carolina adopted the applicable constitutional provision, and our precedents." *McCrory*, 368 N.C. at 639. We begin with surveying standing at common law before turning to a view of standing in federal caselaw and, finally, to our own Constitution and caselaw.

B. English Common Law History

¶ 20 English common law provides an important touchstone for determining the intent of the framers of both the federal and, in many cases, state constitutions.[10] " 'It is manifest,' said the General Assembly of North Carolina in 1715 'that the laws of England are the laws of this Government, so far as they are compatible with our way of living and trade.' " *State v. Willis*, 255 N.C. 473, 474 (1961) (quoting 17 N.C. L. Rev.

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constitutional touchstone "[t]hat the legislative, executive, and supreme judicial powers of government, ought to be forever separate and distinct from each other." N.C. Const. of 1776, Declaration of Rights, § IV (1776).

10. We are not the first state supreme court to plough the fields of English common law as it pertains to standing under state constitutions. *See, e.g.*, *Couey v. Atkins*, 357 Or. 460 (2015).

205). In 1778, in a statute that has continued unaltered since, the General Assembly of our newly constituted State adopted the common law:

> All such parts of the common law as were heretofore in force and use within this State, or so much of the common law as is not destructive of, or repugnant to, or inconsistent with, the freedom and independence of this State and the form of government therein established, and which has not been otherwise provided for in whole or in part, not abrogated, repealed, or become obsolete, are hereby declared to be in full force within this State.

N.C.G.S. § 4-1 (2019). "The 'common law' referred to in N.C.G.S. § 4-1 has been held to be the common law of England as of the date of the signing of the American Declaration of Independence." *Gwathmey v. State*, 342 N.C. 287, 296 (1995). While the General Assembly may in general modify or repeal the common law, "any parts of the common law which are incorporated in our Constitution may be modified only by proper constitutional amendment." *Id.* (citing *State v. Mitchell*, 202 N.C. 439 (1932)). Thus, while not necessarily dispositive, the common law background is highly relevant to discerning the meaning of the constitutional text when it was adopted.

¶ 21 When examining "standing" (as a requirement for a personal stake in litigation) under English common law, the first thing one notes is its almost complete absence. Instead, "[b]efore and at the time of the framing [of the United States Constitution], the English practice was to allow strangers to have standing in the many cases involving the ancient prerogative writs." Cass R. Sunstein, *What's Standing After* Lujan*? Of Citizen Suits, "Injuries," and Article III*, 91 Mich. L. Rev. 163, 171 (1992) (hereinafter, *Standing After* Lujan). A "stranger" in this sense means "[s]omeone who is not party to a given transaction" or "[o]ne not standing toward another in some relation implied in the context," therefore, one who lacks a personal stake in the litigation. "Stranger," Black's Law Dictionary (11th ed. 2019). The prerogative writs for which courts recognized the authority of strangers to sue to enforce public rights included the writs of certiorari, prohibition, mandamus, and *quo warranto*. *See generally* Louis L. Jaffe, *Standing to Secure Judicial Review: Public Actions*, 74 Harv. L. Rev. 1265 (1961) (hereinafter *Standing to Secure*); Raoul Berger, *Standing to Sue in Public Actions: Is It a Constitutional* Requirement?, 78 Yale L.J. 816 (1969) (hereinafter, *Standing to Sue*); John L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 Stan. L. Rev. 1371 (1988) (hereinafter, *Metaphor*).

¶ 22 The extraordinary writs of certiorari[11] and prohibition[12] both authorized such "stranger suits." "The English tradition of *locus standi* in prohibition and certiorari is that 'a stranger' has standing, but relief in suits by strangers is discretionary. If, however, the official's lack of 'jurisdiction' [ ] appeared on the face of the record, relief followed as [a matter] of course." Jaffe, *Standing to Secure*, 74 Harv. L. Rev. at 1274. The *locus standi* rule permitting stranger suits "has been explained on the ground that a usurpation of jurisdiction, being an encroachment upon the royal prerogative, caused such concern that it made little difference who raised the question." *Id.*

¶ 23 First, English courts strongly defended the right of strangers to bring writs of prohibition. In a notable example, clergy complained to the king of excessive grants of writs of prohibition against ecclesiastical courts. In response, according to Lord Coke, "all the judges of England, and the barons of the Exchequer, with one unanimous consent," answered the charges in a seminal document called *Articulo Cleri*. The judges stated as follows in their Third Answer to the complaints:

> Prohibitions by law are to be granted at any time to restraine a court to intermeddle with, or execute any thing, which by law they ought not to hold plea of, and they are much mistaken that maintaine the contrary . . . . And the kings courts that may award prohibitions, being informed either by the parties themselves, *or by any stranger*, that any court temporall or ecclesiasticall doth hold plea of that (whereof they have not jurisdiction) may lawfully prohibit the same, as well after judgment and execution, as before.

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11. The prerogative writ of certiorari was the antecedent of this Court's own writ of certiorari. *See* N.C. R. App. P. 21; *see also* N.C. Const. art. IV, § 12 ("the [Supreme] Court may issue any remedial writs necessary to give it general supervision and control over the proceedings of the other courts."). As used by the King's Bench, however, it had a narrower function, generally reviewing the decisions of lower courts only for exceeding their jurisdiction in particular cases. Daniel R. Coquillette, *The Anglo-American Legal Heritage* 248 (1999). However, the writ was also used to regulate administrative agencies performing judicial functions. *See* Berger, *Standing to Sue*, 78 Yale L.J. at 821–22.

12. Prohibition was "[a]n extraordinary writ issued by an appellate court to prevent a lower court from exceeding its jurisdiction or to prevent a nonjudicial officer or entity from exercising a power." "Prohibition," Black's Law Dictionary (11th ed. 2019). "The writ is so ancient that forms of it are given in Glanville . . . , the first book of English law, written in the year 1189." Forrest G. Ferris & Forrest G. Ferris, Jr., *The Law of Extraordinary Legal Remedies* 414–15 (1926). Like the writs of certiorari and mandamus, it persists today. *See* N.C. R. App. P. 22.

Edward Coke, 2 *Institutes of the Laws of England* 602 (1797) (emphasis added).[13] Similarly, the writ of certiorari in English practice could be brought by strangers.[14]

¶ 24 The prerogative writ of mandamus was also extended to strangers without a personal stake. Professor Louis Jaffe has described the writ of mandamus[15] as being "invented" by Lord Coke, sitting on the King's Bench, "if not out of whole cloth then at least out of a few rags and tatters[.]" Jaffe, *Standing to Secure*, 74 Harv. L. Rev. at 1269. In *James Bagg's Case*, Lord Coke, reasoning the first assertion of jurisdiction through the writ was justified "so that no Wrong or Injury, either Publick or Private, can be done, but that it shall be reformed or punished by due Course of Law."[16] 11 Coke 93b, 98a, 77 Eng. Rep. 1271, 1278 (K.B. 1615). English cases have long held that, in matters of public right, anyone may seek the writ of mandamus to enforce the public's interest.[17] *See People*

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13. Professor Raoul Berger makes the following observation regarding this passage: "No English court, so far as I can discover, has ever rejected the authority of *Articulo Cleri* or denied that a writ of prohibition may be granted at the suit of a stranger. On the contrary, Coke was cited by the 18th century Abridgments and by English courts throughout the 19th century, and his rule remains the law in England today. Thus, at the time of the [American] Revolution, the 'courts in Westminster' afforded to a stranger a means of attack on jurisdictional excesses without requiring a showing of injury to his personal interest." Berger, *Standing to Sue*, 78 Yale L.J. at 819–20 (footnotes omitted); *see also Wadsworth v. Queen of Spain*, 17 Q.B. 171, 214 (1851) ("[W]e find it laid down in books of the highest authority that, where the court to which prohibition is to go has no jurisdiction, a prohibition may be granted upon the request of a *stranger*, as well as of the defendant himself." (citing 2 Coke 607)).

14. In *Arthur v. Commissioners of Sewers*, 88 Eng. Rep. 237 (K.B. 1725), for instance, the King's Bench distinguished between a party with a personal stake and "one who comes merely as a stranger," in determining whether the remedy of a writ of certiorari was mandatory or merely discretionary.

15. Mandamus being then, as now, "[a] writ issued by a court to compel performance of a particular act by a lower court or a governmental officer or body[.]" "Mandamus," Black's Law Dictionary (11th ed. 2019); *see Sutton v. Figgatt*, 280 N.C. 89, 93 (1971) ("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."); N.C. R. App. P. 22.

16. Lord Coke's rationale for the assertion of jurisdiction through mandamus is, as further discussed below, an exposition of Magna Carta that two-and-a-half centuries later would become the remedy clause in our Constitution's Declaration of Rights. *Cf.* N.C. Const. Art. I, § 18 ("every person for an injury done him in his lands, goods, person, or reputation shall have remedy by due course of law[.]").

17. Professor Jaffe notes "I have encountered no case before 1807 in which the standing of plaintiff is mooted, though the lists of the cases in the digest strongly suggest the possibility that the plaintiff in some of them was without a personal interest." Jaffe, *Standing to Secure*, 74 Harv. L. Rev. at 1271.

ex rel. Case v. Collins, 19 Wend. 56, 65-66 (N.Y. Sup. Ct. 1837) (collecting English cases in which party obtaining mandamus in name of king was a private person without a personal interest); *id.* at 65 ("It is at least the right, if not the duty of every citizen to interfere and see that a public offence be properly pursued and punished, and that a public grievance be remedied.").

¶ 25 The writ for *quo warranto* also contemplated suit by a stranger.[18] *See, e.g.*, *Rex v. Smith*, 100 Eng. Rep. 740 (1790) (discussing *Rex v. Brown* (1789), in which writ of *quo warranto* was granted despite "it [] not appear[ing that] the party making the application ha[d] any connection with the corporation [(a municipal government)] because "the ground on which this application is made to enforce a general Act of Parliament, which interests all the corporations of the kingdom; and therefore it is no objection that the party applying is not a member of the corporation."). *See also* Berger, *Standing to Sue*, 78 Yale L. J. at 823 (discussing same).

¶ 26 Finally, English law recognized the practice of "informers" and "relators" actions, which presaged modern "private attorney general actions."

> ["Informers" actions] went beyond making *available* procedures to control unlawful conduct, and offered financial *inducements* to strangers to prosecute such actions, provided for by a "very large" number of statutes "in which the public at large was encouraged to enforce obedience to statutes by the promise of a share of the penalty imposed for disobedience . . ." Such informers had "no interest whatever in the controversy other than that given by statute," and the pecuniary reward thus offered to strangers was little calculated to read cognate remedies narrowly.

Berger, *Standing to Sue*, 78 Yale L. J. at 825–26 (footnotes omitted).[19] A "relator" action, often for a writ of *quo warranto*, could be brought

18. "Quo Warranto," was "[a] common-law writ used to inquire into the authority by which a public office is held or a franchise is claimed." "Quo Warranto," Black's Law Dictionary (11th ed. 2019). The writ of *quo warranto* was ultimately modified by England's Statute of Anne, 9 Anne c. 20 (1710), after which the statutory "information in nature of *quo warranto*" lied instead. *See Saunders v. Gatling*, 81 N.C. 298, 300 (1879).

19. *See also Martin v. Trout*, 199 U.S. 212, 225 (1905) ("Statutes providing for actions by a common informer, who himself had no interest whatever in the controversy other than that given by statute, have been in existence hundreds of years in England, and in this country ever since the foundation of our government.").

by the Attorney General, according to Blackstone, "at the relation of any person desiring to prosecute the same, (who is then styled the *relator*). . . ." William Blackstone, 3 *Commentaries on the Laws of England* 264. The relator need have no personal interest in the matter apart from the public interest. *See, e.g.*, *Rex v. Mayor of Hartford*, 91 Eng. Rep. 325 (1700) (*quo warranto* issued against mayor and alderman to show 'by what authority they admitted persons to be freemen of the corporation who did not inhabit in the borough. The motion was pretended to be on behalf of freemen, who by this means were encroached upon." (emphasis added)).

¶ 27 In summary, under English common law practice, which informs our interpretation of the intent of the framers of our State's constitutional text, the concept of "standing," as a personal stake, aggrievement, or injury as a prerequisite for litigation brought to vindicate public rights, was basically absent.[20] Instead, the English practice included the prerogative writs and informers and relators actions, which "took forms astonishingly similar to the 'standingless' public action or 'private attorney general' model that modern standing law is designed to thwart." Winter, *Metaphor*, 40 Stan. L. Rev. at 1396. To the extent the framers of the North Carolina Constitution were informed by the English common law which so suffused the development of law in America in crafting our constitutional text, we must conclude the use of the term "judicial power" excluded any requirement that there be "actual harm" or "injury in fact" apart from the existence of a legal right or cause of action to have standing to invoke the power of the courts in this State. This was almost certainly the intent of the original framers of the North Carolina Constitution in 1776 in establishing a "Supreme Court of Justice in Law and Equity" and recognizing a "judicial power[]" to be preserved "ever separate and distinct" from the legislative and executive powers. N.C. Const. of 1776, Declaration of Rights, § IV (1776).

¶ 28 Of course, Article IV of our Constitution which now delineates the judicial power is a product of the transformative 1868 Reconstruction convention and the most recent reorganization of our Constitution in 1971, along with the major amendments in 1935. Therefore, one may object that, whatever the meaning of the term as used by colonial lawyers raised on the English common law in 1776, that meaning no longer holds today. We therefore examine the law of standing as it evolved in America and, in particular, North Carolina to determine if that meaning still applies.

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20. *See* Jaffe, *Standing to Secure*, 74 Harv. L. Rev. at 1270; Berger, *Standing to Sue*, 78 Yale L.J. at 827, Winter, *Metaphor*, 40 Stan. L. Rev. at 1374.

C. The American Experience

¶ 29 In the century following the Revolution, the American states, including North Carolina, inherited the English common law of prerogative writs and, in general, drew a distinction between writs enforcing private rights, which required a showing of legal right or injury (i.e., the existence of a cause of action, as a matter of substantive—not constitutional—law), and those enforcing public rights, which could be brought by anyone or, at its most restrictive, a citizen or taxpayer. *See Couey*, 357 Or. at 496–98 (summarizing the caselaw of the period). Furthermore, in the late-nineteenth and early-twentieth centuries state courts, including in North Carolina, began expressing a concern with mootness, not as a constitutional but as a discretionary, prudential limitation on judicial power. *See id*. at 498–99.

¶ 30 One early case reveals the early framers' conception of the judicial powers of this Court, including the power to hear prerogative writs, relative to the English courts. In *Griffin v. Graham*, (1 Hawks) 8 N.C. 96 (1820), this Court, acting in equity, heard a complaint from the would-be heirs of a decedent who instead sought to create a trust for the establishment of a free school for indigent students. *Griffin*, 8 N.C. at 97–99. This Court held the charitable trust was valid and the court had jurisdiction to declare it so because, per the reporter's headnotes,

> though the jurisdiction of charities in England belong[ed] to the Court of Chancery, not as a Court of Equity, but as administering the prerogative of the Crown, the Court of Equity of this state hath the like jurisdiction: for, upon the revolution, the political rights and duties of the King devolved upon the people in their sovereign capacity; and they, by their representatives, have placed this power in the Courts of Equity, by the acts of Assembly of 1778, c. 5, and 1782, c. 11.

Griffin, 8 N.C. at 97. Thus, this Court necessarily recognized it inherited the same jurisdiction, including the expansive prerogative writs, now in the name of the sovereign people rather than the Crown, through the statute now codified at N.C.G.S. § 4-1, discussed above. Although the language is not couched in constitutional terms, this early decision interpreting the acts of the first session of our General Assembly is persuasive evidence of what the framers of our 1776 Constitution believed the content and limits of judicial power to be. Chief Justice Taylor, speaking for a majority of the Court, recognized, as a matter of *parens*

patriae, the authority of the Court of Chancery in England (and thus, by statutory succession, the Court of Equity in North Carolina) to hear an "information for a charitable trust" filed *ex officio* by the Attorney General "*at the relation of some informant*, where it is necessary."[21] *Id.* at 133 (emphasis added).

¶ 31 Broad access to the prerogative writs for vindication of public rights without a showing of personal interest was widely accepted in the nineteenth century. By 1875, the United States Supreme Court recognized "[t]here [wa]s . . . a decided preponderance of American authority in favor of the doctrine, that private persons may move for a [writ of] *mandamus* to enforce a public duty, not due to the government as such, without the intervention of the government law-officer." *Union Pac. R. Co. v. Hall*, 91 U.S. 343, 355 (1875) (citing many cases from several states). The Supreme Court of Illinois, in one of the cases cited therein, summarized the difference between private rights and public rights:

> The question, who shall be the relator . . . depends upon the object to be attained by the writ. Where the remedy is resorted to for the purpose of enforcing a private right, the person interested in having the right enforced, must become the relator. . . . A stranger is not permitted officiously to interfere, and sue out a mandamus in a matter of private concern. But where the object is the enforcement of a public right, the People are regarded as the real party, and the relator need not show that he has any legal interest in the result. It is enough that he is interested, as a citizen, in having the laws executed, and the right in question enforced.

Pike Cnty. Comm'rs v. Illinois ex rel. Metz, 11 Ill. 202, 207–08 (1849).

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21. Although this Court did not address what, if any, interest the relator must have to invoke the court's jurisdiction, William J. Gaston, who would become a justice of this Court, was one of the trustees and is reported to have argued before the Court that North Carolina law permitted a writ of mandamus filed by a relator in the absence of a personal interest to vindicate the public's interest. 8 N.C. at 124–25 ("It is well settled, that the discretion of the trustees does not make it the less a charity: nor does it oppose the right of this Court to interfere; for, in all cases of discretionary powers, if they be abused, the Court will interfere, and by virtue of its general jurisdiction over trusts, will take the trust out of impure hands, and place it in honester. And, upon a bill in the name of the Attorney-General, (and any person, however remotely concerned, may be *relator*,) the Court will compel the trust to act, or to assign the trust.").

¶ 32 This Court followed the majority trend in recognizing the right of persons without any personal interest or injury to pursue actions to vindicate a public right throughout the nineteenth century. For instance, this Court, without any further showing or discussion of his interest, permitted a plaintiff "as a citizen and taxpayer of the state," to bring an action for mandamus against the secretary of state. *Carr v. Coke*, 116 N.C. 223, 223 (1895).

¶ 33 Another example concerns actions by private relators under section 366 of the Code of Civil Procedure of 1868, which, largely following the Statute of Anne, abolished the writ of *quo warranto* and provided a statutory action in the nature of a writ of *quo warranto* for private persons as relator to challenge the wrongful occupation of municipal offices in the name of the state, with the permission of the Attorney General. In 1892, this Court heard an action under the statute filed in the name of the state by a taxpayer and citizen of Greensboro against the appointment of a police chief, who challenged the suit on the grounds that the relator "d[id] not allege that he is entitled to the office, nor has any interest in its emoluments, and therefore is not a proper relator." *State ex rel. Foard v. Hall*, 111 N.C. 369, 369 (1892). This Court held that, under the statute, "[i]t is not necessary that the relator should have such interest." *Id.* This Court reasoned that "In many instances . . . when an office is illegally held or usurped, there is no one else who can claim a title thereto. In such cases, unless a voter or taxpayer (not a mere stranger)[22] can bring the action by leave of the attorney general, there would often be no remedy[.]" *Id.* at 370. Other cases interpreting the *quo warranto* statute show that any private person can bring an action under it and the purpose of the statute is to vindicate public, not private, rights. *See Ellison v. Raleigh*, 89 N.C. 125, 132 (1883) (holding the statute "seems to contemplate the action as one open upon the complaint of any private party[.]"); *Saunders v. Gatling*, 81 N.C. 298, 301 (1879) ("It is not merely an action to redress the grievance of a private person who claims a right to the office, but the public has an interest in the question which the legislature by these provisions of the code seems to have considered paramount to that of the private rights of the persons aggrieved[.]").

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22. Although this Court limited the class of persons who could bring the action to citizens or taxpayers as opposed to "mere strangers," this was a matter of statutory, rather than constitutional, interpretation. This Court later cited *Hall* in dismissing a complaint brought by a relator under the statute for failing to allege as a matter of substantive law under the relevant code section that he was a citizen or taxpayer of the county and thus did not show he was a "party in interest" under the Code of Civil Procedure. *State ex rel. Hines v. Vann*, 118 N.C. 3, 6 (1896) (citing N.C. Code Civ. P. of 1868, § 177).

¶ 34 These cases demonstrate that in North Carolina, as in a "decided preponderance" of states throughout the nineteenth century, *see Union Pac. R. Co.*, 91 U.S. at 355, the writ of mandamus and the successor by statute of the writ of *quo warranto* were both broadly available for the vindication of public rights common to all citizens and taxpayers, without any required showing of a personal interest. Even where such a showing was required, such as where a private right was asserted, it was treated as a matter of substantive, not constitutional law.[23]

D. Federal Standing Law and the "Case" or "Controversy" Requirement

¶ 35 Before resolving the question at hand under the North Carolina Constitution, we must examine the federal law of standing arising under the United States Constitution.[24] Federal justiciability doctrines—standing, ripeness, mootness, and the prohibition against advisory opinions—are not explicit within the constitutional text, but are the fruit of judicial interpretation of Article III's extension of the "judicial Power" to certain "Cases" or "Controversies."[25] U.S. Const. art. III, § 2;

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23. Standing is not the only modern "justiciability" doctrine not located in the North Carolina Constitution in the nineteenth century. For instance, despite the lack of statutory or common law authority, this Court at times has approved of courts in equity advising trustees as to the discharge of trusts. *See*, *e.g.*, *Simpson v. Wallace*, 83 N.C. 477, 479 (1880). In certain cases, mootness, too, was regarded, not as a matter of constitutional law, but a matter of discretion and prudence. *See State ex rel. Martin v. Sloan*, 69 N.C. 128, 128 (1873) (holding when "neither party has any interest in the case except as to cost[,]" this Court "[is] not in the habit of deciding the case."); *State v. Richmond & D.R. Co.*, 74 N.C. 287, 289 (1876) (holding the same). However, this Court expressly held that "[i]f feigned issues "—those collusively brought to test the validity of a law—" were ever valid in this State, they are abolished by the Constitution, Art. 4, § 1." *Blake v. Askew*, 76 N.C. 325, 326 (1877).

24. One might query whether this digression is necessary. As the law of standing evolved essentially and originally as a matter of federal law in the twentieth century, and our courts have on certain occasions turned to federal law to apply standing under our own laws, we believe it is. *See* Wright & Miller, 13A Fed. Prac. & Proc. Juris. § 3531.1 (3d ed. 2020) ("As academic as the history may seem, it serves vitally important purposes. Current standing law is an incredibly rich tapestry woven from all the strands that have been twisted by the wheels of time. No single approach has become finally dominant; none has gone to eternal rest. Workaday answers to many specific questions can be found in some areas, but other questions can be argued and answered only with full knowledge of the intellectual heritage."). It is particularly necessary to understand the odd federal "strands twisted" into the fabric of the law of North Carolina.

25. The political question doctrine, another justiciability doctrine, has its roots in part in Article III, but also in the "textually demonstrable constitutional commitment" of certain questions to the *other* "political departments" by other parts of the Constitution's text, *see*, *e.g.*, *Nixon v. United States*, 506 U.S. 224, 229 (1993) (holding nonjusticiable Senate's impeachment proceedings due to Article I's provision that Senate has "sole

see DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 341–42 (2006) ("[N]o principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." (cleaned up)); *Arizonans for Official English v. Arizona*, 520 U.S. 43, 64 (1997) ("Standing to sue or defend is an aspect of the case or controversy requirement."). Chief Justice Earl Warren, writing for the United States Supreme Court, articulated the complex role of the federal case or controversy requirement:

> [T]hose two words have an iceberg quality, containing beneath their surface simplicity submerged complexities which go to the very heart of our constitutional form of government. Embodied in the words 'cases' and 'controversies' are two complementary but somewhat different limitations. In part those words limit the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process. And in part those words define the role assigned to the judiciary in a tripartite allocation of power to assure that the federal courts will not intrude into areas committed to the other branches of government. Justiciability is the term of art employed to give expression to this dual limitation placed upon federal courts by the case and controversy doctrine.

Flast v. Cohen, 392 U.S. 83, 94–95 (1968). The meaning of these provisions to the framers is not described and the only evidence in the records of the Constitutional Convention is James Madison's statement that judicial power ought "to be limited to cases of a judiciary nature."[26] As we previously noted, the North Carolina Constitution lacks this provision.

¶ 36 The prohibition against advisory opinions by federal courts is, by far, "the oldest and most consistent thread in the federal law of justiciability[.]" Wright & Miller, 13A Fed. Prac. & Proc. Juris. § 3529.1 (3d ed. 2020). The rule against advisory opinions plainly originates in Article III's case or controversy requirement, as well as concerns about separa-

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Power to try all Impeachments"), and prudential considerations regarding the appropriate role of federal courts in the federal constitutional schema. *See Baker v. Carr*, 369 U.S. 186, 217 (1962).

26. *See* F. Andrew Hessick, *Standing, Injury in Fact, and Private Rights*, 93 Cornell L. Rev. 275, 278 (2008) (quoting 2 Records of the Federal Conventions of 1787 at 430 (Max Farrand ed., rev. ed. 1966)).

tion of powers. *Clinton v. Jones*, 520 U.S. 681, 700 (1997) ("[T]he judicial power to decide cases and controversies does not include the provision of purely advisory opinions to the Executive, or permit the federal courts to resolve non justiciable questions." (footnotes omitted)). The prohibition was first recognized in the refusal of the Supreme Court to give advice to the Secretary of War and Congress on pension applications from veterans of the Revolution, in support of which the Court held " '[N]either the Legislature nor the Executive branches can constitutionally assign to the judicial any duties, but such as are properly judicial, and to be performed in a judicial manner.' " *Hayburn's Case*, 2 U.S. (2 Dall.) 408, 410 n.† (1792) (an unnumbered footnote quoting the circuit court opinion below). Moreover, in a famous letter submitted in response to Secretary of State Thomas Jefferson's request for the Court to advise President Washington on certain questions about the neutral status of the United States in the French Revolutionary Wars of 1793, Chief Justice John Jay writing for the members of the Court but not *as* the Court, emphasized the separation of powers in declining to do so:

> The lines of separation drawn by the Constitution between the three departments of the government—their being in certain respects checks upon each other—and our being judges of a court of the last resort—are considerations which afford strong arguments against the propriety of our extrajudicially deciding the questions alluded to; especially as the power given by the Constitution to the President, of calling on the heads of departments for opinions, seems to have been *purposely* as well as expressly united to the *executive* departments.

Letter from Chief Justice John Jay and the Associate Justices to President George Washington, August 8, 1793 (cleaned up) (available at https://founders.archives.gov/documents/Washington/05-13-02-0263). As an aspect of the prohibition against advisory opinions, the Court held it could not hear collusive suits, and that exercise of the judicial power required adverse parties. *See*, *e.g.*, *Poe v. Ullman*, 367 U.S. 497, 505 (1961); *United States v. Johnson*, 319 U.S. 302, 305 (1943).

¶ 37 In contrast to the well-established rule against advisory opinions, standing doctrine is of comparatively recent origin. *See* Winter, *Metaphor*, 40 Stan. L. Rev. at 1374 ("[A] painstaking search of the historical material demonstrates that—for the first 150 years of the Republic—the Framers, the first Congresses, and the Court were oblivious to the modern conception either that standing is a component of the constitutional

phrase 'cases or controversies' or that it is a prerequisite for seeking governmental compliance with the law."). As federal standing evolved from a requirement that a party have a cause of action to an increasingly restrictive tool curbing access to federal courts, the doctrine has been challenged by many scholars for inconsistency. *See* Gene R. Nichol, Jr., *Rethinking Standing*, 72 Cal. L. Rev. 68, 68 (1984) ("In perhaps no other area of constitutional law has scholarly commentary been so uniformly critical."). Even the Supreme Court has acknowledged this doctrinal confusion. *See Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 475 (1982) ("We need not mince words when we say that the concept of 'Art. III standing" has not been defined with complete consistency . . . .").

¶ 38 From the founding to well into the twentieth century, cases addressing the justiciability of parties to maintain a suit turned on whether the party could maintain a cause of action. *See* Sunstein, *Standing After* Lujan, 91 Mich. L. Rev. at 170. If the common law or a statute gave them a cause of action, that was all that was required for the case to come within the judicial power. *See Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 819 (1824) ("[The judicial] power is capable of acting only when the subject is submitted to it, by a party who asserts his rights in the form prescribed by law. It then becomes a case, and the constitution declares that the judicial power shall extend to all cases arising under the constitution, laws and treaties of the United States."); Winter, *Metaphor*, 40 Stan. L. Rev. at 1395 (standing was contained in the question "whether the matter before it fit one of the recognized forms of action."). As in state courts, federal courts also recognized the right to sue to redress public harms without a showing of a particular private interest. One of the most notable early cases addressing the justiciability of a case when the party lacked a particular interest or injury was *Union Pacific Railroad v. Hall*, 91 U.S. 343 (1875), in which the Supreme Court allowed a mandamus petition brought by merchants under a general mandamus statute to compel a chartered railroad to build a railroad line. The Supreme Court recognized the merchants attempted to enforce "a duty to the public generally" and they "had no interest other than such as belonged to others." *Id.* at 354. The ultimate question—"whether a writ of *mandamus* to compel the performance of a public duty may be issued at the instance of a private relator" without a "special injury"—was answered in the affirmative. *Id.* at 354. The existence of the right to bring an action for mandamus under the statute, confirmed by the Court's examination of the widespread acceptance of public actions without particular injuries in America, settled the question; the Court raised no issue of an additional showing of a "peculiar

and special" injury being required as a matter of constitutional law. *Id.* at 355. Moreover, the existence since the first Congress of federal *qui tam* and informer's actions that permitted individuals to file suit without a personal interest support the view that Article III was not understood to impose any greater requirement for injury or a personal interest where a congressional act created a cause of action. *See* Sunstein, *Standing After* Lujan, 91 Mich. L. Rev. at 176–77.

¶ 39 Standing doctrine as a distinct constitutional requirement under Article III first arose in the middle part of the twentieth century, largely at the hands of Justices Brandeis and, later, Frankfurter, partially in response to the emergence of the administrative state and constitutional attacks on progressive federal legislative programs. *See* Sunstein, *Standing After* Lujan, 91 Mich. L. Rev. at 179; F. Andrew Hessick, *Standing, Injury in Fact, and Private Rights*, 93 Cornell L. Rev. 275, 276 (2008).[27] These cases primarily involved constitutional challenges to legislative enactments and government action without a common law cause of action or one arising under a statute. Importantly, in most of the cases, there was also no clear right created in the federal constitution that did not run to the public at large. *See, e.g.*, *Frothingham v. Mellon*, 262 U.S. 447, 488 (1923) (Tenth Amendment challenge); *Ex Parte Levitt*, 302 U.S. 633, 633 (1937) (challenge alleged violation of Article I, § 6). The cases of this period, although not until later explicitly defining the inquiry in terms of "standing," were consistent with the longstanding concern only that the plaintiff show some right under common law, a statutory source, or the constitution.[28] *See, e.g.*,

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27. As several commentators have noted, in a pair of decisions, Justice Frankfurter attempted to ground the new standing requirements in the historical practice of the "courts at Westminster," even though these requirements are essentially inconsistent with the history summarized above. *See, e.g.*, Sunstein, *Standing After* Lujan, 91 Mich. L. Rev. at 172; Winter, *Metaphor*, 40 Stan. L. Rev. at 1394–95; Berger, *Standing to Sue*, 78 Yale L.J. at 816. For an empirical review of Supreme Court decisions by parts validating and criticizing the claimed impact of liberal justices, including Justices Brandeis and Frankfurter, in this early period, *see generally* Daniel E. Ho & Erica L. Ross, *Did Liberal Justices Invent the Standing Doctrine? An Empirical Study of the Evolution of Standing, 1921-2006*, 62 Stan. L. Rev. 591 (2010).

28. Although as Professor Sunstein notes the direct cause of action arising under the constitution recognized in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), was still a long way off, Sunstein, *Standing After* Lujan, 91 Mich. L. Rev. at 180, as Professor Andrew Hessick notes, early in this period the Supreme Court recognized there was standing arising directly under the Fourteenth Amendment in *Pierce v. Society of Sisters*, 268 U.S. 510, 535–36 (1925). *See* Hessick, *Standing, Injury in Fact, and Private Rights*, 93 Cornell L. Rev. at 291, n.97. For our purposes, the relevance of *Pierce* is that the plaintiffs' standing to sue was recognized where there was a right under the constitution.

Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 159 (1951) (Frankfurter, J., concurring) ("Only on the ground that the organizations assert no interest protected in analogous situations at common law, by statute, or by the Constitution, therefore, can plausible challenge to their 'standing' here be made."). In the absence of such a "legal right," factual injury was insufficient. *See Tennessee Elec. Power Co. v. Tennessee Val. Authority*, 306 U.S. 118, 137–38 (1939).

¶ 40 In the most notable case of this period, *Frothingham v. Mellon*, 262 U.S. 447 (1923), the Supreme Court held a person may not sue only as a federal taxpayer who shares a grievance in common with all other federal taxpayers.[29] In *Frothingham*, the plaintiff sued as a federal taxpayer seeking to restrain the expenditure of federal funds on grants to the states through the Maternity Act of 1921 by arguing it violated the Tenth Amendment reservation of powers to the states. *Id.* at 486. The Supreme Court rejected the challenge. In holding the plaintiff's suit could not be maintained, the Court first held the plaintiff could not avail herself of the equitable powers of the federal courts because, as opposed to a taxpayer of a municipality, her "interest in the moneys of the [federal] treasury . . . is comparatively minute and indeterminable," and, therefore, obtaining an injunction as a remedy is inappropriate *Id.* at 487. The Court suggested that concerns about administrability and separation of powers informed its decision on the exercise of courts' equitable power. *Id.* at 487 ("If one taxpayer may champion and litigate such a cause, then every other taxpayer may do the same, not only in respect of the statute here under review, but also in respect of every other appropriation act and statute whose administration requires the outlay of public money, and whose validity may be questioned."). The Court provided a further rationale: it "ha[s] no power per se" of judicial review, but "[t]hat question may be considered only when the justification for some direct injury suffered or threatened, presenting a justiciable issue, is made to rest upon such an act." *Id.* at 488. Thus "[t]he party who invokes the power must be able to show, not only that the statute is invalid, but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally." *Id.*

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29. The Supreme Court's first dismissal under this rationale was decided a year before in an opinion authored by Justice Brandeis. *See Fairchild v. Hughes*, 258 U.S. 126 (1922) ("Plaintiffs alleged interest [as a taxpayer] in the question submitted is not such as to afford a basis for this proceeding."). *See* Winter, *Metaphor*, 40 Stan. L. Rev. at 1376.

¶ 41 While *Frothingham* first explained the prohibition against taxpayer standing, *Ex parte Levitt*, 302 U.S. 633 (1937), announced the prohibition against citizen standing. In *Levitt*, the plaintiff sued "as a citizen and a member of the bar of [the United States Supreme] Court" challenging the appointment of Justice Hugo Black as an Associate Justice of the Supreme Court arguing that, as a sitting United States Senator, he was ineligible under Article I, § 6.[30] 302 U.S. 635–36. The Supreme Court held, citing *Frothingham* and other cases involving third-party standing, "[i]t is an established principle that to entitle a private individual to invoke the judicial power to determine the validity of executive or legislative action he must show that he has sustained, or is immediately in danger of sustaining, a direct injury as the result of that action and it is not sufficient that he has merely a general interest common to all members of the public." *Id.* at 636.

¶ 42 Taken together, *Frothingham* and *Levitt* establish a general prohibition against "generalized grievances"—in which the plaintiff alleges only an injury he shares in common with all other taxpayers or citizens and alleges no direct injury—to challenge the constitutionality of legislative or executive action in federal court. Some have contended *Frothingham*'s prohibition on taxpayer standing and its reasoning is "prudential"—that is, it is a product of judicial self-restraint—while others contend it is constitutional and a product of the case or controversy requirement.[31] Indeed, even one of the progenitors of modern standing, Justice Brandeis, conceived of it as a prudential, not jurisdictional limitation.[32] *See Ashwander v. Tennessee Val. Authority*, 297 U.S. 288, 346, 346–48 (1936) (Brandeis, J., concurring) (holding that "[t]he court will not pass upon the validity of a statute upon complaint of one who fails to show

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30. The clause in question provides that "No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which . . . the Emoluments whereof shall have been [i]ncreased during such time." U.S. Const. art. I, § 6, cl.2. The salaries of the Supreme Court had been raised while Justice Black served as Senator.

31. Professor Jaffe, for instance, contended *Frothingham* can be reconciled with the history of 'standingless' public actions in that it "can rest on the ground that until Congress decides otherwise, there is no need for a *generally available* federal taxpayer's action." Louis L. Jaffe, *Standing to Secure Judicial Review: Private Action*s, 75 Harv. L. Rev. 255, 303 (1961).

32. Whether a standing requirement such as the prohibition against generalized grievances and attendant requirement for "direct injury" is prudential or jurisdictional may seem academic, but it is a vital distinction. If a limitation is adopted as an exercise in prudential self-restraint by the judiciary, Congress (or the legislature) may enact a statute conferring standing on persons in cases the courts would otherwise decline to hear.

that he is injured by its operation[,]" is a rule of constitutional avoidance the Supreme Court developed "for its own governance in the cases *confessedly within its jurisdiction*." (citing *Mellon*, 262 U.S. 447) (emphasis added)).

¶ 43 An important development in the law of standing happened in the middle of the twentieth century when the federal Administrative Procedure Act (APA) was enacted in 1946. In an important provision, the APA provided "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702 (2018). The "legal wrong" prong authorized suits based on invasion of common law interests or invasion or disregard of interests protected by a governing statute. *See* Sunstein, *Standing after* Lujan, 91 Mich. L. Rev. at 181–82; *id.* at 182, n.94 ("[T]he key point is that the APA did not require an explicit grant, but instead inferred a cause of action (standing) from the existence of an interest that the agency was entitled to consider."). The second prong, creating a statutory cause of action for persons "adversely affected or aggrieved by agency action within the meaning of a relevant statute" served to confer standing on persons as private attorneys general. The Court had previously interpreted an analogous provision of the Communications Act of 1934 to give standing to persons "only as representatives of the public interest." *Scripps-Howard Radio v. F.C.C.*, 316 U.S. 4, 14 (1942).

¶ 44 Beginning in the early 1960s, the Supreme Court under Chief Justice Earl Warren, perhaps recognizing the restrictiveness of its standing decisions, applied a "pragmatic and functional strain" of standing doctrine. Wright & Miller, 13A Fed. Prac. & Proc. Juris. § 3531.1 (3d ed. 2020); *See* Sunstein, *Standing After* Lujan, 91 Mich. L. Rev. at 183–84 ; Hessick, *Standing*, *Injury in Fact*, *and Private Rights*, 93 Cornell L. Rev. at 292–93. After *Frothingham* and *Levitt*, the first Supreme Court decision to address standing again in detail was *Baker v. Carr*, 369 U.S. 186 (1962). In *Baker*, the Supreme Court held that citizens who suffered vote dilution based on malapportionment had standing to sue under the Equal Protection Clause. *See id.* at 208 ("A citizen's right to a vote free of arbitrary impairment by state action has been judicially recognized as a right secured by the Constitution[.]"). In support of its holding, the Supreme Court articulated a rationale that has become a "refrain" if not a "shibboleth" in standing decisions, Nichol, *Rethinking Standing*, 72 Cal. L. Rev. at 71, including our own:

> A federal court cannot "pronounce any statute, either of a state or of the United States, void, because

> irreconcilable with the constitution, except as it is called upon to adjudge the legal rights of litigants in actual controversies." Have the appellants alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions? This is the gist of the question of standing.

Baker, 369 U.S. at 205 (citation omitted) (quoting *Liverpool, N.Y. & P. Steamship Co. v. Comm'rs of Emigration*, 113 U.S. 33, 39 (1885)).

¶ 45 Notably, the Supreme Court rested its decision not on any recent standing case, including *Frothingham* or *Levitt*, but instead on the old principle requiring an "actual controversy," or, in the *Baker* Court's term, "concrete adverseness." In *Liverpool, N.Y. & P. Steamship*, the Court noted that it would not pass upon the constitutionality of acts of Congress "as an abstract question" because "[t]hat is not the mode in which this court is accustomed or willing to consider such questions." *Liverpool, N.Y. & P. Steamship*, 113 U.S. at 39. Although it described the requirement for an "actual controvers[y]" was "jurisdictional," it reasoned that "in the exercise of that jurisdiction," it is bound by rules that are essentially functional and prudential. *See id.* (holding the court is bound by rules of constitutional avoidance as "safe guides to sound judgment" and "[i]t is the dictate of wisdom to follow them closely and carefully").

¶ 46 Besides the overarching rationale that standing is predicated on a prudential concern for sharpening legal issues, nowhere does the *Baker* opinion suggest a need for "injury in fact." To the contrary, the only injury asserted is the impairment of a constitutional right broadly shared and divorced from any "factual" harm experienced by the plaintiffs. *See* Winter, *Metaphor*, 40 Stan. L. Rev. at 1380 (describing the "voter's interest in the relative weight of his or her vote" at issue in *Baker* as "a matter that is a purely legal construct dependent on one's conceptualization of a properly weighted vote").

¶ 47 Toward the end of the Warren era, the Supreme Court again addressed standing in the context of a taxpayer suit, attempting to resolve the dispute generated by *Frothingham* about whether the prohibition against federal taxpayer standing was an absolute constitutional bar or a prudential concern. In *Flast v. Cohen*, 392 U.S. 83 (1968), the Court seemingly reversed course on *Frothingham*, and held that federal in-

come taxpayers had standing to challenge the use of federal funds to support instructional activities and materials in religious schools. *Id.* at 88. In support of this holding, Chief Justice Warren, writing for the Court, turned toward *Baker*'s functional approach rather than *Frothingham*'s concern with separation of powers:

> The question whether a particular person is a proper party to maintain the action does not, by its own force, raise separation of powers problems related to improper judicial interference in areas committed to other branches of the Federal Government. Such problems arise, if at all, only from the substantive issues the individual seeks to have adjudicated. Thus, in terms of Article III limitations on federal court jurisdiction, the question of standing is related only to whether the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution. It is for that reason that the emphasis in standing problems is on whether the party invoking federal court jurisdiction has "a personal stake in the outcome of the controversy," . . . and whether the dispute touches upon "the legal relations of parties having adverse legal interests."

Id. at 100–01 (quoting *Baker*, 369 U.S. at 205). After announcing these broad principles, the Court introduced a test to determine whether there was sufficient personal stake in a taxpayer standing suit by requiring "a logical nexus between the status asserted and the claim sought to be adjudicated." *Id.* at 102. In the context of a taxpayer suit, the taxpayer must show the challenged statute was an exercise of Congress's power to tax and spend under Article I, § 8, and, if so, that the challenged enactment violates specific constitutional limitations on that power. In *Flast*, the Court held the expenditures were a result of the spending power and the Establishment Clause specifically limited the exercise of that power. Thus, there was standing. In contrast, the Court held, *Frothingham* lacked such a nexus.

¶ 48 The "nexus test" announced in *Flast* has been much-criticized.[33] Subsequently, the Court has essentially confined its scope to analy-

33. *See, e.g.*, *United States v. Richardson*, 418 U.S. at 182 (Powell, J., concurring) ("[I]t is impossible to see how an inquiry about the existence of 'concrete adverseness' is furthered by the application of the *Flast* test.").

sis of taxpayer standing claims under the taxing and spending power of Article I, § 8. For our purposes, *Flast* is relevant for cementing the 'pragmatic and functional strain' of *Baker*'s requirement for "concrete adverseness" and a sufficiently "personal stake in the outcome of the controversy," and also for significantly limiting the apparently broad scope of *Frothingham*'s prohibition against federal taxpayer standing in constitutional litigation.

¶ 49 While *Baker* and *Flast* involved rights arising directly under the constitution, this era also saw an expansion in standing based on rights created by statute. There was, of course, general acceptance that an express conferral of standing by Congress created a right to sue. *See McGrath*, 341 U.S. at 151–53 (Frankfurter, J., concurring). This included private attorney general actions where the plaintiff alleged no *personal* interest of their own besides the right to sue created by the statute. *See, e.g.*, *Scripps-Howard Radio*, 316 U.S. at 14 (recognizing that Congress permits litigants "standing only as representatives of the public interest."). Furthermore, the objects of statutes—that is, those regulated, as distinguished from the beneficiaries of such regulation—had standing under the APA where they had a personal interest at stake that was protected by the statute. *See* Sunstein, *Standing After* Lujan, 91 Mich. L. Rev. at 182 ("People could bring suit if they could show that 'a relevant statute' . . . granted them standing by providing that people 'adversely affected or aggrieved' were entitled to bring suit. In this way, the APA recognized that Congress had allowed people to have causes of action, and hence standing, even if their interests were not entitled to consideration by the relevant agency." (footnote omitted)). In the decade following *Flast* courts went further, concluding that the beneficiaries of regulatory programs, as well as their objects, had standing to sue to challenge government action—as well as administrative *in*action. *See id.* at 183 (citing cases from 1960 through 1975 where "courts concluded that displaced urban residents, listeners of radio stations, and users of the environment could proceed against the government to redress an agency's legally insufficient regulatory protection"). The "legal interest" test, which was exemplified by Justice Frankfurter's concurrence in *McGrath*, under which plaintiffs had standing if they suffered infringement of a right at common law, by statute, or under the constitution, *McGrath*, 341 U.S. at 151–53 (Frankfurter, J., concurring), was thus "read to allow standing for beneficiaries, who often faced statutory harm—'legal injury'—by virtue of inadequate regulatory action." Sunstein, *Standing After* Lujan, 91 Mich. L. Rev. at 184; *see Hardin v. Kentucky Utilities Co.*, 390 U.S. 1 (1968) (holding that "no explicit statutory provision [was] necessary to confer standing," since the private utility bringing suit was "in the class

which [the statute was] designed to protect"); Louis L. Jaffe, *Standing Again*, 84 Harv. L. Rev. 633, 633 (1972).

¶ 50 However, the Court did not stop with expanding the legal interest test. Nor did it decide that a private person could challenge any alleged violation of the public interest. Instead, in *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150 (1970), the Supreme Court abandoned the legal interest test, distinguishing it by reasoning that it "goes to the merits," and unanimously held for the first time that a plaintiff could challenge a government action by alleging "injury in fact." 397 U.S. at 152–53. The factual injury could, but need not be, economic. *See id.* at 152. In particular, the court recognized that "aesthetic, conservational, and recreational" interests, or even "a spiritual stake" could support standing under the "injury in fact" test. *Id.* at 154 (citations omitted); *see also* Gene R. Nichol, Jr., *Injury and the Disintegration of Article III*, 74 Cal. L. Rev. 1915, 1921 (1986) (identifying cases in which the Supreme Court subsequently recognized these injuries, as well as other nontraditional injuries). Plainly the injury-in-fact test was intended to expand standing to new categories of plaintiffs beyond that conferred by the legal interest test. *See Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 39 (1976) ("Reduction of the threshold requirement to actual injury redressable by the court represented a substantial broadening of access to the federal courts over that previously thought to be the constitutional minimum under [the APA]."). This expansion soon presented problems, however. *See* Nichol, *Rethinking Standing*, 72 Cal. L. Rev. at 75 (noting that, in some cases, injury-in-fact-test relied on injuries "that were not only intangible, but also subjective" and, in others, could not be separated from legal interests). Although *Data Processing* intended to expand standing, not restrict it, *Data Processing*'s injury-in-fact test paved the way for the restriction of standing to come. *See* Laurence H. Tribe, 1 *American Constitutional Law* 394 (3d ed. 2000) ("By decoupling standing from questions of substantive law, the *Data Processing* Court sowed the initial seeds of doubt regarding Congress' power to create standing where private rights were not infringed.").

¶ 51 The attempt to expand standing under the injury-in-fact test announced in *Data Processing* and the adoption of a pragmatic and functional approach to the question in *Baker* and *Flast* soon gave way to doctrinal change that tightened standing requirements and limited access to federal courts in the Burger era. In a series of cases addressing constitutional challenges to legislation, the Supreme Court reversed course on the pragmatic approach to standing, grounding it instead in

separation of powers—a view it had expressly rejected in the prior era. *See Flast*, 392 U.S. at 100 ("[W]hether a particular person is a proper party to maintain the action does not, by its own force, raise separation of powers problems.").

¶ 52 In a pair of decisions handed down the same day, the Court held there was no standing in a case alleging the failure to publish the CIA's budget violated Article I, § 9, or in a challenge to the ability of members of Congress to simultaneously serve in the Armed Forces Reserve under the incompatibility clause of Article I, § 6, cl. 2. *United States v. Richardson*, 418 U.S. 166 (1974); *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208 (1974). In *Schlesinger*, the Court held a plaintiff cannot rely on citizen standing if his interest is " 'undifferentiated' from that of all other citizens." *Id.* at 217. While the Court in part defended this position in terms of *Baker*'s need for a personal stake to ensure adversary presentation, the decision primarily turned on separation-of-powers concerns, noting that since "every provision of the Constitution was meant to serve the interests of all," and permitting standing under all constitutional provisions would "ha[ve] no boundaries" and ultimately "distort the role of the Judiciary in its relationship to the Executive and the Legislature . . . ." *Id.* at 226–27, 222. Similarly, in *Richardson*, the Court held there was no citizen or taxpayer standing to challenge legislation shielding the CIA budget from public disclosure under the Statement and Account Clause, U.S. Const. art. I, sec. 9, cl. 7. *Richardson*, 418 U.S. at 175. In his concurrence, Justice Powell reasoned that "taxpayer or citizen advocacy, given its potentially broad base, is precisely the type of leverage that in a democracy ought to be employed against the branches that were intended to be responsive to public attitudes." *Id.* at 189 (Powell, J., concurring). *Richardson*, too, tightened taxpayer and citizen standing based primarily on separation-of-powers grounds. Finally, in *Valley Forge*, the Court nevertheless found no standing for a taxpayer challenging the federal government transfer of public property to a religious institution under the Establishment Clause, distinguishing it from *Flast* on the grounds that it was executive not legislative action, thus cabining the conceivably broad access to taxpayer standing under *Flast*. *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464 (1982).

¶ 53 These cases reaffirm and extend the prohibition against generalized grievances, making clear that "undifferentiated" or "abstract" rights under the constitution were not sufficient to confer standing. Moreover, the Court continued to change course on its earlier expansion of standing, emphasizing that the federal law of standing was based not pri-

marily on functional concerns about the adversary presentation of the dispute, as indicated in *Baker* and *Flast*, but separation of powers, *see Allen v. Wright*, 468 U.S. 737, 752 (1984), and federalism, *see Los Angeles v. Lyons*, 461 U.S. 102, 112 (1983).

E. *Lujan* and "Injury in Fact" to Date

¶ 54 In 1992, with an opinion written by Justice Scalia, the Supreme Court dramatically altered the law of standing in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), when the Court held for the first time that plaintiffs had no standing to bring suit under a congressional statute authorizing suit because they lacked "injury in fact." The plaintiffs had sued under the Endangered Species Act (ESA). Section 7 of the ESA requires the Secretary of the Interior to consult with other agencies when agency projects threaten the existence of endangered plants and animals. 16 U.S.C. § 1536(a)(2) (2018). The Interior Department had originally construed that statute to apply to actions within the United States, on the high seas, or in foreign nations. *Lujan*, 504 U.S. at 558. The agency reexamined its position and ultimately issued a new regulation interpreting the statute to require consultation only for actions taken in the United States or on the high seas, not in foreign nations. *Id.* at 558–59. The plaintiffs, wildlife conservation organizations, challenged the new regulation as wrongly interpreting the statute.

¶ 55 In its decision, the Court announced the test for standing that remains the law of standing at the federal level today, that as an "irreducible constitutional minimum" standing requires three elements:

> First, the plaintiff must have suffered an "injury in fact"—an invasion of a legally protected interest which is (a) concrete and particularized and (b) "actual or imminent, not 'conjectural' or 'hypothetical.' " Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."

Id. at 560–61 (citations omitted) (alterations in original). The Court applied this test and held the plaintiffs had failed to allege adequate "injury in fact." Although the parties had a "cognizable interest" in "the desire to use or observe an animal species," the particular plaintiffs (here, one or

more of the organizations' members) would not be " 'directly' affected apart from their ' "special interest" in the subject.' " *Id.* at 563 (citations omitted). The Eighth Circuit Court of Appeals below had nevertheless held there was standing based upon the ESA's "citizen-suit" provision granting "any person" a right to sue to enforce the statute. *Id.* at 571–72 (quoting 16 U.S.C. § 1540(g)). The Supreme Court rejected this rationale, however, concluding that the interest conferred by the statute was merely a "conferral upon *all* persons of an abstract, self-contained, noninstrumental 'right' ," *id.* at 573, and that it was merely a "generalized grievance," *id.* at 575. The Court summarized the generalized grievance caselaw including *Frothingham*, *Levitt*, *Richardson*, *Schlesinger*, and *Valley Forge*[34] and applied the prohibition for the first time to bar standing for a claim that arose not under the Constitution, like every generalized grievance case before, but under a statutory cause of action created by Congress. Recognizing this novel path, the Court noted that "there is absolutely no basis for making the Article III inquiry turn on the source of the asserted right," and to do so "would be discarding . . . one of the essential elements that identifies those 'Cases' and 'Controversies' that are the business of the courts. . . ." *Id.* at 576. Thus, on the basis of the Case or Controversy requirement, the Court held plaintiffs lacked standing to sue in an action to vindicate the public interest in the effective enforcement of laws even where Congress expressly conferred standing to sue.

¶ 56 Criticism of *Lujan* and the injury-in-fact requirement more broadly has been widespread. First, it has been criticized most harshly for its inconsistency with the original meaning of the case or controversy requirement of Article III and, in particular, the long history in England and the United States of public actions brought by private plaintiffs, including those authorized under a statute, as summarized above. *See generally* Sunstein, *Standing After* Lujan, 91 Mich. L. Rev. 163; Gene R. Nichol, Jr., *Justice Scalia, Standing, and Public Law Litigation*, 42 Duke L.J. 1141, 1151–53 (1993). Second, the injury-in-fact test, which was introduced in *Data Processing* to expand access to the courts, was, according to the critics, perversely used instead to foreclose access to the judiciary under many statutory "citizen-action" provisions. Third, critics argue that despite its occasional statements to the contrary, in turning to "injury in fact," the Court has undermined the separation of powers by invading the power of the legislature to create rights. *See* Hessick, *Standing, Injury in Fact, and Private Rights*, 93 Cornell L.

34. Although, notably, *Flast* was not discussed.

Rev. 275 at 320—21. Most strikingly, critics argue that the rule in *Lujan* could be applied to limit even indisputably private rights of action created by statute.[35] Fifth, despite reflecting an attempt to objectify the law and separate standing analysis from a decision on the merits, the critics argue that the injury-in-fact test essentially imports assessment of the merits of the claim into the analysis *sub rosa*. Nichol, *Rethinking Standing*, 72 Cal. L. Rev. at 78. Finally, the critics argue that original concerns motivating standing doctrine—ensuring sufficient "concrete adverseness" to ensure efficient resolution of disputes—does not necessitate and is arguably impaired by the injury in fact requirement.[36]

¶ 57 In summary, the very notion of a standing requirement under Article III only arose in the twentieth century. For most of our nation's history, federal law permitted standing for private citizens in public actions even in the absence of any particularized injury requirement. For most of the twentieth century, standing existed where there was invasion of a legal right under the common law, a statute, or the Constitution. The Supreme Court long emphasized a functional and pragmatic approach to the question of standing, focused on "concrete adverseness," generally limiting this concern to constitutional questions, and significantly expanded the categories of claims that could support standing. However, that expansion was reversed, first in the context of taxpayer and citizen suits and, later with the adoption of an "injury in fact" requirement, which has been increasingly used to constrain access to federal courts even where a statute creates a right to sue. Ultimately the Court adopted a restrictive interpretation of injury-in-fact that applied its substantially tightened requirements for standing to attack the constitutionality of acts of the other branches based on taxpayer or citizen standing beyond that context to rights actually created by Congress.

F. Standing Under North Carolina Law

¶ 58 We must now determine whether our North Carolina Constitution, specifically the "judicial power" provisions of Article IV, §§ 1 and 2,

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35. *See Spokeo*, 136 S. Ct. at 1549, 194 L. Ed. 2d at 635 ("Congress' role in identifying and elevating intangible harms does not mean that a plaintiff automatically satisfies the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right.").

36. Notably, the Supreme Court has largely jettisoned *Baker*'s concrete adverseness rationale. *See Lewis v. Casey*, 518 U.S. 343, 353 n.3 (1996) (noting standing doctrine "has a separation of powers component, which keeps courts within certain traditional bounds vis-à-vis the other branches, concrete adverseness or not. That is where the 'actual injury' requirement comes from").

imposes a requirement for "standing," as well as a requirement for "injury-in-fact," to bring suit under a cause of action which the General Assembly has expressly created. As an initial matter, we have held that our Constitution, unlike the federal constitution, "is in no matter a grant of power. All power which is not limited by the Constitution inheres in the people . . . ." *McIntyre v. Clarkson*, 254 N.C. 510, 515 (1961) (quoting *Lassiter v. Northampton Cty. Bd. of Elections*, 248 N.C. 102, 112 (1958)). Judicial power under the state constitution is, therefore, plenary, and "[e]xcept as expressly limited by the constitution, the inherent power of the judicial branch of government continues."[37] *Beard v. North Carolina State Bar*, 320 N.C. 126, 129 (1987); *see generally State v. Lewis*, 142 N.C. 626 (1906). While the federal constitution limits the federal "judicial Power" to certain "Cases" and "Controversies." U.S. Const. Art. III, § 2, our Constitution, in contrast, has no such case or controversy limitation to the "judicial power." Because the federal concept of standing is textually grounded in terms which are not present in the North Carolina Constitution, we see that the framers of the North Carolina Constitution did not, by their plain words, incorporate the same federal standing requirements. *See Goldston v. State*, 316 N.C. 26, 35 (2006) (holding North Carolina standing doctrine is "not coincident with federal standing doctrine"). Thus, any limitation on the judicial power in the North Carolina Constitution must inhere in the phrase "judicial power" itself.

1. Does the North Carolina Constitution Impose an "Injury-in-Fact" Requirement Under the "Judicial Power" Provision?

¶ 59 As noted, throughout the nineteenth century, the words "judicial power" in our Constitution imposed no limitation on standing. Since 1776, North Carolina law contemplated that the writ of mandamus and an action in the nature of the writ of *quo warranto* were available without any showing of a personal stake in the litigation, continuing a legacy that originated in the earliest days of the common law. Against this backdrop, we conclude that neither the framers of the 1776 Constitution, which recognized a judicial power to be kept "forever separate and distinct," nor of the 1868 Constitution, which originated our present "judicial power" in its own Article, imposed a requirement of particular injury beyond a legal right at common law, by statute, or under the constitution itself. The only case we have identified in the nineteenth century impos-

37. Other states have recognized the "plenary" nature of their judicial power under state constitutions. *See*, *e.g.*, *Couey*, 357 Or. at 502, 355 P.3d at 891; *Borrego v. Territory*, 8 N.M. 446, 495 (1896) ("judicial power . . . is thus vested in plenary terms"); *Floyd v. Quinn*, 24 R.I. 147, 149 (1902) ("[T]he vesting of the judicial power is plenary and exclusive.").

ing a standing-type justiciability doctrine as a constitutional requirement was the prohibition against collusive suits. *See Blake v. Askew*, 76 N.C. at 326 ("If they were ever valid in this State, feigned issues are abolished by the Constitution, Art. 4, § 1.").

¶ 60 Concerns about standing under North Carolina law arose in the context of suits to enjoin legislation for violating the constitution; rather than in preventing parties from getting in the courthouse door, these concerns addressed what arguments parties may lodge once there. In *St. George v. Hardie*, 147 N.C. 88 (1908), for instance, a licensed boat pilot for hire, who was licensed by a licensing board regulating pilotage on the Cape Fear River, sought to pilot a boat into the river and was denied by the defendant, the captain of the vessel, who piloted it into and out of the river himself. The plaintiff sued for the fee and the defendant, on appeal, challenged the validity of the statute authorizing the licensing board alleging that it created a monopoly in violation of the emoluments and monopolies clauses of the North Carolina Constitution by limiting the number of pilots. This Court held the defendant could not present this argument because he did not lose any right of selection of pilot as he intended to pilot his own ship. "Nor will a court listen to an objection made to the constitutionality of an act by a party whose rights it does not affect, and who has, therefore, no interest in defeating it." *Id.* at 97. Reasoning that the plaintiff was thus advancing the right of third parties, we noted that, as a principle of constitutional avoidance, we will pass upon the constitutionality of a legislative act "only in respect to those particulars, and as against those persons whose rights are thus affected[;] . . . it is only where some person attempts to resist its operation and calls in the aid of its judicial power, to pronounce it void, as to him, his property, his rights, that the objection of unconstitutionality can be presented and sustained." *Id.* at 98 (quoting *In re Wellington*, 33 Mass. (16 Pick.) 87, 96 (1834)). *St. George* might best be understood as an application of the principle of *jus tertii*, prohibiting a party from raising the rights of third parties. *See Holmes v. Godwin*, 69 N.C. 467, 470 (1873) ("*In general*, *jus tertii* cannot be set up as a defence by the defendant, unless he can in some way connect himself with the third party.").

¶ 61 We soon extended this principle to recognize that, in exercise of the equitable judicial power, a party was not entitled to injunctive relief as a matter of *substantive* law unless he would be irreparably harmed. *See Newman v. Watkins*, 208 N.C. 675, 678 (1935) ("The plaintiffs sought in a court of equity to restrain an election. It was freely conceded upon the argument that unless the statute in question is unconstitutional, the plaintiffs were not entitled to the relief sought."). This Court quoted a

treatise which itself cited *Frothingham* for the principle that "[t]he party who invokes the power (of a court to declare an act of the legislature unconstitutional) must be able to show, not only that the statute is invalid, but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally." *Id.* at 676–77 (quoting Willoughby, *Willoughby on the Constitution of the United States* (2d ed.) § 13, p. 20).[38] We have consistently required a showing of direct injury in injunctive suits, emphasizing that this requirement is limited to parties seeking injunctive relief declaring laws unconstitutional. *See Leonard v. Maxwell*, 216 N.C. 89, 97 (1939), ("If others have been aggrieved [by provisions for which plaintiff did not allege hurt], it suffices to say the plaintiff can speak only for himself. *In matters of constitutional challenge*, he is not his brother's keeper." (emphasis added) (citing *Newman v. Watkins*, 208 N.C. 675 (1935)); *Yarborough v. North Carolina Park Comm'n*, 196 N.C. 284, 288 (1928) ("A party who is not personally injured by a statute is not permitted to assail its validity; if he is not injured, he should not complain because another may be hurt."). In subsequent cases we have required a plaintiff to show direct injury in the two modern contexts in which injunctive relief remedied by declaring a law unconstitutional ordinarily arises—actions under the Uniform Declaratory Judgment Act and challenges to zoning ordinances. *See, e.g.*, *American Equitable Assur. Co. of N.Y. v. Gold*, 248 N.C. 288 (1958) (plaintiffs adequately alleged personal, direct injury under Uniform Declaratory Judgment Act); *Fox v. Board of Comm'rs of Durham County*, 244 N.C. 497 (1956) (no injury alleged in challenge zoning ordinance affecting county only as residents and taxpayers of county).

¶ 62 The "direct injury" required in this context could be, but is not necessarily limited to, "deprivation of a constitutionally guaranteed personal right or an invasion of his property rights." *State ex rel. Summrell*

38. This Court has also cited *Ex parte Levitt* for a near-identical proposition. *See Turner v. City of Reidsville*, 224 N.C. 42, 47 (1944) ("It is an established principle that to entitle a private individual to invoke the judicial power to determine the validity of executive or legislative action he must show that he has sustained, or is in immediate danger of sustaining, a direct injury as the result of that action and it is not sufficient that he has merely a general interest common to all members of the public." (quoting *Ex parte Levitt*, 302 U.S. 633 (1937))). Although we have cited these federal cases for this proposition in the past, it does not follow that the requirement for direct injury in injunctive suits in North Carolina is coterminous with these federal analogues. *See Goldston*, 361 N.C. at 35; *accord Nicholson v. State Ed. Assistance Authority*, 275 N.C. 439, 448 (1969) ("A taxpayer, as such, may challenge, by suit for injunction, the constitutionality of a tax levied, or proposed to be levied, upon him for an illegal or unauthorized purpose.").

v. Carolina-Virginia Racing Ass'n, 239 N.C. 591, 594 (1954); *see also Canteen Services v. Johnson, Comm'r of Revenue*, 256 N.C. 155, 166 (1962) (holding only persons "who have been injuriously affected . . . in their persons, property or constitutional rights" may challenge constitutionality of a statute). Notably, unlike in federal court, taxpayer status has long served as a basis for challenges alleging the unconstitutional or illegal disbursement of tax funds. *See Goldston v. State*, 361 N.C. at 30–31 (citing *Stratford v. City of Greensboro*, 124 N.C. 110, 111–112 (1899)). For example, we considered the standing of taxpayers to challenge the validity of a statute in *Stanley v. Department of Conservation and Development*, 284 N.C. 15 (1973). There, we held that the taxpayers were injured by a statute that exempted property from taxation, because this "increases the burden imposed upon all other taxable property." *Stanley*, 284 N.C. at 29.

¶ 63 We have not yet addressed whether the requirement of a "direct injury" or, in other words, that a person be "adversely affected" by a statute, which we have applied as a substantive requirement to entitle a plaintiff to injunctive relief, is also a constitutional requirement under the "judicial power" of Article IV, § 2 of our Constitution. This requirement is, however, founded on a longstanding concern that "[t]he courts never anticipate a question of constitutional law in advance of the necessity of deciding it." *Wood v. Braswell*, 192 N.C. 588, 589 (1926). Notably in *Wood*, Chief Justice Stacy in a concurring opinion did locate this rule, along with our avoidance of venturing advisory opinions on constitutional questions, in Article IV, § 2, reasoning that "it is only in cases calling for the exercise of judicial power that the courts may render harmless invalid acts of the Legislature." *Id.* at 590 (Stacy, C.J., concurring). The majority, however, did not go that far, implicitly reserving the question of whether this principle arises directly from the judicial power or as a prudential principle of judicial self-restraint.

¶ 64 We have since clarified that the rule requiring direct injury to challenge the constitutionality of a statute is based on the rationale "that only one with a genuine grievance, one personally injured by a statute, can be trusted to battle the issue." *Stanley v. Department of Conservation and Development*, 284 N.C. 15, 28 (1973). In *Stanley*, citing *Flast* approvingly for the rationale underpinning federal standing announced in *Baker*, we held

> [t]he "gist of the question of standing" is whether the party seeking relief has "alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens

> the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions."

Id. (quoting *Flast v. Cohen*, 392 U.S. 83, 99 (1968)). As in the case "in which there is no actual antagonistic interest between the parties, or where it appears that the parties are as one in interest and desire the same relief," *Bizzell*, 248 N.C. at 295 (citations omitted), we held that "[w]henever it appears that no genuine controversy between the parties exists, the Court will dismiss the action ex mero motu." *Stanley*, 284 N.C. at 29 (citing *Bizzell*, 248 N.C. 294).

¶ 65 As we have shown, the general question of standing under the North Carolina Constitution is motivated by a pragmatic and functional concern with ensuring "concrete adverseness" that "sharpens the presentation of issues" upon which we depend, in contrast to the federal standing doctrine which is motivated by both separation-of-powers and federalism concerns. We hold, therefore, that the "concrete adverseness" rationale undergirding our standing doctrine is grounded on prudential principles of self-restraint in exercise of our power of judicial review for constitutionality, which is itself only an incident of our exercise of the judicial power to determine the law in particular cases. *See Bayard*, 1 N.C. (Mart.) at 6–7. As this rationale is directly related to the circumstances under which we assert our power and duty to declare laws unconstitutional, it applies to challenges necessitating the resolution of "constitutional questions."[39] *Stanley*, 284 N.C. at 28 (quoting *Flast*, 392 U.S. at 99). Indeed, it is *only* in this context of invoking the "judicial power" to review the constitutionality of legislative and executive acts that the direct injury requirement can be understood. It therefore does not necessarily follow that our requirement for direct injury applies to suits not arising under the constitution, but instead based on common law or statutory right.[40]

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39. This is not the only vital question of justiciability we have recognized is a matter of prudential self-restraint. In *In re Peoples*, we recognized that while "[i]n federal the mootness doctrine is grounded primarily in the 'case or controversy' requirement of Article III, Section 2 of the United States Constitution and has been labeled 'jurisdictional' by the United States Supreme Court . . . [i]n state courts [including North Carolina] the exclusion of moot questions from determination is not based on a lack of jurisdiction but rather represents a form of judicial restraint." *In re Peoples*, 296 N.C. 109, 147 (1978).

40. In the context of an action challenging the constitutionality of a legislative or executive action, we emphasize the requirement for "direct injury" or that the complaining party be "adversely affected" by the action does not incorporate the "injury-in-fact" requirement of federal law. As discussed in detail above, that test arose in 1970 in the context of an interpretation of a provision of the federal APA; whatever its merits as a

¶ 66 We have long held that a plaintiff can maintain an action for infringement of a common law interest irrespective of any "actual" injury that may occur to her. For instance, we have not dismissed trespass actions where there is no allegation of harm beyond the infringement of the legal right. *See Keziah v. Seaboard Air Line R. Co.*, 272 N.C. 299, 311 (1968) ("Any unauthorized entry on land in the actual or constructive possession of another constitutes a trespass, *irrespective of degree of force used or whether actual damages is done*." (emphasis added)); *see also Hildebrand v. Southern Bell*, 219 N.C. 402, 408 (1941) (holding landowner "is entitled to be protected as to that which is his without regard to its money value"). Indeed, "[s]uch entry entitle[s] the aggrieved party to at least nominal damages." *Keziah*, 272 N.C. at 311. Actions for breach of contract can, in some circumstances, proceed on a theory of nominal damages. *See*, *e.g.*, *Bryan Builders Supply v. Midyette*, 274 N.C. 264, 271 (1968) (explaining that in a contract action proof of breach alone is enough to avoid judgment of nonsuit). Even in a common law action where actual injury is a necessary element of the claim, such as negligence, the proper disposition for failure to allege actual injury or damages is not dismissal for lack of standing, but dismissal for failure to state a claim upon which relief can be granted. *See*, *e.g.*, *Hansley v. Jamesville & W.R. Co.*, 115 N.C. 602, 613 (1894) ("Neither negligence without damage nor damage without negligence will constitute any cause of action.").[41] As one commentator has noted, at common law, "[l]egal injuries were conceptualized in terms of the experience of physical injury, but the former was not confused with the latter. It is only in this sense that there could be a notion of *damnum absque injuria*—that is, damage without cognizable legal injury." Winter, *Metaphor*, 40 Stan. L. Rev. at 1397.[42]

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requirement of the federal constitution, it has no connection to the text or history of our state constitutional provisions or the doctrines we have developed in accordance with them.

41. As the Court of Appeals below noted, "[i]f EMPAC had *slandered* Mr. Forest in its political ad, Mr. Forest would have had standing to seek at least nominal damages for this tort, even though he won the election." *See Comm. to Elect Dan Forest*, 260 N.C. App. at 7 (citing *Wolfe v. Montgomery Ward*, 211 N.C. 295, 296 (1937)).

42. One possible exception is the private action for common law public nuisance, but while our courts have sometimes characterized the requirement of a showing of special damages or invasion of a right not considered merged in the general public right in such an action as a requirement for "standing," *see*, *e.g.*, *Neuse River Foundation, Inc. v. Smithfield Foods, Inc.*, 155 N.C. App. 110, 115 (2002), dismissal for lack of subject-matter jurisdiction in such cases is based not on a constitutional requirement for standing or injury, but on the absence of any possible damages to be recovered. *See Hampton v. Pulp Co.*, 223 N.C. 535, 544 (1943) ("The real reason on which the rule denying individual

¶ 67 We have also long held that where the Legislature has created a statutory cause of action, so long as the plaintiff falls in the class of persons on which the statute confers the right, the courts will hear her claim. As we previously noted, since the nineteenth century, our Court has permitted citizens to bring citizen-suits alleging no personal injury or interest besides the statutory grant under statutory analogues to the common-law prerogative writs, such as the action in the nature of a writ *quo warranto*. *See Hall*, 111 N.C. at 371. We continue to recognize the Legislature's power to create such 'standingless' causes of action based upon purely 'public' rights. *State ex rel. Summrell v. Carolina-Virginia Racing Association*, 239 N.C. 591 (1954), authored by Justice (later, Chief Justice) William Bobbitt for the Court, is most instructive.

¶ 68 In *Summrell*, a plaintiff who was a resident of Currituck County sued "to perpetually enjoin, as a nuisance as defined by N.C.G.S. § 19-1, the defendant's maintenance and use of certain premises, buildings, fixtures and machines, for the purpose of gambling." *Id.* at 591. The defendant Racing Association was a private corporation granted a franchise as a result of an act of the General Assembly. Pursuant to that law, an election was held at which a majority of the voters participating voted in favor of a countywide Racing Commission. *Id.* To enforce its prohibition against the nuisances listed in § 19-1, the General Assembly chose to create a civil action at N.C.G.S. § 19-2, under which the plaintiff sued as relator, which provided as follows:

> "Any citizen of the county may maintain a civil action in the name of the State of North Carolina upon the relation of such . . . citizen, to perpetually enjoin said nuisance, the person or persons conducting or maintaining the same, and the owner or agent of the building or ground upon which said nuisance exists."

Id. at 594 (quoting N.C.G.S. § 19-2 (1965)). The action created by the General Assembly was plainly a "public action" as we discussed above—a "case[ ] in which a plaintiff, in some fashion or other, asserts the pub-

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recovery of damages [for public nuisances absent special damages or invasion of some right not considered merged in the general public right] is based—and the only one on which the policy it reflects could be justified—is that a purely public right is of such a nature that ordinarily an interference with it produces no appreciable or substantial damage."). In such cases, the absence of special damages or infringement of a right precludes establishment of the private cause of action at all, but as discussed below, a public action for abatement of public nuisance, including one maintained by any "private citizen of the county," is still available. *See* N.C.G.S. § 19-2.1 (2019).

lic's interest rather than just his own—in an attempt to challenge the actions of the government or a private party." Gene R. Nichol, Jr., *The Impossibility of* Lujan*'s Project*, 11 Duke Envtl. L. & Pol'y F. 193, 194 (2001). The plaintiff's interest, even as recognized by the statute, was no different than that of any other "citizen" of his county.[43] It certainly could not be contended to be "concrete" or "particularized." *Lujan*, 504 U.S. at 560. Nevertheless, this Court reversed the trial court's decision that it lacked "legal authority" to pass upon the action, holding that "the plaintiff's action is not grounded on general equitable principles *but on the express authority of [the statute]*, and he is entitled to injunctive relief if he can prove his allegations that the defendant is conducting and maintaining a gambling establishment." *Summrell*, 239 N.C. at 594 (emphasis added).

¶ 69 Nor was *Summrell* the last time this Court recognized the Legislature's power to create causes of action and permit a plaintiff to recover in the absence of a traditional injury. In *Bumpers v. Community Bank*, 367 N.C. 81, 88 (2013), for instance, we held the General Assembly had authority to prohibit unfair and deceptive trade practices and to create a private cause of action in favor of a class of individuals to enforce this prohibition. In order to come within the class of persons protected by the statute the plaintiff must have been "injured by reason of any act or thing done by any other person, firm or corporation in violation of the provisions of this Chapter," N.C.G.S. § 75-16 (2011); however, "[t]his statute is broader and covers more than traditional common law proscriptions on tortious conduct, though fraud and deceit tend to be included within its ambit." *Bumpers*, 367 N.C. at 88. Thus, North Carolina's Unfair and Deceptive Trade Practices Act expanded the injury for which a plaintiff could recover beyond the common law and the question of the plaintiff's standing was not even raised.

¶ 70 In *Addison v. Britt*, 83 N.C. App. 418 (1986), a case involving the federal Truth in Lending Act, our Court of Appeals concluded that "[o]nce a violation of an actionable portion of the [Truth in Lending Act] is established, the debtor is entitled to recover statutory damages [and

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43. It is worth noting, though not strictly necessary to our present purposes, that the constitutionality of the act authorizing the commission was implicitly at issue in the claim because, if the act was valid, the plaintiff could not prevail on his substantive nuisance claim. Thus, this Court recognized, in this instance at least, that a statutory cause of action could provide a basis for judicial review of the constitutionality of a legislative act where there was effectively no citizen standing, on the basis that the action was not grounded on equity, but statute. This bolsters our conclusion that standing is a prudential, not purely constitutional, restraint on this Court's exercise of the "judicial power."

that b]ecause the purpose of that section is to encourage private enforcement of the Act, *proof of actual damages is unnecessary*." *Id.* at 421 (emphasis added). Thus, the civil action under the Truth in Lending Act reflects a "private attorney general" action, in the sense that Congress, to promote the purposes of the Act, has empowered private individuals to sue to vindicate the public interest and to recover based on the statutory damage formula, regardless of the damages actually accumulated. Furthermore, the Act did not require "that the debtors have been misled or deceived in any way." *Id.* Thus, the Act authorized "any person [who] is liable to such [creditor failing to comply with the Act]" to recover under the Act, irrespective of actual injury resulting from infringement of the Act. *See* 15 U.S.C. § 1640(a) (1982).

¶ 71 In summary, our courts have recognized the broad authority of the legislature to create causes of action, such as "citizen-suits" and "private attorney general actions," even where personal, factual injury did not previously exist, in order to vindicate the public interest. In such cases, the relevant questions are only whether the plaintiff has shown a relevant statute confers a cause of action and whether the plaintiff satisfies the requirements to bring a claim under the statute. There is no further constitutional requirement because the issue does not implicate the concerns that motivate our standing doctrine. *See*, *e.g.*, *Stanley*, 284 N.C. at 28. The existence of the legal right is enough.

¶ 72 Having surveyed the relevant English, American, and North Carolina law of standing, we are finally in a position to determine whether, as EMPAC and the dissent below argue, the North Carolina Constitution imposes an "injury-in-fact" requirement, as under the federal constitution. While our Court of Appeals has previously come to that conclusion, which was followed by numerous panels of that court, *see*, *e.g.*, *Neuse River Foundation*, *Inc. v. Smithfield Foods*, *Inc.*, 155 N.C. App. 110, 113–15 (2002) (holding North Carolina law requires "injury in fact" for standing and applying *Lujan*), we are not bound by those decisions and conclude our Constitution does not include such a requirement.

¶ 73 First, the federal injury-in-fact requirement has no place in the text or history of our Constitution. Our Constitution includes no case-or-controversy requirement, upon which the federal injury-in-fact requirement is based. As discussed above, the "judicial power" provision of our Constitution imposes no particular requirement regarding "standing" at all. Rather, as a rule of prudential self-restraint, we have held that, in order to assure the requisite "concrete adverseness" to address "difficult constitutional questions," we have required a plaintiff to allege "direct injury" to invoke the judicial power to pass on the constitutionality of

a legislative or executive act. *See Stanley*, 284 N.C. at 28. This standing principle arises as an incident of our power and duty to determine whether executive or legislative acts violate the constitution in the resolution of actual controversies. However, where a purely statutory or common law right is at issue, this rationale is not implicated, and a showing of direct injury beyond the impairment of the common law or statutory right is not required.

¶ 74 Second, the injury-in-fact standard is inconsistent with the caselaw of this Court. To be sure, our own decisions have not always maintained these distinctions with exactitude—or avoided the doctrinal encumbrances which have attached to the "slogans and litanies" of standing decisions as barnacles to the hull. Nichol, *Rethinking Standing*, 72 Cal. L. Rev. at 71. *Dunn v. Pate*, 334 N.C. 115 (1993), provides a particularly instructive example. In that case, we held defendants seeking to avoid having a 1962 deed set aside for failure to comply with a statute in effect at the time, which required the clerk of court to make a private examination of a wife whenever she and her husband entered into a contract to ensure the conveyance was neither unreasonable nor injurious to the wife, had standing to challenge the statute as unconstitutional when the conveyance at issue apparently did not comply with the allegedly discriminatory (and since-repealed) statutory requirement. *Id.* at 117. On the way to holding the defendants in question had standing to attack the constitutionality of the private examination statute, however, we partially overruled a prior Court of Appeals decision while noting the court "correctly stated that the petitioner 'must allege she has sustained an "injury in fact" as a direct result of the statute to have standing.' " *Id.* at 119 (quoting *Murphy v. Davis*, 61 N.C. App. 597, 600, *cert. denied & appeal dismissed*, 309 N.C. 192 (1983)). The Court of Appeals decision, *Murphy*, which we had approved of in this respect had cited Article III, § 1 of the U.S. Constitution, *Baker*, and a case of this Court that itself precisely quoted the standard we discussed above in *Stanley* that was derived from *Baker* via *Flast*. However, the proposition in *Murphy* for which these sources were cited was entirely different: that "Petitioner must allege she has sustained an 'injury in fact' as a direct result of the statute to have standing to challenge the statute as violating either the federal or the North Carolina constitutions." *Murphy*, 61 N.C. App. at 600. Notably, *none* of the sources cited in *Murphy* included the language "injury in fact" and, as discussed in detail above, stand for entirely different propositions. Moreover, this Court in *Dunn* did not itself rely on the federal "injury in fact" standard—throughout the opinion we cited North Carolina caselaw and nowhere cited *Lujan* or *Data Processing*, from which that language originates. Instead, we relied upon the familiar prin-

ciple that, in a challenge to the constitutionality of a statute, a party has standing if they have been "injuriously affected . . . in their . . . property . . . ." *See Dunn*, 334 N.C. at 119 (quoting *Canteen Service*, 256 N.C. at 166). Nevertheless, the Court of Appeals and litigants have taken this apparent approval of an unsupported reference to "injury in fact" in *Dunn* and concluded we intended to incorporate federal standing requirements into North Carolina law. *See, e.g.*, *Neuse River Foundation*, 155 N.C. App. at 114 ("Standing most often turns on whether the party has alleged 'injury in fact' in light of the applicable statutes or caselaw." (citing, inter alia, *Dunn*, 334 N.C. at 119)); *Coker v. DaimlerChrysler Corp.*, 172 N.C. App. 386, 390–92 (2005) (applying *Neuse River Foundation*'s adoption of *Lujan*'s standing requirements to hold plaintiff under UDTPA had not shown "injury in fact" to support standing). We conclude otherwise.[44]

¶ 75 The Court of Appeals' misapplication of our standing requirements in *Neuse River Foundation* was also based on our opinion in *Empire Power Co. v. North Carolina Department of Environment, Health and Natural Resources (DEHNR)*, 337 N.C. 569 (1994). This case is particularly instructive, because it demonstrates how words can assume unintended meanings in the arena of standing. *Empire Power Co.* involved a challenge brought under the North Carolina Administrative Procedure Act (NCAPA), N.C.G.S. §§ 150B-1, *et seq.* (1991), and the Air Pollution Control Act (APCA), N.C.G.S. §§ 143-215.105, *et seq.* (1993), appealing a decision of DEHNR granting an air pollution control permit to a power company to the Office of Administrative Hearings (OAH). *Empire Power Co.*, 337 N.C. at 572. The petitioner alleged DEHNR had violated its statutory duty to reduce air pollution under the APCA by giving the power company a permit without addressing comments filed by another power company. *Id.* at 572. The Court of Appeals concluded, and the power company and DEHNR both argued before this Court, that the petitioner was not an "aggrieved person" within the meaning of the NCAPA because the NCAPA cannot confer a right to an administrative hearing in the OAH and that such a right must be set forth in the organic statute at issue (there, the APCA). *Id.* at 574. This Court reversed, holding that the petitioner had shown that he was a "person aggrieved" under the NCAPA and thus "entitled to an administrative hearing to determine [his] rights, duties, or privileges." *Id.* at 588 (quoting N.C.G.S. § 150B-23(a) (1991)). We noted that, under the NCAPA, " 'Person aggrieved' means any person or group of persons of common interest directly or indirectly af-

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44. To the extent the Court of Appeals' opinion in *Neuse River Foundation, Inc. v. Smithfield Foods, Inc.*, 155 N.C. App. 110 (2002), is at odds with this opinion, we disavow it.

fected substantially in his or its person, property, or employment, by an administrative decision," *Id.* at 588 (quoting N.C.G.S. § 150B-2(6)), and held that the petitioner had established he was a "person aggrieved" because he lived downwind of the permitted station and "alleged *sufficient injury in fact to interests within the zone of those to be protected* and regulated by the statute [(the APCA)], and rules and standards promulgated thereto, the substantive and procedural requirements of which he asserts the agency violated when it issued the permit." *Id.* at 589 (emphasis added). This passing use of the phrase "injury in fact" was not in reference to any requirement of standing under the North Carolina Constitution, but whether the plaintiff had injuries to interests that fall within the zone of interests protected by the underlying statute such that the plaintiff was in the class of those "persons aggrieved" for whom the NCAPA conferred a right to an administrative decision.

2. Does the Remedy Clause of the North Carolina Constitution Impose an "Injury-in-Fact" Requirement?

¶ 76 Finally, it might nevertheless be argued that the remedy clause of the North Carolina Constitution imposes a factual injury requirement for standing. In this case, the Court of Appeals, including both the majority and the dissent below, relied on our statement in *Mangum v. Raleigh Board of Adjustment*, 362 N.C. 640 (2008), to hold the North Carolina Constitution imposes an injury in fact requirement before a plaintiff may have standing.[45] *See Comm. to Elect Dan Forest*, 260 N.C. App. at 6 ("According to our Supreme Court, '[t]he North Carolina Constitution confers standing on those who suffer harm[,]' and that one must have suffered some 'injury in fact' to have standing to sue." (citing first *Mangum*, 362 N.C. at 642; and then *Dunn*, 334 N.C. at 119); *Id.* at 13 (McGee, C.J., dissenting) (" 'As a general matter, the North Carolina Constitution confers standing on *those who suffer harm*[.]' Therefore, the North Carolina Constitution does *not* confer standing on those who

45. As an initial matter, we note that we did not impose a constitutional requirement of "injury-in-fact" in *Mangum*; rather, we held only that, where a petitioner files an action in the nature of certiorari to challenge a quasi-judicial decision under a zoning ordinance based on standing conferred under 160A-393(d)(2) (2019) (recodified at N.C.G.S. § 160D-1402(c)(2)), the petitioner must have alleged "special damages" to maintain the action and the allegations of the petitioner there were sufficient in that regard. *See Mangum*, 362 N.C. at 644; *accord* N.C.G.S. § 160D-1402(c)(2) (Supp. 2 2020) ("The following persons shall have standing to file a petition under this section: . . . Any other person who will suffer special damages as the result of the decision being appealed."). The requirement for special damages to have standing to sue in such cases arises from the requirements of the statute which creates and confers the cause of action on certain persons, not the constitution.

have not suffered harm." (emphasis in original) (citations omitted)). In *Mangum*, we stated "The North Carolina Constitution confers standing on those who suffer harm: 'All courts shall be open; [and] every person for an injury done him in his lands, goods, person, or reputation shall have remedy by due course of law . . . .'" *Mangum*, 362 N.C. at 642 (quoting N.C. Const. Art. I, § 18). While our statement in *Mangum* was an adequate summary of the remedy clause's effect on questions of standing—that the provision "confers standing on those who suffer harm"—it does not follow that the those who do not suffer "harm" lack "standing." In terms of logic, "harm" is a sufficient but not a necessary condition for "standing." Much recent difficulty has arisen because of our use of the term "harm." Of course, the remedy clause does not speak in terms of "harm" but "injury," and we turn to the text and history to discern its meaning.

¶ 77 Article I, section 18 of the North Carolina Constitution provides:

> 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.

N.C. Const. art. I, § 18 (emphasis added). This provision has ancient roots in English and American law. Our most contemporary treatise on the North Carolina Constitution identifies the protean origins of Article I, § 18 as a principle in Magna Carta: " '*Nulli vendemus nulli negabimus aut differemus rectum vel justitiam*.' ('To no one will we sell, to no one will we deny or delay right or justice.')" John V. Orth and Paul Martin Newby, *The North Carolina State Constitution* 65 (2d ed. 2013) (quoting Magna Carta, § 40 (1215)). The second clause of the open courts provision, commonly termed a "remedy clause," stemmed not from the text of Magna Carta, § 40 itself, but from Lord Edward Coke's influential commentaries on the provision in his *Institutes of the Laws of England*. *See* Orth and Newby, *The North Carolina State Constitution* 66 (noting that Lord Coke's commentaries pointed out that "[o]pen courts were not enough . . . ; they had to be righting wrongs and doing justice"); *see generally* David Schuman, *The Right to a Remedy*, 65 Temp. L. Rev. 1197 (1992) (describing the origin, history, and interpretation of remedy clauses). Lord Coke reasoned that, by implication, Magna Carta necessitated more than merely "open" courts: "And therefore every Subject of the Realm, for injury done to him in *bonis*, *terries*, *vel persona* [goods, lands, or person] . . . may take his remedy by the course of the Law . . . ." Orth and Newby, *The North Carolina State Constitution* 66 (quoting

Edward Coke, *Institutes of the Laws of England* (London: Society of Stationers, 1641), vol. 2, 55–56).

¶ 78 Prior to *Mangum*, we had never construed this provision to implicate standing. Rather, we have focused on whether the legislature may restrain the remedies available in certain ways. For instance, we have held the remedy clause of the open courts provision permitted the legislature to abolish punitive damages for a libeled plaintiff if a timely retraction was printed, however, we stated in dicta that abolishing compensatory damages would have violated the clause. *Osborn v. Leach*, 135 N.C. 628, 639–40 (1904). Moreover, we have held the legislature does not violate the clause by instituting a statute of repose, because the "the remedy constitutionally guaranteed must be one that is legally cognizable," and "[t]he legislature has the power to define the circumstances under which a remedy is legally cognizable and those under which it is not." *Lamb v. Wedgewood S. Corp.*, 308 N.C. 419, 444 (1983).[46]

¶ 79 How the remedy clause interacts with standing presents another question. This question turns not on what "remedy" is guaranteed, but what the term "injury" means in the phrase so as to entitle a plaintiff to a remedy. Although the provision in its present incarnation was first incorporated into the Declaration of Rights as Article I, § 35 at the 1868 Constitutional Convention, it was not discussed in the records of Convention. *See Journal of the Constitutional Convention of the State of North Carolina* (Raleigh, Joseph W. Holden, 1868). While we cannot infer the intent of the framers from this silent record, commentators have noted "the enactment of these provisions was generally motivated by concerns that the legislature, and sometimes even the courts, might block access to justice. Thus, rather than restricting legislative conferrals [of standing], if anything, they suggest a constitutional mood favorable to broad access to the courts." James W. Doggett, *"Trickle Down" Constitutional Interpretation: Should Federal Limits on Legislative Conferral of Standing be Imported into State Constitutional Law?*, 108 Colum. L. Rev. 839, 878 (2008) (note) (footnotes omitted). Acknowledging this background, we nevertheless must interpret our open courts provision based on contemporaneous understandings and the common law background, which, as we have seen, continued to inform lawmakers well into the nineteenth century.

¶ 80 The concept of "injury" to which Lord Coke referred in his *Institutes* and which pervaded the common law of England and in America is en-

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46. In *Lamb*, we expressly reserved the question whether "the legislature may constitutionally abolish altogether a common law cause of action." *Id.* at 444.

tirely distinct from the concept of "injury in fact" in modern caselaw, encompassing "injuries" which did not include factual harm. For instance, in his own *Commentaries*, Blackstone recognized the writs of mandamus and prohibition, discussed in detail above, "redressed the legal injuries of 'refusal or neglect of justice' and 'encroachment of jurisdiction,' respectively." Winter, *Metaphor*, 40 Stan. L. Rev. at 1397 (quoting 3 William Blackstone, *Commentaries* *111).[47]

> The term 'injury' referred to 'any infringement of the rights of another . . . for which an action lies at law.' Legal injuries were conceptualized in terms of the experience of physical injury, but the former was not confused with the latter. It is only in this sense that there could be a notion of *damnum absque injuria* —that is, damage without cognizable legal injury.

Id. (footnotes omitted) (quoting 1 W. Jowitt, *The Dictionary of English Law* 977 (2d ed. 1977)). As Professor Hessick has noted,

> [f]actual injury (damnum) alone was not sufficient to warrant judicial intervention; rather, a person could maintain a cause of action only if he suffered a legal injury, that is, the violation of a legal right (injuria). A factual harm without a legal injury was *damnum absque injuria*, and provided no basis for relief.

Hessick, *Standing, Injury in Fact, and Private Rights*, 93 Cornell L. Rev. at 280–81 (citing 1 Theodore Sedgwick, *A Treatise on the Measure of Damages* § 32, at 28 (Arthur G. Sedgwick and Joseph H. Beale eds., 9th ed. 1920)). However, while *damnum absque injuria* (factual harm without legal injury) was insufficient at common law, *injuria sine damno* (legal injury without factual harm) sufficed. As Professor Hessick recounts, the seminal case of *Ashby v. White*, 2 Ld. Raym. 938, 92 Eng. Rep. 126, (1702) (Holt, C.J., dissenting), rev'd, 3 Salk. 17, 91 Eng. Rep. 665, would ultimately resolve this question:

> The distinction between actions on for trespass [(which did not require factual harm)] and actions on the case [(which initially did)] began to collapse in the early eighteenth century as courts became resistant to denying relief to plaintiffs whose rights had

47. As Professor Winter notes, "if Blackstone's definitions of these 'injuries' sound strange to modern ears, it is because today's jurisprudence treats 'injury-in-fact' in literalist terms. But the common law usage of the term 'injury' was plainly metaphoric." *Id.* at 1397.

> been violated but who could not demonstrate harm. In the English case *Ashby v. White*, Chief Justice Holt rejected the notion that a plaintiff could not maintain an action on the case arising from the violation of a right if he suffered no harm. He explained that "[i]f the plaintiff has a right, he must of necessity have a means to vindicate and maintain it, and a remedy if he is injured in the exercise or enjoyment of it; and indeed it is a vain thing to imagine a right without a remedy; for want of right and want of remedy are reciprocal." Responding to the argument that an action on the case was "not maintainable because here is no hurt or damage to the plaintiff," Chief Justice Holt argued that "surely every injury imports a damage, though it does not cost the party one farthing, and it is impossible to prove the contrary; for a damage is not merely pecuniary, but an injury imports a damage, when a man is thereby hindered of his right." Regardless of the type of action, the violation of the right was what mattered.

Hessick, *Standing, Injury in Fact, and Private Rights*, 93 Cornell L. Rev. at 281–82 (footnotes omitted).[48] The validity of Justice Holt's views in *Ashby* has been affirmed by this Court as a matter of North Carolina common law. *See, e.g.*, *Eller v. Carolina & W. Ry. Co.*, 140 N.C. 140, 142 (1905) ("Plaintiff may recover what we call nominal damages, which are really no pecuniary compensation, but which merely ascertain or fix his right or cause of action. Lord Holt has well said: 'Surely every injury imports a damage, though it does not cost the party one farthing, and it is impossible to prove the contrary; for a damage is not merely pecuniary, but an injury imports a damage when a man is thereby hindered of his right.' " (quoting *Ashby*, 2 Ld. Raym. at 938)).[49]

¶ 81 Therefore, the word "injury" in the remedy clause of our Constitution's open courts provision, derived from the common-law

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48. "Although Chief Justice Holt's opinion was in dissent, his judgment prevailed on appeal in the House of Lords. By the nineteenth century, both England and the United States regarded Chief Justice Holt's view as correctly stating the law." Hessick, *Standing, Injury in Fact, and Private Rights*, 93 Cornell L. Rev. at 282–83 (footnotes omitted).

49. Lord Holt's rule in *Ashby* was well-established in North Carolina by 1855, prior to the 1868 Convention. *See, e.g.*, *Bond v. Hilton*, 47 N.C. (2 Jones) 149, 150–51 (1855) (per curiam) ("Wherever there is a breach of an agreement, or the invasion of a right, the law infers some damage, and if no evidence is given of any particular amount of loss, it gives nominal damages, by way of declaring the right, upon the maxim, *ubi jus ibi remedium*." (citing *Ashby v. White*, 1st Salk. 19)).

concept of "*injuria*," means, at a minimum, the infringement of a legal right; not necessarily "injury in fact" or factual harm, derived from the contrary concept of "*damnum*." Taking the remedy clause as a whole and in the context of this history, it cannot be understood to impose a *limitation* on the power of the courts to hear a claim, under the "injury in fact" test or otherwise.[50] For the same reason, the remedy clause cannot be understood to impose a limitation on the legislature's power to create new legal rights. To the contrary, by its express terms, which provide that "every person for an injury done him . . . *shall have* remedy by due course of law," to the extent it implicates the doctrine of standing, our remedy clause should be understood as *guaranteeing* standing to sue in our courts where a legal right at common law, by statute, or arising under the North Carolina Constitution has been infringed. N.C. Const. Art. I, § 18, cl. 2 (emphasis added).

G. The Law of Standing in North Carolina Summarized

¶ 82 In summary, the "judicial power" under the North Carolina Constitution is plenary, and "[e]xcept as expressly limited by the constitution, the inherent power of the judicial branch of government continues." *Beard v. North Carolina State Bar*, 320 N.C. 126, 129 (1987). As an exercise of the judicial power entrusted in us by the people of North Carolina in our Constitution, we have the power and duty to determine the law in particular cases and, as a necessary incident of that duty, the power to conduct judicial review of executive and legislative actions for constitutionality when necessary to resolve a case. *Bayard*, 1 N.C. (Mart.) at 6–7. We have held that, in directly attacking the validity of a statute under the constitution, a party must show they suffered a "direct injury." *Summrell*, 239 N.C. at 594; *see also Stanley*, 284 N.C. at 28 (holding party must be "personally injured" to attack validity of statute). The personal or "direct injury" required in this context could be, but is not necessarily limited to, "deprivation of a constitutionally guaranteed personal right or an invasion of his property rights." *Summrell*, 239 N.C.

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50. Thirty-nine state constitutions have remedy clause provisions identical or similar to ours. *See* Schuman, *The Right to a Remedy*, 65 Temp. L. Rev. at 1201–02 (identifying these provisions). The only state we have identified that construes the remedy clause of its open courts provision to impose a standing requirement is Texas, where our sister supreme court has held that "[u]nder the Texas Constitution, standing is implicit in the open courts provision, which contemplates access to the courts only for those litigants suffering an injury," and has applied the standing principle of federal law, including *Lujan. Texas Ass'n of Business v. Texas Air Control Bd.*, 852 S.W.2d 440, 444 (1993); *see id.* at 445 (citing *Lujan*, 504 U.S. 555). We are not persuaded by its reasoning. *See* Doggett, "*Trickle Down" Constitutional Interpretation*, 108 Colum. L. Rev. at 878 (cautioning against adopting the Texas approach because it conflicts with the purposes underlying the adoption of open court provisions).

at 594; *see also Canteen Services*, 256 N.C. at 166 (holding only persons "who have been injuriously affected . . . in their persons, property or constitutional rights" may challenge constitutionality of a statute). The direct injury requirement applicable in cases involving constitutional challenges to the validity of government action is a rule of prudential self-restraint based on functional concern for assuring sufficient "concrete adverseness" to address "difficult constitutional questions":

> " '[t]he "gist of the question of standing" is whether the party seeking relief has "alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.' "

Goldston, 361 N.C. at 30 (quoting *Stanley*, 284 N.C. at 28 (quoting *Flast v. Cohen*, 392 U.S. 83, 99 (1968))). When a person alleges the infringement of a legal right arising under a cause of action at common law, a statute, or the North Carolina Constitution, however, the legal injury itself gives rise to standing. The North Carolina Constitution confers standing to sue in our courts on those who suffer the infringement of a legal right, because "every person for an injury done him in his lands, goods, person, or reputation shall have remedy by due course of law." N.C. Const. art. I, § 18, cl. 2. Thus, when the legislature exercises its power to create a cause of action under a statute, even where a plaintiff has no factual injury and the action is solely in the public interest, the plaintiff has standing to vindicate the legal right so long as he is in the class of persons on whom the statute confers a cause of action.[51]

H. Standing under the Disclosure Statute

¶ 83 Having followed the tortuous track through the thorny thicket of standing that brought us here, applying the law is simple. The Committee

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51. Showing a party falls within the class of persons on whom the statute confers a cause of action may require a showing of some special injury depending on the statutory terms. For instance, our zoning statutes confer standing to maintain a cause of action in the nature of certiorari appealing a quasi-judicial zoning action on certain classes of persons, including "person[s] who will suffer special damages as the result of the decision being appealed." N.C.G.S. § 160D-1402(c)(2) (Supp. 2 2020); *see Mangum*, 362 N.C. at 644. In certain cases, a cause of action may be implied from the statutory scheme. For example, to be entitled to administrative hearing under the NCAPA, a petitioner must show they are a "party aggrieved" by agency action, but where the underlying organic statute does not expressly create a right to a hearing, we have nevertheless held that those who "alleged sufficient injury in fact to interests within the zone of those to be protected and regulated by the [underlying] statute," would have a right to an administrative hearing under the NCAPA as a "person aggrieved." *Empire Power Co.*, 337 N.C. at 589.

has alleged EMPAC violated the requirements of the Disclosure Statute. Part of the Disclosure Statute creates a cause of action permitting the candidate targeted by the illegal ad to enforce the regulations by bringing suit and establishing statutory damages he can seek. This provision is one of many where our General Assembly has provided for such private enforcement. The record indicates the Committee has complied with the requirements of the Disclosure Statute.[52]

¶ 84 The Committee clearly falls under the class of persons on whom the Disclosure Statute confers a cause of action. Mr. Forest was the candidate against whom the ad below was run. He has assigned his interest in the case to his Committee. EMPAC contends that the Committee lacks standing because it cannot show "injury in fact" under *Lujan*. But, as discussed above, that is not the law of North Carolina. Under North Carolina law, the legislature may create causes of action, including "private attorney general actions" to vindicate even a purely public harm. Our requirement for a "direct injury" in cases where the plaintiff attacks the validity of a statute under the constitution does not apply here. Where the plaintiff has suffered infringement of a legal right arising under a statute that confers on a class of persons including the plaintiff a cause of action, and the plaintiff has satisfied the requirements of the statute, the plaintiff has shown standing under the North Carolina Constitution. Here, the Committee has standing based on the statutory cause of action created by the Disclosure Statute.

IV. Conclusion

¶ 85 The doctrine of standing in federal courts, including the "injury-in-fact" requirement, arises under the case-or-controversy provisions of the United States Constitution, by which exercise of the federal judicial power is limited. The North Carolina Constitution, by contrast, contains no analogous provision. Rather, in the context of standing, our "judicial power" is limited by principles of self-restraint requiring a "direct injury" when attacking the validity of a statute under the constitution. When a person alleges the infringement of a legal right directly under a cause of action at common law, a statute, or the North Carolina Constitution, however, the legal injury itself gives rise to standing. The North Carolina Constitution confers standing to sue in our courts on those who suffer the infringement of a legal right, because "every person for an injury

52. EMPAC and the dissent below argued that the Committee did not comply with the "condition precedent" of the Disclosure Statute. We disagree and hold the Committee has satisfied this condition precedent for the reasons stated in the majority opinion below.

done him in his lands, goods, person, or reputation shall have remedy by due course of law." N.C. Const. art. I, § 18, cl. 2.

AFFIRMED IN PART; DISRECTIONARY REVIEW IMPROVIDENTLY ALLOWED IN PART.[53]

Justices BERGER and BARRINGER did not participate in the consideration or decision of this case.

Chief Justice NEWBY concurring in the result.

¶ 86 I agree with the result reached by the majority. Nonetheless, I write separately because I differ in the rationale. A system of fair elections is foundational to self-government. Our state constitution acknowledges this principle and allows the General Assembly broad authority to enact laws to protect the integrity of elections and thus encourage public trust and confidence in the election process. Under that authority, the General Assembly enacted a "stand by your ad" law in 1999, requiring political ads to contain particular information it deemed necessary to inform the public of the ad sponsor. A nonconforming ad provides inadequate information, thus harming the public generally and an affected candidate specifically. Part of that statute allowed a candidate affected by the illegal ad to enforce the regulations by bringing suit and established statutory damages he or she could seek. This provision is one of many where our General Assembly has provided for such private enforcement.

¶ 87 Misinformation harms the public, particularly when the misinformation concerns candidates for elected office. Indeed, the North Carolina Constitution recognizes the people's right to free elections, N.C. Const. art. I, § 10, which means that elections must be free from "interference," John V. Orth & Paul Martin Newby, *The North Carolina State Constitution* 56 (2d ed. 2013). The General Assembly, under its constitutional mandate to protect fair play in elections, addressed the generally recognized threat that improper advertising poses to that goal. *See, e.g.*, *Citizens United v. FEC*, 558 U.S. 310, 371, 130 S. Ct. 876, 916, 175 L. Ed. 2d 753, 802 (2010) (explaining that "disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way," and "[t]his transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages");

53. We originally granted EMPAC's petition for discretionary review on the constitutionality of the Disclosure Statute. We decline to address that issue here.

Buckley v. Valeo, 424 U.S. 1, 66–68, 96 S. Ct. 612, 657–58, 46 L. Ed. 2d 659, 714–15 (1976) (describing the various reasons the government has a significant interest in ensuring that the public is well informed on matters related to campaigning and political candidates).

¶ 88 Some states may address this problem through criminal punishment or civil penalty for intentional violations of disclosure laws. *See Friends of Joe Sam Queen v. Ralph Hise for N.C. Senate*, 223 N.C. App. 395, 403 n.7, 735 S.E.2d 229, 235 n.7 (2012) (explaining the approaches to enforcement various states have taken). The General Assembly chose a different enforcement mechanism. By allowing actions by those candidates who have been affected by unlawful ads, the General Assembly sought to meaningfully secure a vital public interest and grant a specific legal path for the injured candidate to address the wrong. *See* N.C. Const. art. I, § 18. The General Assembly perhaps recognized that it is difficult to monitor all campaign ads, that the public is harmed even by unintentional misinformation, and that the affected candidate has the greatest incentive to pursue a remedy for illegal ads.

¶ 89 Specifically, the General Assembly provided that when any entity creates a political campaign ad that violates certain disclosure requirements, the candidate affected by the unlawful ad "*shall have* a monetary remedy in a civil action against" the violator. N.C.G.S. § 163-278.39A(f) (2011) (emphasis added) (repealed 2014). The injuries to the public, to the election process, and to the individual candidate are hard to quantify: what is the monetary value of misleading information that may affect an election? The General Assembly thus provided for statutory damages. That monetary remedy is, according to the statute, equal to the amount the violating party spent to broadcast the unlawful ad. N.C.G.S. § 163-278.39A(f)(2). Only those candidates who have not violated any of the statutory provisions themselves may sue. N.C.G.S. § 163-278.39A(f). The candidate must file a notice of the complaint with the Board of Elections by the Friday following Election Tuesday. N.C.G.S. § 163-278.39A(f)(1). By the language of the statute, the General Assembly has decided that a candidate who complies with these requirements and shows a violation is entitled to statutory damages.

¶ 90 Plaintiff here has complied with all the statutory requirements. First, there is no evidence that plaintiff has violated any disclosure requirement; plaintiff has clean hands, as the General Assembly required. Next, both defendant and the Board of Elections received notice of the violation within the statutory period. Thus, sufficient evidence exists to show that plaintiff complied with any condition precedent to suing. There is

no dispute that plaintiff's complaint precisely tracks the requirements of the statute.

¶ 91 The only remaining question, then, is whether subsection 163-278.39A(f) is enforceable as written; in other words, is the statute constitutional? It is. Here the General Assembly used its longstanding constitutional authority to create causes of action like this one.

¶ 92 All political power resides in the people, N.C. Const. art. I, § 2, and the people act through the General Assembly. *State ex rel. Ewart v. Jones*, 116 N.C. 570, 570, 21 S.E. 787, 787 (1895) ("[T]he sovereign power resides with the people and is exercised by their representatives in the General Assembly."). The General Assembly therefore may presumptively take any legislative action not specifically prohibited by the North Carolina Constitution. *McIntyre v. Clarkson*, 254 N.C. 510, 515, 119 S.E.2d 888, 891 (1961) ("[A] doctrine firmly established in the law is that a State Constitution is in no matter a grant of power. All power which is not limited by the Constitution inheres in the people, and an act of a State legislature is legal when the Constitution contains no prohibition against it." (alteration in original) (quoting *Lassiter v. Northampton Cnty. Bd. of Elections*, 248 N.C. 102, 112, 102 S.E.2d 853, 861 (1958), *aff'd*, 360 U.S. 45, 54, 79 S. Ct. 985, 991, 3 L. Ed. 2d 1072, 1078 (1959))). Thus, as this Court has regularly noted, any alleged constitutional limitation on the General Assembly's power must be express and demonstrated beyond a reasonable doubt. *E.g.*, *Hart v. State*, 368 N.C. 122, 126, 774 S.E.2d 281, 284 (2015).

¶ 93 In keeping with its general legislative power, the General Assembly has the authority to recognize threats to the public good, identify an injury, and provide for the appropriate remedy. A statute may create a private cause of action even if the common law would not provide that right. *See Rhyne v. K-Mart Corp.*, 358 N.C. 160, 169, 594 S.E.2d 1, 8 (2004) (The General Assembly is inarguably "the policy-making agency of our government, and when it elects to legislate in respect to the subject matter of any common law rule, the statute supplants the common law rule and becomes the public policy of the State in respect to that particular matter." (quoting *McMichael v. Proctor*, 243 N.C. 479, 483, 91 S.E.2d 231, 234 (1956))).

¶ 94 The General Assembly may therefore create "private attorney general actions." Private attorney general actions allow nongovernmental actors to enforce laws. These actions are integral to the well-being of this State's citizens. They are often used when the harm is to the public generally and is difficult to quantify. Such a statute by its own accord

recognizes that an injury has occurred and allows a specified party to sue for recovery. *See*, *e.g.*, *Mayton v. Hiatt's Used Cars*, *Inc.*, 45 N.C. App. 206, 212, 262 S.E.2d 860, 864 (1980) (indicating that when a statute allows for a private attorney general action, it may be irrelevant whether the party bringing the suit has suffered an "actual injury"). For an action to qualify as one brought by a private attorney general, the action usually must address a right that is important to the public interest and provide for private enforcement. *See*, *e.g.*, *Stephenson v. Bartlett*, 177 N.C. App. 239, 244, 628 S.E.2d 442, 445 (2006) (explaining the traditional treatment of private attorney general actions in the context of awards of attorney's fees). These actions deter wrongdoing by incentivizing private parties to prosecute violations.

¶ 95 Indeed, the General Assembly has established a private enforcement mechanism like the one in this case in several other statutes. For example, North Carolina's Open Meetings Law, which requires certain government meetings to be open to the public, allows for such suits. It says that "[a]ny person" may bring a suit for an injunction to force the government entity to comply with the law, and "the plaintiff need not allege or prove special damage different from that suffered by the public at large." N.C.G.S. § 143-318.16A(a) (2019). The law allows the plaintiff to be awarded attorney's fees upon prevailing in such a suit. N.C.G.S. § 143-318.16B (2019).

¶ 96 Some laws go even further, mirroring the statute in this case, by providing for specified statutory damages without requiring the plaintiff to prove actual injury. *See* N.C.G.S. § 75-56(b) (2019) ("Any debt collector who fails to comply with any provision of this Article with respect to any person is liable to such person in a private action in an amount equal to the sum of (i) any actual damage sustained by such person as a result of such failure and (ii) civil penalties the court may allow, but not less than five hundred dollars ($500.00) nor greater than four thousand dollars ($4,000) for each violation."); *see also* N.C.G.S. § 75-118(a)(2) (2019) (providing that any recipient of an unsolicited facsimile may bring a suit to recover "five hundred dollars ($500.00) for the first violation, one thousand dollars ($1,000) for the second violation, and five thousand dollars ($5,000) for the third and any other violation that occurs within two years of the first violation"). The General Assembly has therefore used its constitutional authority to recognize public injuries, declare an appropriate plaintiff, and fashion a proper remedy on several occasions, including in this case.

¶ 97 Private attorney general actions with statutory damages serve to vindicate the rights of an injured public when harm is hard to quantify. The

General Assembly, within its constitutional authority, provided for such a cause of action and such damages in this case. Plaintiff has the right to sue under this statute, and neither the North Carolina Constitution nor this Court's precedent limit courts from hearing the case.

¶ 98 I respectfully concur in the result.

IN THE MATTER OF C.L.H.

No. 213A20

Filed 5 February 2021

1. Termination of Parental Rights—grounds for termination—neglect—sufficiency of findings

The trial court's findings were insufficient to support its conclusion that grounds existed to terminate respondent-father's parental rights to his child based on neglect where the sole finding—stating that the child was previously neglected due to lack of care when respondent experienced a medical issue—was not supported by the evidence. Further, the findings failed to address whether the child would be neglected in the future if returned to respondent's care.

2. Termination of Parental Rights—grounds for termination—dependency—sufficiency of findings

The trial court's findings were insufficient to support its conclusion that grounds existed to terminate respondent-father's parental rights to his child based on dependency where the sole finding related to dependency—stating that there was no proper plan of care for the child during an incident in which respondent experienced a medical issue—was not supported by the evidence. There were no findings, nor evidence presented, that respondent's health prevented him from providing proper care or supervision of the child.

3. Termination of Parental Rights—grounds for termination—willful failure to pay child support—sufficiency of findings

In a termination of parental rights case, the trial court's findings were insufficient to support termination on the grounds of willful failure to pay child support where they failed to address whether an enforceable child support order was in place within one year prior to the termination petition being filed. The termination order was

vacated and remanded for the trial court to exercise its discretion regarding the need for new evidence and to enter an order with findings and conclusions regarding the existence of a valid support order.

Justice BARRINGER dissenting.

Chief Justice NEWBY and Justice BERGER join in this dissenting opinion.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from an order entered on 22 January 2020 by Judge Christy E. Wilhelm in District Court, Cabarrus County. This matter was calendared for argument in the Supreme Court on 6 January 2021 but determined on the record and brief without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

No brief for petitioner-appellee mother.

No brief for appellee Guardian ad Litem.

Anné C. Wright for respondent-appellant father.

EARLS, Justice.

¶ 1 Respondent appeals from the trial court's order terminating his parental rights to C.L.H. (Cash).[1] After careful review, we conclude that this case is in large part controlled by *In re K.N.*, 373 N.C. 274, 837 S.E.2d 861 (2020), necessitating that we reverse in part and vacate and remand in part.

¶ 2 Respondent is the biological father of Cash, and petitioner is Cash's biological mother. Cash was born in 2009 following a brief relationship between respondent and petitioner. Respondent and petitioner never married. On 19 August 2011, respondent and petitioner entered into a parenting agreement by which petitioner was granted primary custody of Cash, and respondent was granted visitation. Respondent and petitioner also entered into a child support consent order by which respondent agreed to pay petitioner $433 per month and fifty percent of any uninsured medical bills after the first $250 was paid by petitioner. However, neither the facts alleged in the termination petition and admit-

1. A pseudonym is used in this opinion to protect the juvenile's identity and for ease of reading. *See* N.C. R. App. P. 42(b)(1).

ted in the answer nor the trial court's factual findings indicate whether the child support consent order was in effect during the year preceding the filing of the termination petition. The last known contact between respondent and Cash was in April 2018.

¶ 3 On 1 May 2018, the trial court held a hearing after petitioner filed a motion in the cause for modification of custody and to hold respondent in contempt. Petitioner stated that she filed the motion because of concerns she had regarding events that occurred during Cash's visitation with respondent. Specifically, petitioner testified that Cash was visiting respondent on 25 February 2018 when she received a phone call claiming that she needed to pick up Cash because respondent had a medical issue. At the time, respondent was living in a camper behind his parents' home, and Cash would stay in the grandparents' home while visiting with respondent. When petitioner arrived at the grandparents' home, she found that respondent had been taken to the hospital. Petitioner testified that she went into respondent's camper to retrieve Cash's belongings and that it was "smoky" and smelled "chemically." On 13 June 2018, the trial court entered an order in which it found as fact that Cash found respondent unresponsive and sought help because respondent was "overdosing on heroin." The trial court found respondent to be unfit to provide for Cash's physical, emotional, and financial well-being and granted petitioner sole physical and legal custody of Cash. The trial court also terminated respondent's visitation with Cash.

¶ 4 On 30 January 2019, petitioner filed a petition to terminate respondent's parental rights to Cash. Petitioner alleged that grounds existed to terminate respondent's parental rights for neglect, willful failure to pay child support, dependency, and willful abandonment. N.C.G.S. § 7B-1111(a)(1), (4), (6)–(7) (2019). On 10 April 2019, respondent filed an answer in which he opposed the termination of his parental rights. On 22 January 2020, the trial court entered an order in which it determined grounds existed to terminate respondent's parental rights pursuant to N.C.G.S. § 7B-1111(a)(1), (4), and (6). The trial court further determined that it was in Cash's best interests that respondent's parental rights be terminated. Respondent appeals.

¶ 5 Respondent argues that the trial court erred by concluding that grounds existed to terminate his parental rights. "Our Juvenile Code provides for a two-step process for termination of parental rights proceedings consisting of an adjudicatory stage and a dispositional stage." *In re Z.A.M.*, 374 N.C. 88, 94, 839 S.E.2d 792, 796–97 (2020) (citing N.C.G.S. §§ 7B-1109, -1110 (2019)). "At the adjudicatory stage, the petitioner bears the burden of proving by 'clear, cogent, and convincing

evidence' the existence of one or more grounds for termination under section 7B-1111(a) of the General Statutes." *In re A.U.D.*, 373 N.C. 3, 5–6, 832 S.E.2d 698, 700 (2019) (quoting N.C.G.S. § 7B-1109(f) (2019)). We review a trial court's adjudication of grounds to terminate parental rights "to determine whether the findings are supported by clear, cogent and convincing evidence and the findings support the conclusions of law." *In re E.H.P.*, 372 N.C. 388, 392, 831 S.E.2d 49, 52 (2019) (quoting *In re Montgomery*, 311 N.C. 101, 111, 316 S.E.2d 246, 253 (1984)). "The trial court's conclusions of law are reviewable de novo on appeal." *In re C.B.C.*, 373 N.C. 16, 19, 832 S.E.2d 692, 695 (2019).

¶ 6 **[1]** In this case, the trial court determined that grounds existed to terminate respondent's parental rights based on neglect, willful failure to pay child support, and dependency. N.C.G.S. § 7B-1111(a)(1), (4), and (6). We begin our analysis with consideration of whether grounds existed to terminate respondent's parental rights for neglect, pursuant to N.C.G.S. § 7B-1111(a)(1).

¶ 7 A trial court may terminate parental rights where it concludes the parent has neglected the juvenile within the meaning of N.C.G.S. § 7B-101. N.C.G.S. § 7B-1111(a)(1). A neglected juvenile is defined, in pertinent part, as a juvenile "whose parent, guardian, custodian, or caretaker does not provide proper care, supervision, or discipline; . . . or who lives in an environment injurious to the juvenile's welfare." N.C.G.S. § 7B-101(15) (2019).

> Termination of parental rights based upon this statutory ground requires a showing of neglect at the time of the termination hearing or, if the child has been separated from the parent for a long period of time, there must be a showing of past neglect and a likelihood of future neglect by the parent.

In re D.L.W., 368 N.C. 835, 843, 788 S.E.2d 162, 167 (2016) (citing *In re Ballard*, 311 N.C. 708, 713–15, 319 S.E.2d 227, 231–32 (1984)). "When determining whether such future neglect is likely, the district court must consider evidence of changed circumstances occurring between the period of past neglect and the time of the termination hearing." *In re Z.V.A.*, 373 N.C. 207, 212, 835 S.E.2d 425, 430 (2019) (citing *In re Ballard*, 311 N.C. at 715, 319 S.E.2d at 232)).[2]

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2. As we have noted in our recent opinion in *In re R.L.D.*, No. 122A20, slip op. at 5 n.3 (N.C. Dec. 11, 2020), it is not necessary in every case that a petitioner make a showing of past neglect and of a probability of future neglect to support a determination that

¶ 8 Here, Cash was not in respondent's custody at the time of the termination hearing and had not been since at least 13 June 2018, when the trial court awarded petitioner sole physical and legal custody of Cash. The last known contact between respondent and Cash was in April 2018, approximately 18 months before the termination hearing. Additionally, because this case does not arise from involvement by the Department of Social Services, no petition alleging neglect was ever filed, and Cash was never adjudicated to be a neglected juvenile.

¶ 9 The sole finding of fact potentially supporting a conclusion that respondent had previously neglected Cash was finding of fact 17(a). In finding of fact 17(a), the trial court found that

> [r]espondent was unable to care for [Cash] during the February 2018 incident, whether it was due to a drug overdose or some other medical condition, for some period of time the child was not cared for and there does not appear that there was a proper plan in place for alternative care.

Respondent argues that the portion of finding of fact 17(a) which states that Cash was not cared for during the February 2018 incident is not supported by clear, cogent, and convincing evidence. We agree. The only evidence in the record concerning Cash's care during this incident was that he stayed in his grandparents' home when visiting with respondent, that his paternal grandfather was the person who called for help with respondent's medical issue, and that petitioner was called to pick up Cash from the grandparents' home. There was no evidence presented that Cash was not cared for during this incident. Accordingly, we disregard this portion of finding of fact 17(a). *See In re J.M.J.-J.*, 374 N.C. 553, 559, 843 S.E.2d 94, 101 (2020) (disregarding adjudicatory findings of fact not supported by clear, cogent, and convincing evidence).

¶ 10 We further note that the trial court's findings of fact, even if supported, shed little light on how this incident, and the alleged absence of care, impacted Cash. *See In re K.L.T.*, 374 N.C. 826, 831, 845 S.E.2d 28, 34 (2020) ("In order to constitute actionable neglect, the conditions at issue must result in 'some physical, mental, or emotional impairment of the juvenile or a substantial risk of such impairment.' " (citation omitted)). Further, assuming arguendo that the incident and alleged lack

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a parent's parental rights in a juvenile are subject to termination on the basis of neglect pursuant to N.C.G.S. § 7B-1111(a)(1). Such a determination is also permissible in the event that there is a showing of current neglect as defined in N.C.G.S. § 7B-101(15).

of care constituted prior neglect, the trial court did not find that there would be a likelihood of future neglect should Cash be returned to respondent's care, nor do the trial court's sparse findings of fact support such a conclusion. *See In re K.N.*, 373 N.C. at 282, 837 S.E.2d at 867 (stating that in light of the juvenile's prior adjudication of neglect and his resulting removal from the home, "we must evaluate whether there are sufficient findings of fact in the termination order to support the trial court's ultimate conclusion that there is a likelihood of future neglect by respondent"). Therefore, we hold the trial court erred by concluding that grounds existed pursuant to N.C.G.S. § 7B-1111(a)(1) to terminate respondent's parental rights.

¶ 11 **[2]** We next consider whether the trial court properly concluded that grounds existed to terminate respondent's parental rights for dependency, pursuant to N.C.G.S. § 7B-1111(a)(6). A trial court may terminate parental rights based on dependency when "the parent is incapable of providing for the proper care and supervision of the juvenile, such that the juvenile is a dependent juvenile within the meaning of [N.C.G.S. §] 7B-101, and that there is a reasonable probability that the incapability will continue for the foreseeable future." N.C.G.S. § 7B-1111(a)(6). A dependent juvenile is defined as "[a] juvenile in need of assistance or placement because (i) the juvenile has no parent, guardian, or custodian responsible for the juvenile's care or supervision or (ii) the juvenile's parent, guardian, or custodian is unable to provide for the juvenile's care or supervision and lacks an appropriate alternative child care arrangement." N.C.G.S. § 7B-101(9). The incapability under N.C.G.S. § 7B-1111(a)(6) "may be the result of substance abuse, intellectual disability, mental illness, organic brain syndrome, or any other cause or condition that renders the parent unable or unavailable to parent the juvenile and the parent lacks an appropriate alternative child care arrangement." N.C.G.S. § 7B-1111(a)(6). To adjudicate the ground of dependency, the trial court "must address both (1) the parent's ability to provide care or supervision, and (2) the availability to the parent of alternative child care arrangements." *In re K.R.C.*, 374 N.C. 849, 859, 845 S.E.2d 56, 63 (2020) (citation omitted).

¶ 12 Here, the sole express finding of fact made by the trial court regarding this statutory ground was that "the ground of dependency exists in that there was no proper plan for care of the minor child." Arguably, the trial court's finding of fact 17(a) concerning the February 2018 incident and the lack of an alternative plan of care for Cash was also related to this statutory ground. However, the trial court made no finding of fact, and there was no evidence presented, that at the time of the termina-

tion hearing respondent suffered from any condition which rendered him incapable of providing proper care or supervision to Cash. The only evidence presented that possibly supported a conclusion that respondent was incapable of parenting Cash was the incident in February 2018, which occurred over 18 months prior to the termination hearing. *See In re Z.D.*, 258 N.C. App. 441, 452, 812 S.E.2d 668, 676 (2018) (holding that the evidence was insufficient to support termination of respondent's parental rights based on dependency where "[r]espondent's mental health and parenting abilities pertain[ed] more to the historic facts of the case that occurred at least a year prior to the hearing, and the order contain[ed] no specific findings regarding [r]espondent's condition, mental health, and alleged incapability at the time of the hearing"). Accordingly, we hold that the trial court erred by concluding that grounds existed pursuant to N.C.G.S. § 7B-1111(a)(6) to terminate respondent's parental rights.

¶ 13 **[3]** Finally, we consider the trial court's conclusion that grounds existed pursuant to N.C.G.S. § 7B-1111(a)(4) to terminate respondent's parental rights for his willful failure to pay for the child's care without justification. A trial court may terminate a parent's parental rights pursuant to this statutory ground when

> [o]ne parent has been awarded custody of the juvenile by judicial decree or has custody by agreement of the parents, and the other parent whose parental rights are sought to be terminated has for a period of one year or more next preceding the filing of the petition or motion willfully failed without justification to pay for the care, support, and education of the juvenile, as required by the decree or custody agreement.

N.C.G.S. § 7B-1111(a)(4). We agree with the Court of Appeals that, when seeking to terminate parental rights pursuant to this statutory ground, "petitioner must prove the existence of a support order that was enforceable during the year before the termination petition was filed." *In re I.R.L.*, 263 N.C. App. 481, 485, 823 S.E.2d 902, 905 (2019) (quoting *In re Roberson*, 97 N.C. App. 277, 281, 387 S.E.2d 668, 670 (1990)). When the trial court fails to make findings of fact "indicating that a child support order existed or that [the parent] failed to pay support 'as required by' the child support order," its findings are insufficient to support the conclusion that grounds for termination exist pursuant to N.C.G.S. § 7B-1111(a)(4). *Id.* at 486, 823 S.E.2d at 906.

¶ 14 In *In re I.R.L.*, the Court of Appeals concluded that the trial court's findings were insufficient to support a conclusion that the father's

parental rights were subject to termination pursuant to N.C.G.S. § 7B-1111(a)(4). *Id.* The Court of Appeals noted that

> while both parties testified that a child support order was entered in December 2014 ordering [the] father to pay $50.00 per month in child support, the trial court's termination order [was] devoid of any findings indicating that a child support order existed or that [the f]ather failed to pay support "as required by" the child support order.

Id. Here, the trial court made no findings of fact that a child support order existed in the year prior to the filing of the petition to terminate respondent's parental rights. Consequently, we conclude that the trial court's findings of fact are insufficient to support the termination of respondent's parental rights based on N.C.G.S. § 7B-1111(a)(4).

¶ 15 The dissent, urging affirmance of the trial court's decision, attempts to distinguish *In re I.R.L.* by pointing out that the trial court's order in that case was "devoid of any findings indicating that a child support order existed or that [the respondent] failed to pay support 'as required by' the child support order." *In re I.R.L.*, 263 N.C. App. at 486, 823 S.E.2d at 906. However, as discussed above, the trial court's order in the instant case is similarly deficient. The dissent also points to the fact that "the only evidence [in *In re I.R.L.*] supporting the existence of a child support order was the testimony of both parties." However, the source of the evidence, as opposed to its existence in the record, does not affect our decision on this issue. When reviewing an order terminating parental rights, our task as an appellate court is "to determine whether the findings are supported by clear, cogent and convincing evidence and the findings support the conclusions of law." *In re Z.A.M.*, 374 N.C. at 94, 839 S.E.2d at 797 (quoting *In re C.B.C.*, 373 N.C. at 19, 832 S.E.2d at 695). Just as in this case, the trial court in *In re I.R.L.* failed to find as a fact that a child support order existed, and that the respondent had violated it, despite the existence of evidence in the record that would have supported such a finding. *In re I.R.L.*, 263 N.C. App. at 486, 823 S.E.2d at 906. The source of that evidence, so long as it is clear, cogent, and convincing, is not relevant to our analysis. There is no material distinction between this case and *In re I.R.L.*

¶ 16 We note that here there appears to be evidence in the record which might support a conclusion that grounds existed to terminate respondent's parental rights pursuant to this statutory ground. First, petitioner alleged in the termination petition, and respondent admitted in his an-

swer, that the parties had entered into a child support consent order.[3] Neither the allegation nor the admission, however, establish that the support order was in effect during the year prior to the filing of the termination petition. *See* N.C.G.S. § 7B-1111(a)(4) (permitting termination of parental rights if a parent has failed to pay support as required by a decree or custody agreement "for a period of one year or more next preceding the filing of the petition or motion"). Second, petitioner testified that there was a child support order in place at the time of the termination hearing.

¶ 17 Also on this ground, the trial court found as fact, and respondent does not dispute, that respondent "paid no support, whether child support or other monetary support for the benefit of the minor child since September 2015." Respondent does, however, argue that the trial court failed to make any findings of fact regarding whether his failure to pay support was willful, and, thus, the trial court's conclusion on this issue was not supported by its factual findings. It is not necessary to resolve this argument because we have determined that the trial court failed to make factual findings that respondent failed to pay for the care, support, and education of the juvenile within the year prior to the filing of the termination petition "as required by the decree or custody agreement." *See* N.C.G.S. § 7B-1111(a)(4). We note, however, that the existence of the child support order in effect at the relevant time, if it had been included in the factual findings, would support a conclusion that respondent had the ability to pay some portion of the cost of care for the juvenile. *In re J.D.S.*, 170 N.C. App. 244, 257, 612 S.E.2d 350, 358 (quoting *In re Roberson*, 97 N.C. App. 277, 281, 387 S.E.2d 668, 670 (1990)), *cert. denied*, 360 N.C. 64, 623 S.E.2d 584 (2005) ("In a termination action pursuant to this ground, petitioner must prove the existence of a support order that was enforceable during the year before the termination petition was filed. . . . Because a proper decree for child support will be based on the supporting parent's ability to pay as well as the child's needs, . . . there is no requirement that petitioner independently prove or that the termination order find as fact respondent's ability to pay support during the relevant statutory time period." (alterations in original)). Where, as in this matter, the "trial court's adjudicatory findings were insufficient to support its conclusion that termination of the parent's rights was warranted, but the record contained additional evidence that could have

3. The admitted allegation reads: "Within the same Cabarrus County file, the Petitioner and Respondent entered into a child support consent order wherein the Respondent agreed to pay the Plaintiff the sum of $433 per month and fifty percent (50%) of any uninsured medical bills after the first $250 is paid by the Petitioner."

potentially supported a conclusion that termination was appropriate," we "vacate[ ] the trial court's termination order and remand[ ] the case for further proceedings, including the entry of a new order containing findings of fact and conclusions of law addressing the issue of whether [the] ground for termination existed." *In re K.N.*, 373 N.C. at 284, 837 S.E.2d at 869.[4]

¶ 18 The dissent, urging the opposite result, argues that the trial court's findings of fact 11 and 17(c) were supported by the record and support the trial court's conclusion to terminate respondent-father's parental rights pursuant to N.C.G.S. § 7B-1111(a)(4). However, neither those nor any of the other findings of the trial court establish the existence of a child support order at the relevant time. In arguing that the record evidence supports the result below, it appears that the dissent is conflating the record with the *factual findings* of the trial court. However, it is our role to review the trial court's factual findings to determine whether they support the trial court's conclusions of law. *See*, *e.g.*, *In re E.H.P.*, 372 N.C. at 392, 831 S.E.2d at 52. As the Court of Appeals has stated, "[i]t is the role of the trial court and not [the appellate court] to make findings of fact regarding the evidence." *In re F.G.J.*, 200 N.C. App. 681, 693, 684 S.E.2d 745, 754 (2009); *see also In re K.N.*, 373 N.C. at 283, 837 S.E.2d at 868 (rejecting argument of petitioner that evidence in the record supported affirmance of trial court's ultimate conclusions and instead looking to "the trial court's actual findings").

¶ 19 This principle has long been followed by our courts. As Justice Exum explained forty years ago:

> The purpose of the requirement that the court make findings of those specific facts which support its ultimate disposition of the case is to allow a reviewing

4. The dissent incorrectly suggests that on the question of whether a remand is necessary for factual findings, this case is controlled by *In re A.U.D.*, 373 N.C. 3, 10–11, 832 S.E.2d 698, 702–03 (2019). In that case, we declined to remand to the trial court for written findings on specific factors that the trial court must consider during the best interests phase of the proceeding. *In re A.U.D.*, 373 N.C. 3, 11, 832 S.E.2d 698, 703 (2019). Critically, N.C.G.S. § 7B-1110(a) does not require written findings as to each factor. *Id.* at 10, 832 S.E.2d at 703. Because the trial transcript demonstrated that the trial court had carefully considered each factor, satisfying the statutory requirement, we concluded that remand for written findings on each factor "would be an elevation of form over substance." *Id.* at 11, 832 S.E.2d at 703. In any case, even were we to adopt the dissent's view that written findings are never required for uncontested facts, the uncontested evidence in this case does not establish that a child support order was in place during the relevant time period—namely, the year preceding the filing of the termination petition. *See* N.C.G.S. § 7B-1111(a)(4).

> court to determine from the record whether the judgment–and the legal conclusions which underlie it–represent a correct application of the law. The requirement for appropriately detailed findings is thus not a mere formality or a rule of empty ritual; it is designed instead "to dispose of the issues raised by the pleadings and to allow the appellate courts to perform their proper function in the judicial system."

Coble v. Coble, 300 N.C. 708, 712, 268 S.E. 2d 185, 189 (1980) (quoting *Montgomery v. Montgomery*, 32 N.C. App. 154, 158, 231 S.E.2d 26, 29 (1977) and citing *Crosby v. Crosby*, 272 N.C. 235, 158 S.E. 2d 77 (1967)). In deciding whether a trial court's award of alimony followed the requirements of applicable statutes, this Court explained:

> The requirement of special fact-finding did not begin with implementation of our present Rules of Civil Procedure. In *Martin v. Martin*, 263 N.C. 86, 138 S.E. 2d 801 (1964) (per curiam), this Court reviewed a trial court order which directed alimony *pendente lite* and child support payments. The trial court made only limited findings of [fact] about the defendant's financial circumstances. The hearing had been on affidavits and defendant submitted his own uncontradicted affidavit indicating his dire financial situation. However, no findings of fact concerning the matters in the affidavit were made. This Court stated, in remanding to the trial court:
>
> If the facts set out in defendant's affidavit are true, the payments required of defendant are clearly excessive, unrealistic and beyond the limits of judicial discretion. *The court made no specific findings with respect to the matters set out in the affidavit, and it does not appear whether they were considered.* 263 N.C. at 87–88, 138 S.E. 2d at 802 (emphasis added).

Quick v. Quick, 305 N.C. 446, 452–53, 290 S.E.2d 653, 658 (1982). In the termination of parental rights context, this has long been the rule as well. *See, e.g.*, *In re T.P.*, 197 N.C. App. 723, 730, 678 S.E.2d 781, 787 (2009) ("We have little doubt after studying the record that there existed evidence from which the trial court could have made findings and conclusions to support its orders for termination of parental rights.

Unfortunately, the skeletal orders in the record are inadequate to allow for meaningful appellate review."); *In re B.G.*, 197 N.C. App. 570, 574, 677 S.E.2d 549, 552 (2009) ("Although there may be evidence in the record to support a finding that Respondent acted inconsistently with his custodial rights, it is not the duty of this Court to issue findings of fact."). The dissent's position would have us make factual findings for the trial court on a fundamental and material fact, which is not how we have applied the standard of review in these cases. As we did recently in *In re K.N.*, and *In re N.D.A.*, we are compelled to remand for further factual findings on this ground. *See In re K.N.*, 373 N.C. at 284, 837 S.E.2d at 868; *In re N.D.A.*, 373 N.C. 71, 84, 833 S.E.2d, 768, 777 (2019).

¶ 20 In summary, the portions of the trial court's order concluding that respondent's parental rights were subject to termination under N.C.G.S. § 7B-1111(a)(1) and (6) are reversed. The portion of the trial court's order adjudicating grounds for termination under N.C.G.S. § 7B-1111(a)(4) is vacated and remanded for further proceedings not inconsistent with this opinion, including the entry of a new order containing findings of fact and conclusions of law addressing whether there was a child support order in place that was enforceable during the year before the termination petition was filed and the issue of whether respondent willfully failed to pay support for Cash without justification. The trial court may, in the exercise of its discretion, receive additional evidence on remand if it elects to do so. *See In re K.N.*, 373 N.C. at 285, 837 S.E.2d at 869.

REVERSED IN PART; VACATED AND REMANDED IN PART.

Justice BARRINGER dissenting.

¶ 21 Based on a review of the record, respondent-father did not preserve for appeal the issue of whether petitioner-mother proved the existence of a child support order to terminate respondent-father's parental rights under N.C.G.S. § 7B-1111(a)(4). Moreover, even if respondent-father had preserved the issue for appeal, the trial court's findings are sufficient to support the conclusion that grounds for termination existed pursuant to N.C.G.S. § 7B-1111(a)(4).

¶ 22 N.C.G.S. § 7B-1111(a)(4) states:

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

> (4) One parent has been awarded custody of the juvenile by judicial decree or has custody by agreement of the parents, and the other parent whose parental rights are sought to be terminated has for a period of one year or more next preceding the filing of the petition or motion willfully failed without justification to pay for the care, support, and education of the juvenile, as required by the decree or custody agreement.

¶ 23 Here, respondent-father admitted that a child support order existed. Specifically, respondent-father admitted to the following allegation in his answer to petitioner-mother's petition for termination:

> Within [Cabarrus County File Number: 11-CVD-961], the Petitioner and Respondent entered into a child support consent order wherein the Respondent agreed to pay the Plaintiff the sum of $433 per month and fifty percent (50%) of any uninsured medical bills after the first $250 is paid by the Petitioner.

¶ 24 Respondent-father never moved to amend his answer or otherwise present to the trial court any reason to disregard this admitted allegation. *See* N.C. R. App. P. 10(a)(1). It is well-established law in this state that an admission in an answer binds the answering party and renders the fact uncontested. *See Harris v. Pembaur*, 84 N.C. App. 666, 670 (1987) ("Facts alleged in the complaint and admitted in the answer are conclusively established by the admission." (citing *Champion v. Waller*, 268 N.C. 426 (1966))).

¶ 25 *In re I.R.L.*, 263 N.C. App. 481 (2019)[1] is incorrectly relied upon by respondent-father and the majority. On the contrary, the controlling precedent established by this Court is found in *In re A.U.D.*, 373 N.C. 3, 10–11 (2019), where this Court held that "a remand by this Court to the trial court for written findings on these uncontested issues—a disposition for which our dissenting colleague appears to be advocating—would be an elevation of form over substance and would serve only to delay the final resolution of this matter for the children." Affirming the trial court's termination of parental rights in this case does not involve improperly finding facts that a child support order exists, as the major-

1. While the majority relies on this decision from the Court of Appeals, it is worth noting that decisions from the Court of Appeals are only persuasive, not binding authority on this Court in cases not previously adopted.

ity contends. Here, the fact of the existence of a child support order is uncontested by respondent-father's admission in his answer to petitioner-mother's allegation in her petition for termination.[2] To remand this case and direct the trial court to make findings of fact on a fact already uncontested by both parties is "an elevation of form over substance." *Id.*

¶ 26 Moreover, *In re I.R.L.* is distinguishable from the instant case. In that case, the "trial court's termination order [was] devoid of any findings indicating that a child support order existed or that [the f]ather failed to pay support 'as required by' the child support order," and the only evidence supporting the existence of a child support order was the testimony of both parties. *Id.* at 486.

¶ 27 In this case, the trial court determined that "[t]he Respondent-father paid no support, whether child support or other monetary support for the benefit of the minor child since September 2015, over four years next preceding the filing of this [termination]." Respondent-father did not challenge finding of fact 11 in the trial court's termination order. Unchallenged findings of fact are "deemed supported by competent evidence and are binding on appeal." *In re T.N.H.*, 372 N.C. 403, 407 (2019). Therefore, finding of fact 11 is binding on this Court.

¶ 28 Finding of fact 11 is also supported by sufficient evidence. Respondent-father admitted that "Petitioner[-mother] and Respondent [-father] entered into a child support consent order wherein the Respondent[-father] agreed to pay the [Petitioner-mother] the sum of $433 per month." The uncontroverted evidence showed that there was a child-support order in place for Cash, the biological child of petitioner-mother and respondent-father, and that the last payment respondent-father made was in September 2015.

¶ 29 The record additionally supports the trial court's finding of fact 17(c) that respondent-father willfully failed to pay child support. Respondent-father testified that he intentionally withheld financial support from Cash. Respondent-father testified that he was employed. When asked about his financial assistance after the 25 February 2018 incident and the loss of his visitation rights, respondent-father responded as follows:

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2. Moreover, a review of the record indicates that the parties apparently considered the issue of whether there was a child support order to be settled. Petitioner-mother, in her testimony during direct examination responded that there was a child support order in place for the minor child. On cross examination of the petitioner-mother, the respondent-father's attorney did not question her regarding her testimony regarding the child support order. On direct examination, the respondent-father testified that he paid money in accordance with "the legal agreement we had."

"I'm not going to give the money when I'm not even allowed to spend time with my son." Also, respondent-father did not give any justification for his failure to pay child support after the 25 February 2018 incident and admitted he was currently employed as a subcontractor and had worked as a contractor for most of his life. On this record, there is sufficient evidence to find that respondent-father had willfully and without justification failed to pay child support for four years.

¶ 30 Respondent-father argues that finding of fact 17(c) should be treated as a conclusion of law and raises that the trial court used the same language in its third conclusion of law. The majority seems to implicitly adopt this argument. However, a finding that an act is willful is determined by the trier of fact whether it be a jury or the trial court. *In re K.N.K.*, 374 N.C. 50, 53 (2020) ("The willfulness of a parent's actions is a question of fact for the trial court."); *see also Brandon v. Brandon*, 132 N.C. App. 646, 651 (1999) ("Where the trial court sits as the finder of fact, 'and where different reasonable inferences can be drawn from the evidence, the determination of which reasonable inference shall be drawn is for the trial [court].' " (alteration in original)). Plainly, the determination of whether a parent is acting willfully is a finding of fact and not a conclusion of law. *In re J.S.*, 374 N.C. 811, 818 (2020). Finding of fact 17(c) is therefore properly classified as a finding of fact in the trial court's termination order.

¶ 31 In conclusion, respondent-father's admission in his answer to petitioner-mother's allegation that he had entered into a consent child support order makes its existence an uncontested fact. Additionally, the trial court's findings of fact 11 and 17(c) were supported by sufficient evidence in the record and support the trial court's conclusion to terminate respondent-father's parental rights pursuant to N.C.G.S. § 7B-1111(a)(4) for willfully failing to pay child support without justification.

¶ 32 For these reasons, the decision of the trial court should be upheld on the ground for termination pursuant to N.C.G.S. § 7B-1111(a)(4).[3] Accordingly, I respectfully dissent.

Chief Justice NEWBY and Justice BERGER join in this dissenting opinion.

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3. Since I would affirm the trial court's termination pursuant to N.C.G.S § 7B-1111(a)(4) and only one termination ground is required under N.C.G.S. § 7B-1111(a), it is unnecessary to reach the remaining grounds found by the trial court.

IN RE J.E.B.

[376 N.C. 629, 2021-NCSC-2]

IN THE MATTER OF J.E.B., II

No. 99A20

Filed 5 February 2021

1. Termination of Parental Rights—guardian ad litem participation in hearing—appointed counsel's duties—N.C.G.S. § 7B-1101.1(d)

Respondent mother received a fundamentally fair hearing in a termination of parental rights case even though her guardian ad litem cross-examined witnesses and made arguments to the court (which was at the express direction of, or in apparent coordination with, respondent's appointed counsel). There was no violation of N.C.G.S. § 7B-1101.1(d) where counsel's actions representing respondent throughout the proceeding did not demonstrate an abdication of his responsibilities and where the clear statutory language required only that the parent's counsel and guardian ad litem not be the same person and did not constitute a prohibition against the guardian ad litem from assisting counsel as he did here.

2. Termination of Parental Rights—appointed counsel—assistance from guardian ad litem—ineffective assistance of counsel claim

In a termination of parental rights case where the guardian ad litem participated in the hearing by questioning some witnesses and making arguments to the trial court, respondent's claim that she received ineffective assistance of counsel because her appointed counsel was not sufficiently involved with the proceeding was rejected because the record reflected that counsel was engaged throughout and utilized the assistance of the guardian ad litem to better serve respondent. Respondent's additional claim that the guardian ad litem was unprepared to assist her counsel was not supported by the record.

Justice MORGAN dissenting.

On writ of certiorari pursuant to N.C.G.S. § 7A-32(b) to review an order terminating respondent's parental rights entered on 21 October 2019 by Judge John K. Greenlee in District Court, Gaston County. Heard in the Supreme Court on 11 January 2021.

IN RE J.E.B.

[376 N.C. 629, 2021-NCSC-2]

Elizabeth Myrick Boone for petitioner-appellee Gaston County Department of Health and Human Services.

Brian C. Bernhardt for appellee Guardian ad Litem.

Garron T. Michael for respondent-appellant mother.

EARLS, Justice.

¶ 1 Respondent-mother appeals from an order entered by Judge John K. Greenlee in District Court, Gaston County, on 21 October 2019 terminating her parental rights in J.E.B., II (Jason).[1] Respondent argues that she was denied a fundamentally fair termination proceeding because her guardian ad litem conducted examinations of some witnesses and, at one point, presented legal arguments on respondent's behalf. In respondent's view, these actions violated N.C.G.S. § 7B-1101.1, which establishes the right of a parent to appointed counsel and, in certain circumstances, to a guardian ad litem in a termination of parental rights proceeding. It further provides that "[t]he parent's counsel shall not be appointed to serve as the guardian ad litem and the guardian ad litem shall not act as the parent's attorney." N.C.G.S. § 7B-1101.1(d) (2019). Because the trial court properly appointed respondent a guardian ad litem and an attorney, both of whom carried out appropriate roles in this matter, we conclude the statute was not violated and we affirm the trial court's order.

I. Background

¶ 2 Jason was placed in the temporary nonsecure custody of the Gaston County Department of Health and Human Services, Division of Social Services (DSS) on 22 November 2017 following a forensic interview during which Jason disclosed that he had been sexually abused by his father's roommate and physically abused by his father. Prior to that point, both respondent and Jason's father had been involved with DSS as a result of concerns of substance abuse and domestic violence.

¶ 3 On 27 March 2018, the trial court entered an adjudication order placing Jason in the legal custody of DSS. The termination order indicates that, at a disposition hearing on 24 April 2018, the trial court ordered respondent to complete a case plan with the following components:

a) Refrain from using/abusing all illegal/mind altering substances;

1. A pseudonym is used to protect the identity of the juvenile and for ease of reading.

b) Complete an updated Mental Health and Substance Abuse Assessment;

c) Follow any recommendations from the Mental Health and Substance Abuse Assessments;

d) Submit to drug screens as requested;

e) Complete parenting classes;

f) Obtain and maintain safe, appropriate, and stable housing;

g) Obtain a Psychological Assessment;

h) Attend visitations with the juvenile, demonstrate effective parenting skills and display appropriate communication skills in presence of the juvenile;

i) Sign all consents necessary;

j) Refrain from any criminal activity.

The trial court subsequently found that Respondent failed to enter into a case plan, despite being ordered to do so by the court. The trial court changed Jason's primary permanent plan from reunification to adoption in an order filed 9 November 2018, following a hearing on 16 October 2018. Respondent was ultimately served with a termination petition alleging that Jason was a neglected juvenile, that respondent had willfully left Jason in foster care for more than twelve months without making reasonable progress to correct the circumstances that led to his removal from the home, and that respondent was incapable of properly caring for Jason.

¶ 4 At the beginning of the termination proceeding, respondent's appointed attorney, Mr. Kakassy, unsuccessfully attempted to withdraw on the basis of noncooperation, indicating that he had been unable to communicate with respondent and that she did not wish him to continue representing her. The court denied Mr. Kakassy's request to withdraw. In doing so, the court stated the following:

> All right. [Respondent,] Mr. Kakassy has been on your underlying case for some period of time, was appointed on this in June. He is very familiar with your case and your situation. You have a Guardian Ad Litem that's been appointed, Mr. Hargett. Both are fully capable, professional attorneys to assist you in this and are fully capable of doing that. So, any motion to have a new attorney appointed or release Mr. Kakassy is denied.

Later, Mr. Kakassy again protested that he would have difficulty proceeding and the trial court stated that Mr. Hargett, respondent's guardian ad litem, was "welcome to ask questions and examine [respondent]" and stated that the group—Mr. Kakassy, Mr. Hargett, and respondent—could determine among themselves what strategy to use to present evidence.

¶ 5 During the proceeding, Mr. Kakassy and Mr. Hargett worked together to represent respondent. At various points, Mr. Hargett cross-examined witnesses, including respondent. At various points, Mr. Kakassy objected on respondent's behalf. At the end of the adjudication stage of the proceeding, Mr. Kakassy requested that DSS dismiss the dependency ground for termination of respondent's parental rights and Mr. Hargett argued on respondent's behalf regarding the remaining two grounds. During the best interests phase of the proceeding, Mr. Kakassy conducted the direct examination of respondent's only witness.

¶ 6 In an order entered on 21 October 2019, the trial court determined that grounds existed to terminate respondent's parental rights with respect to Jason. Respondent filed the instant appeal and argued that Mr. Hargett's actions violated a statutory mandate that a parent's guardian ad litem "shall not act as the parent's attorney." *See* N.C.G.S. § 7B-1101.1(d). Respondent also asserts in the alternative that, if we do not reverse the termination order on that basis, she received ineffective assistance of counsel. On a motion filed by DSS, respondent's original appeal was dismissed by order of this Court on 7 May 2020. We allowed respondent's petition for a writ of certiorari by order on the same date.

II. Standard of Review

¶ 7 Generally, when this Court reviews a trial court's order terminating parental rights, we review "to determine whether the trial court made sufficient factual findings to support its ultimate findings of fact and conclusions of law, regardless of how they are classified in the order." *In re Z.A.M.*, 374 N.C. 88, 97, 839 S.E.2d 792, 798 (2020). Factual findings are sufficient if they "are supported by clear, cogent and convincing evidence" in the record. *In re Montgomery*, 311 N.C. 101, 111, 316 S.E.2d 246, 253 (1984). Here, respondent raises a question of statutory interpretation, which we review de novo. *Town of Pinebluff v. Moore Cnty.*, 374 N.C. 254, 255–56, 839 S.E.2d 833, 834 (2020) (citing *Applewood Props., LLC v. New S. Props., LLC*, 366 N.C. 518, 522, 742 S.E.2d 776, 779 (2013)).

III. Analysis

¶ 8 Respondent raises two arguments on appeal. First, she argues that she was denied a fundamentally fair termination proceeding because

her appointed guardian ad litem acted as her attorney. In the alternative, she argues that her appointed counsel provided ineffective assistance. We address each argument in turn.

A. Guardian ad litem

¶ 9 **[1]** In a hearing to determine the termination of parental rights, "[t]he parent has the right to counsel, and to appointed counsel in cases of indigency, unless the parent waives the right." N.C.G.S. § 7B-1101.1(a). In certain circumstances, the parent may also be appointed a guardian ad litem. N.C.G.S. § 7B-1101.1(b)–(c). If a guardian ad litem is appointed for the parent, "[t]he parent's counsel shall not be appointed to serve as the guardian ad litem and the guardian ad litem shall not act as the parent's attorney." N.C.G.S. § 7B-1101.1(d). Respondent urges us to interpret subsection (d) to mean that a guardian ad litem shall not perform the functions of an attorney, so that the statute is violated where a guardian ad litem conducts examinations or performs similar acts. DSS, on the other hand, argues that the statute merely precludes one person from being appointed both as a parent's counsel and as a parent's guardian ad litem.

¶ 10 A parent whose rights are considered in a termination of parental rights proceeding must be provided "with fundamentally fair procedures" consistent with the Due Process Clause of the Fourteenth Amendment. *In re Murphy*, 105 N.C. App. 651, 653, 414 S.E.2d 396, 397 (quoting *Santosky v. Kramer*, 455 U.S. 745, 754, 102 S. Ct. 1388, 1395 (1982)), *aff'd per curiam*, 332 N.C. 663, 422 S.E.2d 577 (1992). Respondent argues that the trial court violated the statute and rendered the proceeding fundamentally unfair by "permitting [her guardian ad litem] to act in the role of [her] parent attorney throughout the termination proceeding." As a result, we must consider whether the actions of respondent's guardian ad litem amounted to acting as the parent's attorney within the meaning of the statute.

¶ 11 "The goal of statutory interpretation is to determine the meaning that the legislature intended upon the statute's enactment." *State v. Rankin*, 371 N.C. 885, 889, 821 S.E.2d 787, 792 (2018). When the meaning is clear from the statute's plain language, we "give effect to the plain meaning of the statute, and judicial construction of legislative intent is not required." *Winkler v. N.C. State Bd. of Plumbing*, 374 N.C. 726, 730, 843 S.E.2d 207, 210 (2020) (citation omitted). However, when the language is ambiguous, we must ascertain the General Assembly's intent. *Id.* "The intent of the General Assembly may be found first from the plain language of the statute, then from the legislative history, the spirit of the act and what the act seeks to accomplish." *Rankin*, 371 N.C. at

889, 821 S.E.2d at 792 (citation omitted). When we are determining legislative intent, "the words and phrases of a statute must be interpreted contextually, in a manner which harmonizes with the other provisions of the statute and which gives effect to the reason and purpose of the statute." *Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205, 215, 388 S.E.2d 134, 140 (1990).

¶ 12 Here, the statute's text is not ambiguous because the text bears only one meaning. *See Winkler*, 374 N.C. at 732, 843 S.E.2d at 212 (describing an ambiguous statute as one "equally susceptible of multiple interpretations"); *State v. Conley*, 374 N.C. 209, 214, 839 S.E.2d 805, 808 (2020) (concluding that a statute's language is ambiguous because it "could reasonably be construed" in two ways). The statute provides that "[t]he parent's counsel shall not be appointed to serve as the guardian ad litem and the guardian ad litem shall not act as the parent's attorney." N.C.G.S. § 7B-1101.1(d). In its preceding subsections, the statute establishes a parent's right to counsel and provides for the appointment of a guardian ad litem in certain circumstances. N.C.G.S. § 7B-1101.1(a)–(c). It is clear to us, reading the language in context, that the statutory mandate of subsection 7B-1101.1(d) that "[t]he parent's counsel shall not be appointed" as the guardian ad litem and that "the guardian ad litem shall not act" as the parent's attorney requires that the parent's counsel and the parent's guardian ad litem not be the same person so that the respondent parent receives the benefit of both.[2] It does not, as respondent suggests, prevent a guardian ad litem from conducting cross-examinations or presenting an argument directly to the trial court.

¶ 13 In urging the opposite result, respondent focuses, as does the dissent, on the phrase "act as the parent's attorney" to the exclusion of the rest of the statute. "However, this Court does not read segments of a statute in isolation." *Rhyne v. K-Mart Corp.*, 358 N.C. 160, 188, 594 S.E.2d 1, 20 (2004). We similarly do not read portions of a sentence in isolation. The statute's statement that the guardian ad litem "shall not act" as the parent's attorney has the same function in the statute as the similar phrase, appearing in the same sentence, that the parent's attorney "shall not be appointed" as the guardian ad litem. The two parts of

2. While there is no need to resort to the history of the statute to interpret its meaning here, it is worth noting that this provision was adopted in 2005 after concerns were expressed about potential conflicts of interest if the same person were to serve simultaneously in both roles for a parent. *See In re K.L.S.*, 635 S.E.2d 536, 2006 N.C. App. LEXIS 2128, at *12 (2006) (unpublished) (stating that effect of N.C.G.S. § 7B-1101.1 (2005) was to prevent the trial court from appointing the same person as both a parent's attorney and guardian ad litem). The history of its enactment further supports our understanding of the statute's plain meaning.

the sentence mirror each other to fulfill the statute's dual purposes—ensuring a parent's right to counsel and providing those in need with a guardian ad litem. The provision of a guardian ad litem does not satisfy the statute's mandate of the parent's right to counsel just as the provision of counsel does not satisfy the statute's mandate for a guardian ad litem when a parent requires one. If the General Assembly had intended a different meaning it would have used different language. For example, the General Assembly could have, but did not, prohibit a guardian ad litem from "furnishing the services of a lawyer or lawyers" on behalf of a parent in a termination of parental rights proceeding. *See* N.C.G.S. § 84-4 (prohibiting persons not licensed as attorneys from holding themselves out as competent to "furnish[ ] the services of a lawyer or lawyers" and prohibiting such persons from "perform[ing] for or furnish[ing] to another legal services"). Instead, the General Assembly stated that the guardian ad litem "shall not act as the parent's attorney" in the same sentence that it stated that the parent's attorney "shall not be appointed to serve as the guardian ad litem." N.C.G.S. § 7B-1101.1(d).

¶ 14 In the instant case, the proceedings did not violate the statute. A thorough review of the record reveals that respondent's counsel maintained control of the respondent's case, actively made strategic decisions regarding how best to protect respondent's interests, and served as respondent's counsel throughout the proceeding. For example, Mr. Kakassy, respondent's appointed attorney, began the proceeding by informing the trial court that respondent did not want him to represent her and that she preferred a different appointed attorney. The trial court denied his request to withdraw, further demonstrating that all present recognized that Mr. Kakassy was respondent's attorney and that Mr. Kakassy was acting in that capacity throughout the proceeding. At appropriate times, Mr. Kakassy objected on respondent's behalf. After DSS closed its case-in-chief regarding the existence of grounds for termination, it was Mr. Kakassy who informed the trial court that respondent had no further witnesses for that portion of the proceeding. When the time came for legal arguments on the existence of grounds for termination, Mr. Kakassy directed the argument, first securing the dismissal of one ground for termination and informing the trial court that Mr. Hargett would present an argument on the remaining two grounds. During the best interests phase of the proceeding, Mr. Kakassy controlled the presentation of evidence for respondent and conducted the direct examination of respondent's only witness. When Mr. Hargett examined witnesses or otherwise performed trial functions, the transcript reveals that he did so either at the express direction of or in apparent coordination with Mr. Kakassy. Where, as here, respondent's

appointed attorney did not functionally abdicate his responsibilities, leaving the guardian ad litem to "act as the parent's attorney" in the absence of the parent's actual legal counsel, there is no violation of N.C.G.S. § 7B-1101.1(d).

B. Ineffective assistance of counsel

¶ 15 **[2]** Respondent briefly argues, in the alternative, that she was denied effective assistance of counsel because Mr. Kakassy was not sufficiently involved in the proceeding. For the same reasons that we have rejected respondent's argument pursuant to N.C.G.S. § 7B-1101.1(d), we also reject this argument. The record reflects that, far from being uninvolved, Mr. Kakassy was engaged throughout the proceeding and utilized the assistance of Mr. Hargett, who is also an attorney, to better serve respondent. While respondent also claims that Mr. Hargett was unprepared to assist Mr. Kakassy, her claim is unsupported by the record.

IV. Conclusion

¶ 16 The parent in a termination of parental rights proceeding has a right to counsel. N.C.G.S. § 7B-1101.1(a). When that parent also qualifies for representation by a guardian ad litem, the parent must be able to receive the benefit of both counsel and the guardian ad litem. To this end, the statute makes clear that the same person may not serve in both roles. N.C.G.S. § 7B-1101.1(d). However, where a parent has been afforded both an attorney and a guardian ad litem, the statute is not violated where, as here, the parent's counsel acts as the parent's attorney and the guardian ad litem assists counsel in the presentation of the case to ensure that the parent is effectively represented. Respondent has not shown that the proceeding below was fundamentally unfair. Accordingly, we affirm the trial court's order terminating respondent's parental rights in Jason.

AFFIRMED.

Justice MORGAN dissenting.

¶ 17 I respectfully disagree with my distinguished colleagues of the majority upon their arrival at the unfortunate conclusion in this case which manifests their startling willingness to forsake the most fundamental tenet of statutory construction: assigning to words their plain and simple meaning. I sharply disagree with the majority's stunning departure from this bedrock of statutory interpretation which is exacerbated by the circuitous approach employed by my fellow justices to justify this deviation. In construing the clear words of the statutory provision at issue in

a direct and appropriate manner, I would conclude that the trial court erred in its interpretation of subsection 7B-1101.1(d) of the General Statutes of North Carolina—the statutory provision at issue in the present case—which constituted a violation of the statute, causing sufficient prejudice to respondent-mother so as to warrant the vacation of the trial court's order and a remand to the trial court for a new termination of parental rights hearing.

¶ 18 The first sentence of N.C.G.S. § 7B-1101.1(d) reads as follows: "The parent's counsel shall not be appointed to serve as the guardian ad litem and the guardian ad litem shall not act as the parent's attorney." N.C.G.S. § 7B-1101.1(d) (2019). In understanding a court's proper role in the accurate interpretation of our Legislature's statutory enactments, this Court stated in its decision in *Brown v. Flowe* that

> [t]o determine legislative intent, a court must analyze the statute as a whole, considering the chosen words themselves, the spirit of the act, and the objectives the statute seeks to accomplish. First among these considerations, however, is the plain meaning of the words chosen by the legislature; if they are clear and unambiguous within the context of the statute, they are to be given their plain and ordinary meanings. The Court's analysis therefore properly begins with the words themselves.

349 N.C. 520, 522, 507 S.E.2d 894, 895–96 (1998) (citations omitted).

¶ 19 "When the language of a statute is clear and unambiguous, there is no room for judicial construction, and the courts must give it its plain and definite meaning." *Lemons v. Old Hickory Council*, *Boy Scouts of Am.*, *Inc.*, 322 N.C. 271, 276, 367 S.E.2d 655, 658 (1988).

¶ 20 In applying the general standards of accurate statutory construction which are specified in *Brown* to the entirety of N.C.G.S. § 7B-1101.1, it is apparent that the intent of the Legislature was to afford a parent whose parental rights were subject to termination with the right to an attorney, with the opportunity for the trial court's appointment of a guardian ad litem for a parent who is deemed to be incompetent, with the fees of these two separate persons to be borne by the Office of Indigent Defense Services upon a determination by the court that the parent is indigent. *See* N.C.G.S. § 7B-1101.1(a)–(f). The objectives of N.C.G.S. § 7B-1101.1 involve the provision of persons to the parent to separately represent the parent's legal interests and the parent's special individualized interests,

with a permeating spirit of the fullness of the protection of the rights of a mother or a father whose parental rights to a child or to children are in peril of being terminated.

¶ 21 Consistent with this identification and analysis of its companion subsections, N.C.G.S. § 7B-1101.1(d) is indicative of the accomplishment of the same objectives and representative of the same spirit when considering the Legislature's selection of the particular words "[t]he parent's counsel shall not be appointed to serve as the guardian ad litem and the guardian ad litem shall not act as the parent's attorney." N.C.G.S. § 7B-1101.1(d). Just as with the other provisions of N.C.G.S. § 7B-1101.1, in analyzing the statute as a whole as mandated by our decision in *Brown*, subsection (d) evinces an expectation in its plain and simple language that the parent's counsel will represent the parent's legal interests, the parent's guardian ad litem will represent the parent's special individualized interests, and such a demarcation of authority and responsibility is clear for the two separate persons from the Legislature's clear and direct language.

¶ 22 It is obvious to me in the instant case that respondent-mother's counsel Mr. Kakassy was not appointed to serve as her guardian ad litem; consequently, there is compliance with N.C.G.S. § 7B-1101.1(d) by the trial court. It is also obvious to me in the instant case—as it is to the Court members in the majority as well—that respondent-mother's guardian ad litem, Mr. Hargett, acted as her attorney; consequently, in my view, there is a violation of N.C.G.S. § 7B-1101.1(d) by the trial court. During the termination of parental rights hearing, the record shows that respondent-mother's guardian ad litem conducted five of the six examinations of witnesses on behalf of respondent-mother and made legal arguments to the trial court in his capacity as a licensed attorney. The majority opinion itself acknowledges that (1) "[a]t various points, Mr. Hargett cross-examined witnesses, including respondent" and (2) "Mr. Hargett argued on respondent's behalf regarding the remaining two grounds [for termination of parental rights]."

¶ 23 Unequivocally, the examination of witnesses and the rendition of legal arguments on the record in a court of general jurisdiction in the State of North Carolina constitutes the actions of an attorney. In the present case, since the guardian ad litem for respondent-mother, at a minimum, performed these acts attributable to an attorney in the course of a termination of parental rights hearing. I would conclude that the trial court violated the mandate of N.C.G.S. § 7B-1101.1(d) that "the guardian ad litem shall not act as the parent's attorney." In applying the well-established principles of statutory construction generally articulated in *Brown* and

specifically addressed in *Lemons* with regard to clear and unambiguous language, the analysis of N.C.G.S. § 7B-1101.1 as a whole, the chosen words of the Legislature throughout N.C.G.S. § 7B-1101.1 including subsection (d), the spirit of the statute, and the objectives that N.C.G.S. § 7B-1101.1 seeks to accomplish, I am compelled to dissent from the majority's view as to its interpretation of N.C.G.S. § 7B-1101.1(d) with respect to the application of this statutory provision in the present case and the conclusion ultimately reached by the majority to affirm the trial court's order which terminated respondent-mother's parental rights.

¶ 24 I agree with the majority that the text of N.C.G.S. § 7B-1101.1(d) "is not ambiguous because the text bears only one meaning." I also concur with the majority that this statutory provision "requires that the parent's counsel and the parent's guardian ad litem not be the same person so that the respondent parent receives the benefit of both." However, the majority's correct identification of these important premises becomes eroded by the majority's faulty assumptions and approaches which are built upon these premises.

¶ 25 At the outset of its opinion, the majority summarized its conclusion that "the statute was not violated and we affirm the trial court's order" because "the trial court properly appointed respondent a guardian ad litem and an attorney, both of whom carried out appropriate roles in this matter." The majority erroneously presumes that the trial court's appointment of one person as the parent's counsel and another person as the parent's guardian ad litem comports with N.C.G.S. § 7B-1101.1(d), so long as the counsel is performing legal responsibilities and the guardian ad litem is performing the responsibilities of the guardian ad litem. I concede that each person was performing his assigned statutory responsibilities; however, the guardian ad litem was acting as the parent's attorney *in addition to* performing his responsibilities as the guardian ad litem, and as stated by the majority, the statutory language of N.C.G.S. § 7B-1101.1(d) "is not ambiguous because the text bears only one meaning," to wit: the guardian ad litem shall not act as the parent's attorney. In an effort to blunt the effect of the plain and simple meaning of the statute's express prohibition against the guardian ad litem's ability to act as the parent's attorney, the majority discerns "that respondent's counsel maintained control of the respondent's case, actively made strategic decisions regarding how best to protect respondent's interests, and served as respondent's counsel throughout the proceeding." Even assuming *arguendo* that this depiction is true, the trial court's allowance of the guardian ad litem to become a second attorney for the parent in the performance of legal responsibilities during the hearing, despite the

ongoing status of respondent-mother's appointed counsel as the parent's attorney of record, contravenes the provision of N.C.G.S. § 7B-1101.1(d) that "the guardian ad litem shall not act as the parent's attorney." "It is well established that the word 'shall' is generally imperative or mandatory when used in our statutes." *Morningstar Marinas/Eaton Ferry, LLC v. Warren Cnty.*, 368 N.C. 360, 365, 777 S.E.2d 733, 737 (2015) (extraneity omitted).

¶ 26 The majority compounds its inconsistent statutory construction of the first sentence of N.C.G.S. § 7B-1101.1(d) in its endeavor to validate the guardian ad litem's sanctioned ability to engage in, as the majority states, "conducting cross-examinations or presenting an argument directly to the trial court" by equating the first phrase of the sentence that "[t]he parent's counsel shall not be appointed to serve as the guardian ad litem" with the second phrase of the sentence that "the guardian ad litem shall not act as the parent's attorney." The majority opines that "[t]he two parts of the sentence mirror each other to fulfill the statute's dual purposes—ensuring a parent's right to counsel and providing those in need with a guardian ad litem." While this statutory construction of the first sentence of N.C.G.S. § 7B-1101.1(d) represents another glimmer of the majority's occasional remembrances and applications in this case of the principles of statutory construction which this Court has espoused in *Brown*, *Lemons*, and *Morningstar Marinas*, nonetheless the repeated inconsistencies of the majority's statutory construction remain which cause it to reiterate that the guardian ad litem here was allowed to conduct cross-examinations and present arguments directly to the trial court, despite the "mirror" images of the two phrases in the first sentence of N.C.G.S. § 7B-1101.1(d) that include the proscription that "the guardian ad litem shall not act as the parent's attorney."

¶ 27 A final approach which the majority has employed to authenticate its concept of statutory construction in the present case is the introduction of inappropriate, extraneous verbiage and considerations which obfuscate the plain and simple meaning of the statutory provision at issue. For example, the majority concludes that "the statute is not violated where, as here, the parent's counsel acts as the parent's attorney and the guardian ad litem assists counsel in the presentation of the case to ensure that the parent is effectively represented." This recapitulation of N.C.G.S. § 7B-1101.1(d) by the majority more resembles a convenient recast of the clear and direct words of the statutory provision's first sentence, "[t]he parent's counsel shall not be appointed to serve as the guardian ad litem and the guardian ad litem shall not act as the parent's attorney." "It is a well-settled principle of statutory construction that where a statute

is intelligible without any additional words, no additional words may be supplied." *State v. Camp*, 286 N.C. 148, 151, 209 S.E.2d 754, 756 (1974). Similarly, the majority adeptly repositions the standard set by the unadulterated directness of the statutory language at issue by restating it as follows: "[w]here, as here, respondent's appointed attorney did not functionally abdicate his responsibilities, leaving the guardian ad litem to 'act as the parent's attorney' in the absence of the parent's actual legal counsel, there is no violation of N.C.G.S. § 7B-1101.1(d)." "When the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must give the statute its plain and definite meaning, and are without power to interpolate, or superimpose, provisions and limitations not contained therein." *In re Banks*, 295 N.C. 236, 239, 244 S.E.2d 386, 388–89 (1978).

¶ 28 In conclusion, the trial court's statement on the record of the hearing to both respondent-mother's appointed counsel, Mr. Kakassy, and respondent-mother's appointed guardian ad litem, Mr. Hargett, that "y'all are both kind of acting as counsel for [respondent-mother] today" was a patently obvious recognition by the trial court that Mr. Hargett, albeit serving as the parent's guardian ad litem, was being allowed by the trial court to act as counsel for the parent. In this regard, the trial court violated N.C.G.S. § 7B-1101.1(d) by permitting the guardian ad litem to act as the parent's attorney. Due to my conclusion that the trial court's error was sufficiently prejudicial to respondent-mother so as to warrant the vacation of the trial court's order terminating respondent-mother's parental rights and a remand to the trial court for a new termination of parental rights hearing, I would not reach respondent-mother's alternative argument that her appointed attorney rendered ineffective assistance of counsel. In my view, respondent-mother's ability to present her position in the termination hearing was unduly compromised by the trial court's contravention of N.C.G.S. § 7B-1101.1(d), which included the appointed guardian ad litem's inability to fully focus upon his responsibilities as contemplated by the plain and simple words of the statute because of the trial court's express authorization for the guardian ad litem to act as the parent's attorney.

¶ 29 In light of the reasons which I have cited and discussed, I respectfully dissent.

IN RE J.T.C.

[376 N.C. 642, 2021-NCSC-3]

IN THE MATTER OF J.T.C.

No. 387A20

Filed 5 February 2021

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 847 S.E.2d 452 (N.C. Ct. App. 2020), affirming an order entered on 4 September 2018 by Judge John M. Britt in District Court, Nash County. Heard in the Supreme Court on 13 January 2021.

Mark L. Hayes for petitioner-appellee mother.

Leslie Rawls for respondent-appellant father.

PER CURIAM.

AFFIRMED.

IN RE S.F.D.

[376 N.C. 643, 2021-NCSC-4]

IN THE MATTER OF S.F.D.

No. 80A20

Filed 5 February 2021

Termination of Parental Rights—no-merit brief—neglect—lifetime incarceration of father

In a termination of parental rights case where respondent-father was incarcerated for life without the possibility of parole for murder and for shooting a child, counsel for respondent filed a no-merit brief pursuant to Appellate Rule 3.1(e) which conceded that counsel could find no meritorious argument to challenge termination on the ground of neglect or the conclusion that termination was in the best interests of the child. After an independent review of the entire record, the Supreme Court affirmed the trial court's termination of respondent's parental rights.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from an order entered on 25 November 2019 by Judge Ward D. Scott in District Court, Buncombe County. This matter was calendared for argument in the Supreme Court on 6 January 2021 but determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

No brief filed for petitioner-appellee Buncombe County Department of Social Services.

Michael N. Tousey for appellee Guardian ad Litem.

Wendy C. Sotolongo, Parent Defender, by J. Lee Gilliam, Assistant Parent Defender, for respondent-appellant father.

BARRINGER, Justice.

¶ 1 Respondent-father of the minor child S.F.D. appeals from the trial court's 25 November 2019 order terminating the parental rights of respondent-father to S.F.D. (Sophia).[1] Counsel for respondent-father has filed a no-merit brief pursuant to Rule 3.1(e) of the North Carolina Rules of Appellate Procedure. We conclude the issues identified by counsel in

1. The pseudonym "Sophia" is used throughout this opinion to protect the identity of the juvenile and for ease of reading.

respondent-father's appeal are meritless. Accordingly, we affirm the trial court's order.

¶ 2 In January 2016, the Buncombe County Department of Social Services (DSS) received a report of a domestic violence incident between Sophia's mother (mother), and the putative father of one of Sophia's half-siblings. The family was found in need of services, and the mother entered into a Family Services Agreement. Sophia was in the care of respondent-father at that time but returned to her mother's care in May 2016, following respondent-father's incarceration.

¶ 3 On 8 August 2016, DSS received a report of a domestic violence incident between the mother and her girlfriend. The mother entered into a safety plan that required her girlfriend to have no contact with the minor children. On 23 August 2016, DSS received another report of a domestic violence incident between the mother and her girlfriend. The mother admitted that her oldest child and Sophia witnessed the argument and subsequently saw the mother sustain injuries.

¶ 4 On 25 August 2016, DSS received a third report of domestic violence between the mother and her girlfriend. The mother admitted Sophia was in the home when her girlfriend hit her and made threats against her life. The mother also admitted to violating the safety plan. DSS immediately requested an emergency Child and Family Team Meeting, and the mother agreed to place her minor children in safety resource placements. Sophia was placed with the maternal grandmother. Respondent-father was in jail on pending charges of first-degree murder, attempted first-degree murder, intentional child abuse causing serious bodily injury, and murder of an unborn child for allegedly shooting his pregnant girlfriend and her toddler.

¶ 5 DSS filed a juvenile petition on 27 September 2016, alleging Sophia to be a neglected juvenile. At the adjudication hearing on 15 February 2017, the mother and respondent-father stipulated that the allegations in the juvenile petition were true and correct and that, based on that stipulation, the trial court could conclude as a matter of law that Sophia was a neglected juvenile. The trial court adjudicated Sophia to be a neglected juvenile and placed Sophia into the custody of DSS, with continued placement with Sophia's maternal grandmother. The trial court adopted DSS's recommendations that respondent-father complete a Comprehensive Clinical Assessment (CCA) and engage in mental health group therapy at the Buncombe County Detention Center but did not adopt DSS's recommendation to continue visitation and ordered no contact between respondent-father and Sophia.

¶ 6 At the permanency-planning hearing on 29 March 2017, the trial court ordered that the permanent plan be a primary plan of reunification and a secondary plan of guardianship or custody with a relative or approved custodian. The trial court changed the secondary plan to adoption and left the primary plan as reunification at the 21 September 2017 permanency-planning hearing. At the 7 November 2018 permanency-planning hearing, the trial court changed the permanent plan to a primary plan of adoption and secondary plans of guardianship and reunification.

¶ 7 On 9 January 2019, DSS filed a petition to terminate respondent-father's parental rights on the grounds of neglect, willfully leaving Sophia in foster care for more than twelve months without a showing of reasonable progress to correct the conditions that led to Sophia's removal, willful failure to pay a reasonable portion of Sophia's care for the preceding six months, and attempted murder of another child residing in the home. *See* N.C.G.S. § 7B-1111(a)(1), (2), (3), (8) (2019). The petition also sought to terminate the mother's parental rights on the grounds of neglect, willfully leaving Sophia in foster care for more than twelve months without a showing of reasonable progress to correct the conditions that led to Sophia's removal, and willful failure to pay a reasonable portion of Sophia's care for the preceding six months. *See* N.C.G.S. § 7B-1111(a)(1), (2), (3) (2019). On 9 April 2019, the mother relinquished her parental rights to Sophia.

¶ 8 Before the hearing on the termination petition, respondent-father had been convicted of offenses arising from the murder of his pregnant girlfriend and the shooting of her toddler-aged child in the face. Respondent-father had been sentenced to incarceration for life without the possibility of parole. The mother did not revoke her relinquishment of her parental rights to Sophia. As the time to revoke had expired before the hearing, the mother was no longer a party to the matter.

¶ 9 Following a hearing on 17 September 2019, the trial court entered an order on 25 November 2019 concluding that three grounds existed to terminate respondent-father's parental rights: neglect, willfully leaving Sophia in foster care for more than twelve months without showing reasonable progress, and attempted murder of another child residing in the home. *See* N.C.G.S. § 7B-1111(a)(1), (2), (8). The trial court also determined it was in Sophia's best interests to terminate his parental rights. *See* N.C.G.S. § 7B-1110(a) (2019). Respondent-father gave notice of appeal to this Court pursuant to N.C.G.S. § 7B-1001(a1)(1).

¶ 10 Respondent-father's counsel has filed a no-merit brief pursuant to Rule 3.1(e) of the Rules of Appellate Procedure. In the brief, counsel identified two issues arguably supporting an appeal related to the grounds for termination pursuant to N.C.G.S. § 7B-1111(a)(2) and (8) but explained that any argument regarding the ground of neglect pursuant to N.C.G.S. § 7B-1111(a)(1) would be wholly without merit. Acknowledging that "a finding of only one ground is necessary to support a termination of parental rights," *In re A.R.A.*, 373 N.C. 190, 194 (2019), counsel stated that "even if successful," arguments pertaining to N.C.G.S. § 7B-1111(a)(2) and (8) "would not alter the ultimate result." Counsel further explained that counsel could not make a meritorious argument of error as to the trial court's conclusion regarding the termination of respondent-father's parental rights being in the best interests of Sophia. Counsel advised respondent-father of his right to file pro se written arguments with this Court and provided him with the documents necessary to do so. Respondent-father has not submitted written arguments to this Court.

¶ 11 We carefully and independently review issues identified by counsel in a no-merit brief in light of the entire record. *In re L.E.M.*, 372 N.C. 396, 402 (2019). Having undertaken this review, we are satisfied that the trial court's 25 November 2019 order is supported by clear, cogent, and convincing evidence and based on proper legal grounds in determining that grounds exist pursuant to N.C.G.S. § 7B-1111(a)(1) to terminate respondent-father's parental rights and that termination is in the best interests of Sophia. Accordingly, we affirm the trial court's order terminating respondent-father's parental rights.

AFFIRMED.

IN RE S.R.F.

[376 N.C. 647, 2021-NCSC-5]

IN THE MATTER OF S.R.F.

No. 214A20

Filed 5 February 2021

Termination of Parental Rights—grounds for termination—neglect—findings of fact

A trial court's uncontested findings of fact supported its conclusion that grounds existed to terminate respondent-mother's parental rights to her child based on neglect, where the findings not only demonstrated respondent's failure to adequately address the domestic violence and substance abuse issues that contributed to the child being adjudicated neglected and dependent but also indicated a likelihood of future neglect based on respondent's noncompliance with her case plan. Although portions of certain findings were unsupported by the evidence with regard to specific aspects of the case plan, any errors were harmless in light of the remaining supported findings.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from an order entered on 12 February 2020 by Chief Judge Thomas M. Brittain in District Court, Transylvania County. This matter was calendared in the Supreme Court on 6 January 2021 but determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

Mary Ann J. Hollocker for petitioner-appellee Transylvania County Department of Social Services.

Susan H. Boyles for appellee Guardian ad Litem.

Robert W. Ewing for respondent-appellant mother.

MORGAN, Justice.

¶ 1 Respondent-mother appeals from the trial court's order terminating her parental rights to "Sarah,"[1] a minor child born in September 2014. Although the trial court also terminated the parental rights of Sarah's father, he is not a party to this appeal. Because we conclude that the

1. We use this pseudonym to protect the juvenile's privacy and for ease of reading.

trial court properly adjudicated the existence of grounds to terminate respondent-mother's parental rights based on her neglect of Sarah, we affirm.

Factual Background and Procedural History

¶ 2 On 28 March 2018, Transylvania County Department of Social Services (DSS) obtained nonsecure custody of Sarah and filed a juvenile petition alleging that she was neglected and dependent. The trial court held an adjudicatory hearing on 30 May 2018 at which the parties stipulated to the following facts:

> 12. On or about October 17, 2017, [DSS] received a Child Protective Services report that [Sarah] had been exposed to a physical altercation between [respondent-mother] and a man named Casey.
>
> 13. [Sarah] was in the presence of the domestic violence incident when Casey hit, smacked, and choked [respondent-mother].
>
> 14. On or about October 18, 2017, [DSS] received a Child Protective Services report alleging [respondent-mother] was using meth and leaving [Sarah] with who[m]ever and drugs are being sold out of the home where the child lives.
>
> 15. . . . Law enforcement went to the home and found methamphetamine. [Respondent-mother] was charged with Felony Possession [of] Methamphetamine. Charges are currently pending. [Sarah] was at the home during the raid.
>
> 16. On or about October 19, 2017, [respondent-mother] made [a] plan for [Sarah] to reside with her grandmother . . . and then later changed the plan to her father, David . . . . David and [his wife] are unable to continue to provide care for [Sarah] at this time.
>
> 17. On or about October 21, 2017, [a DSS] Social Worker . . . met with [respondent-mother] in Transylvania County jail and [respondent-mother] agreed to [a] safety assessment. . . .
>
> . . . .

22. [Respondent-mother] did not contact the social worker upon release from jail. [She] has not completed a substance abuse assessment. [She] has not complied with drug screen requests from the Department.

. . . .

24. On or about March 5, 2018, [respondent-mother] was charged with Felony Breaking and/or Entering and Felony Larceny after Breaking/Entering for stealing items from her grandmother's home. Charges are currently pending.

25. [Respondent-mother] admitted to the social worker that drugs were sold out of the home where the juvenile was residing.

26. [Respondent-mother] admitted to the social worker that she has an addiction problem and was using methamphetamine.

. . . .

29. . . . [Respondent-mother] was incarcerated at the time of the petition.

30. [Sarah] has been exposed to an injurious environment while in her mother's care. The juvenile has been exposed to domestic violence and substance abuse.

31. [Respondent-mother's] substance abuse has impeded her ability to provide appropriate care and supervision of the juvenile.

Based on these stipulated facts, the trial court entered an order on 12 June 2018 adjudicating Sarah to be a neglected and dependent juvenile.

¶ 3 The trial court held a dispositional hearing on 13 June 2018 and subsequently entered a "Disposition Order" on 2 August 2018. As a result of the hearing and the order, the trial court granted custody and placement authority over Sarah to DSS and specifically sanctioned Sarah's transfer from kinship care into a foster placement recommended by DSS. The trial court provided one hour of supervised visitation per week with Sarah to respondent-mother and ordered respondent-mother to contact DSS in order to establish a case plan and to "follow any and all parts" thereof. Respondent-mother signed her DSS case plan on 14 June 2018.

¶ 4 After a permanency planning hearing on 14 November 2018, the trial court established a primary permanent plan for Sarah of reunification, with a secondary plan of adoption and termination of parental rights. However, the trial court discontinued respondent-mother's visitation with Sarah due to respondent-mother's repeated failure to attend scheduled visits and the resulting distress caused to Sarah. The trial court offered the prospect of future visitation if respondent-mother would "reengage."

¶ 5 Following a hearing on 15 May 2019, the trial court changed Sarah's primary permanent plan to termination of parental rights and adoption. The trial court found that respondent-mother was incarcerated and had not "made any attempts to work on her [case] plan" since the previous hearing.

¶ 6 DSS filed a motion to terminate the parental rights of both respondents to Sarah on 15 July 2019. After a series of continuances, the trial court held a hearing on the motion to terminate parental rights on 15 January 2020 and entered an order terminating respondents' parental rights on 12 February 2020.

¶ 7 The trial court adjudicated the existence of two statutory grounds for terminating respondent-mother's parental rights: (1) respondent-mother's neglect of Sarah under N.C.G.S. § 7B-1111(a)(1) (2019), and (2) respondent-mother's willful failure to make reasonable progress to correct the conditions leading to Sarah's removal from the home in March 2018 under N.C.G.S. § 7B-1111(a)(2) (2019). The trial court then considered the dispositional factors in N.C.G.S. § 7B-1110(a) (2019) and concluded that it was in Sarah's best interests to terminate respondent-mother's parental rights. Respondent-mother gave timely notice of appeal from the termination of parental rights order.

¶ 8 In her appeal to this Court, respondent-mother challenges both of the grounds for termination of her parental rights which were adjudicated by the trial court.[2] She contends the court's adjudications are unsupported by its findings of fact and based on findings not supported by the evidence. Respondent-mother does not separately contest the trial

2. In an "abundance of caution," respondent-mother also challenges the trial court's adjudications of dependency under N.C.G.S. § 7B-1111(a)(6) (2019) and willful abandonment under N.C.G.S. § 7B-1111(a)(7) (2019), insofar as the trial court relied on these additional grounds. Although the trial court made findings that include language found in N.C.G.S. § 7B-1111(a)(6) and (7), the termination of parental rights order makes no reference to either of these provisions. The trial court relied only upon N.C.G.S. § 7B-1111(a)(1) and (2) as its grounds for terminating respondent-mother's parental rights.

court's determination of Sarah's best interests at the dispositional stage of the proceeding under N.C.G.S. § 7B-1110(a). We thus limit our review to the court's adjudicatory findings and conclusions.

Adjudication

¶ 9 Under this Court's well-established standard of review,

> [w]e 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. Unchallenged findings of fact are deemed supported by competent evidence and are binding on appeal. Moreover, we review only those findings needed to sustain the trial court's adjudication.
>
> The issue of whether a trial court's findings of fact support its conclusions of law is reviewed de novo. However, an adjudication of any single ground for terminating a parent's rights under N.C.G.S. § 7B-1111(a) will suffice to support a termination order. Therefore, if this Court upholds the trial court's order in which it concludes that a particular ground for termination exists, then we need not review any remaining grounds.

In re J.S., 374 N.C. 811, 814–15, 845 S.E.2d 66, 70–71 (2020) (extraneity omitted).

¶ 10 In the instant case, the trial court adjudicated grounds to terminate respondent-mother's parental rights for neglecting Sarah under N.C.G.S. § 7B-1111(a)(1). A juvenile is deemed "neglected" if the child is denied "proper care, supervision, or discipline" by the child's parent or caretaker, if the juvenile "lives in an environment injurious to the juvenile's welfare[,]" or if the juvenile "has been abandoned[.]" N.C.G.S. § 7B-101(15) (2019).

¶ 11 When termination of parental rights is based on neglect, "if the child has been separated from the parent for a long period of time, there must be a showing of . . . a likelihood of future neglect by the parent." *In re D.L.W.*, 368 N.C. 835, 843, 788 S.E.2d 162, 167 (2016) (citing *In re Ballard*, 311 N.C. 708, 713–15, 319 S.E.2d 227, 231–32 (1984))[3]. "When

3. As we have more recently determined in our opinion rendered in *In re R.L.D.*, No. 122A20, 2020 N.C. LEXIS 1043, at *5 n.3 (N.C. Dec. 11, 2020), a showing of past neglect and a probability of future neglect is not necessary to support a determination that a

determining whether such future neglect is likely, the district court must consider evidence of changed circumstances occurring between the period of past neglect and the time of the termination hearing." *In re Z.V.A.*, 373 N.C. 207, 212, 835 S.E.2d 425, 430 (2019) (citing *Ballard*, 311 N.C. at 715, 319 S.E.2d at 232).

¶ 12 Respondent-mother challenges several of the trial court's findings of fact on the basis that they are unsupported by the evidence introduced at the termination hearing. She first claims that the evidence does not support Finding of Fact 14(6), which states that the trial court's initial Disposition Order entered on 2 August 2018 required her and respondent-father to "[o]btain a domestic violence assessment and follow any recommended treatment[.]"

¶ 13 We agree with respondent-mother that the Disposition Order did not contain an express directive to address the issue of domestic violence, even though exposure to domestic violence in respondent-mother's home was one of the reasons for Sarah's adjudication as a neglected juvenile on 13 June 2018. However, in light of the uncontested portions of Findings of Fact 16 and 17, which state that respondent-mother signed a case plan with DSS on 14 June 2018 and that her DSS case plan required her "to engage in domestic violence treatment which she has failed to do," we conclude that the trial court's erroneous finding about the terms of the Disposition Order on this subject and respondent-mother's failure to comply in this area constitute harmless error. As respondent-mother does not contest Findings of Fact 16 and 17, they are binding on appeal. *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991). Since the Disposition Order required respondent-mother to "follow any and all parts" of her DSS case plan, the error that she identifies in Finding of Fact 14(6) is unavailing to her appeal. *See generally In re M.C.*, 374 N.C. 882, 887, 844 S.E.2d 564, 568 (2020) (concluding that "the erroneous finding is not necessary to support the trial court's legal determination that grounds existed for the termination of respondent's parental rights").

¶ 14 Respondent-mother next objects to those portions of Finding of Fact 17 which state that she was ordered to obtain "a comprehensive clinical assessment which she never completed" and that she failed to "engage in substance abuse treatment . . . by not having the assessment." Respondent-mother claims that there is no evidence in the record that she was required to have a "comprehensive clinical assessment" (CCA).

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parent's parental rights to a juvenile are subject to termination on the basis of neglect pursuant to N.C.G.S. 7B-1111(a)(1) in light of the fact that such a determination is also permissible in the event that there is a showing of current neglect.

She further contends that the record shows that she submitted to a mental health and substance abuse assessment as ordered by the trial court.

¶ 15 While we again agree with respondent-mother that the findings of fact that she has identified and challenged are erroneous, we also again conclude that these errors are harmless in light of the trial court's related findings and supporting evidence. While the record contains no evidence that respondent-mother was ordered to obtain a CCA,[4] the trial court did order, however, that respondent-mother was required to

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4. North Carolina law does not define or establish uniform protocols for a CCA. A manual published by the North Carolina Department of Health and Human Services provides the following description:

> The CCA is a face-to-face evaluation and must include the following elements:
>
> - A description of the presenting problems, including source of distress, precipitating events, and associated problems or symptoms;
> - A chronological general health and behavioral history (including both mental health and substance abuse) of the individual's symptoms, treatment, and treatment response;
> - Current medications (for both physical and psychiatric treatment);
> - A review of biological, psychological, familial, social, developmental, and environmental dimensions to identify strengths, needs, and risks in each area;
> - Evidence of beneficiary and legally responsible person's (if applicable) participation in the assessment;
> - Analysis and interpretation of the assessment information with an appropriate case formulation;
> - Diagnoses from the DSM-5 [or any subsequent editions], including mental health, substance use disorders, and/or intellectual/developmental disabilities, as well as physical health conditions and functional impairment; and
> - Recommendations for additional assessments, services, support, or treatment based on the results of the CCA.

N.C. Dep't of Health & Hum. Servs. Div. of Mental Health, Dev. Disabilities, and Subs. Abuse Servs., APSM45-2, Records Mgmt. & Doc. Manual for Providers of Publicly-Funded Mental Health, Intell. or Dev. Disabilities & Subs. Use Servs. & Local Mgmt. Entities-Managed Care Orgs., ch. 3-2 (Dec. 1, 2016).

enter into a case plan with DSS that included the following components: "obtain a mental health and substance abuse assessment [and] follow all recommendations of the assessment[.]" Whatever specific distinctions may exist between a CCA and a "mental health and substance abuse assessment," they are irrelevant given respondent-mother's lack of progress in addressing the causes of Sarah's 12 June 2018 adjudication as a neglected juvenile.

¶ 16 The evidence at the termination of parental rights hearing showed that respondent-mother obtained a mental health assessment and substance abuse assessment at Meridian on 14 June 2018 but failed to comply with the recommended treatment. Respondent-mother had an updated substance abuse assessment on 11 December 2019[5] while she was living in Forsyth County following her release from prison in October 2019, but she again failed to follow the assessor's treatment recommendations. The assessor had recommended, based on respondent-mother's self-report that respondent-mother had been sober since her arrest for possession of methamphetamine and other drugs on 28 April 2019, that respondent-mother attend "a relapse prevention program at Daymark" and "twelve-step meetings and Celebrate Recovery" due to the high rate of relapse associated with methamphetamine use. However, respondent-mother declined to do so. Accordingly, although we disregard the improper finding by the trial court that respondent-mother failed to obtain a substance abuse assessment, we fully credit the trial court's proper finding that respondent-mother failed to engage in the recommended treatment as required by her case plan. *See In re S.D.*, 374 N.C. 67, 83, 839 S.E.2d 315, 328 (2020).

¶ 17 Respondent-mother also challenges the following segment of Finding of Fact 27:

> 27. As of the date of this hearing, due to the respondent parents' *continued substance abuse and domestic violence* [emphasis added], failure to work on their case plan and obtain treatment, and failure to work toward reunification with the child, there is a substantial likelihood of further neglect if child was placed in the custody of said respondents.

Respondent-mother objects to the trial court's determination that she continued to engage in substance abuse and domestic violence at the

5. DSS Social Worker Jodi Hopkins testified that mental health and substance abuse assessments are considered valid for a period of one year.

time of the termination hearing. Respondent-mother specifically argues that "the finding that [she] continued to engage in substance abuse and domestic violence is a conclusion of law and should be treated as such" for purposes of appellate review. *See generally State v. Sparks*, 362 N.C. 181, 185, 657 S.E.2d 655, 658 (2008) ("Findings of fact which are essentially conclusions of law will be treated as such on appeal." (extraneity omitted)). She then submits that the trial court's conclusion about her continued substance abuse and domestic violence was "not supported by any findings of fact" in the order terminating respondent-mother's parental rights.

¶ 18 We hold that the trial court's determination that respondents continued to engage in substance abuse and domestic violence is properly designated as a finding of fact rather than as a conclusion of law. In the event that the trial court had used the words "substance abuse" and "domestic violence" as legal terms of art in its order to clearly articulate a legal ruling, then respondent-mother's characterization of these terms might be more persuasive. *See generally Sparks*, 362 N.C. at 185, 657 S.E.2d at 658 ("In distinguishing between findings of fact and conclusions of law, as a general rule, any determination requiring the exercise of judgment or the application of legal principles is more properly classified a conclusion of law." (extraneity omitted)). However, in the context in which the trial court's observation is rendered, we construe the trial court's determination that respondent parents engaged in "continued substance abuse and domestic violence" to mean that they still acted in such a manner at the time of the termination hearing. We do recognize, however, that the trial court's ending determination in Finding of Fact 27 that this conduct of respondent parents creates "a substantial likelihood of further neglect if child was placed in the custody of said respondents" is in the nature of a conclusion of law. *See In re J.O.D.*, 374 N.C. 797, 807, 844 S.E.2d 570, 578 (2020).

¶ 19 Notwithstanding this Court's disagreement with respondent-mother's disputed classification of the trial court's determination, we find insufficient evidentiary support for the portion of Finding of Fact 27 that she was participating in "continued substance abuse and domestic violence" at the time of the termination of parental rights hearing on 15 January 2020. DSS presented evidence that respondent-mother had multiple drug-related arrests and periods of incarceration during the course of the underlying juvenile case. DSS Social Worker Hopkins also testified that respondent-mother was on probation and awaiting trial on felony drug charges at the time of the termination hearing. However, respondent-mother's three most recent drug screens had been negative for

the presence of controlled substances; for in Finding of Fact 17, the trial court acknowledged that respondent-mother "did submit to some [drug screens,] and the most recent ones were negative." Similarly, although DSS adduced evidence of respondent-mother's involvement in a single domestic violence incident at her boyfriend's residence in August 2018 after Sarah had entered nonsecure custody, the agency did not present evidence of any subsequent episodes of domestic violence. As a result, we disregard the portion of Finding of Fact 27 concerning "continued substance abuse and domestic violence." *See In re J.M.J.-J.*, 374 N.C. 553, 559, 843 S.E.2d 94, 101 (2020).

¶ 20 Having addressed each of respondent-mother's objections to the trial court's challenged findings of fact, we now consider her claim that the court's findings as a whole do not support its conclusion of law in support of its adjudication of neglect under N.C.G.S. § 7B-1111(a)(1), to wit:

> 4. The respondent parents have neglected the minor child [Sarah]. Due to the respondent parents' substance abuse and improper care and supervision of the child, the child was adjudicated to be a neglected and dependent juvenile by order entered in this matter following hearing on May 30, 2018. Despite the movant having referred the parents to services aimed at remedying the issues that lead [sic] to the child being placed out of the home of the respondents, including referrals to various agencies to help address substance abuse issues and improvement of parenting skills, said respondents failed to meaningfully engage in their case plan. The respondent parents' unwillingness to document an ability to provide a safe and appropriate home for the minor child, together with the failure to address their substance abuse issues and domestic violence issues, and failure to meaningfully engage in their case plan[,] demonstrate there is a reasonable likelihood that neglect [of] the child would reoccur in the future if the child was placed in the custody of said respondents, and said facts constitute a ground to terminate the respondent parents' parental rights to the minor child pursuant to N.C.[G.S.] § 7B-1111(a)(1).

¶ 21 While she does not deny her prior neglect of Sarah, respondent-mother contends that the trial court erred in concluding that Sarah

was likely to experience further neglect if the child were returned to respondent-mother's custody. *See generally In re J.O.D.*, 374 N.C. at 807, 844 S.E.2d at 578 (explaining that the "determination that neglect is likely to reoccur if [the juvenile] was returned to [the parent's] care is more properly classified as a conclusion of law"). We must determine therefore whether the trial court's valid findings of fact demonstrate a likelihood of future neglect by respondent-mother at the time of the termination of parental rights hearing. *In re D.L.W.*, 368 N.C. at 843, 788 S.E.2d at 167.

¶ 22 The trial court's supported findings of fact indicate that respondent-mother has a Child Protective Services history dating back to 2014 which denotes repeated reports of improper supervision and care, substance abuse, and domestic violence. The findings also detail the circumstances that led DSS to assume nonsecure custody of Sarah in March 2018 and resulted in the child's adjudication as a neglected and dependent juvenile in June 2018. Specifically, the findings describe Sarah's "expos[ure] to domestic violence and substance abuse" in respondent-mother's care, as well as respondent-mother's incarceration on criminal charges, lack of stable employment or housing, and self-professed addiction to methamphetamine.

¶ 23 As summarized in Conclusion of Law 4, the trial court's findings of fact further reflect respondent-mother's failure to "meaningfully address[]" the issues of substance abuse and domestic violence which led to Sarah's status as a neglected and dependent juvenile. These findings recognize that respondent-mother obtained no domestic violence or substance abuse treatment, except for a brief period of substance abuse treatment while she was incarcerated in 2019. More generally, said findings illustrate respondent-mother's failure to "meaningfully engage" in any of the requirements of her court-ordered DSS case plan, which also included the completion of parenting classes and the attainment of stable housing and employment. The findings also catalog respondent-mother's failure to visit or contact Sarah after 21 August 2018 and respondent-mother's dereliction to provide any financial support for Sarah while the child was in DSS custody.

¶ 24 Other findings—specifically Finding of Fact 17—demonstrate the trial court's consideration of the evidence of changed circumstances which are favorable to respondent-mother. Finding of Fact 17 credits respondent-mother with obtaining some substance abuse treatment while in prison. The evidence at the termination hearing showed that she re-

ceived approximately four weeks of "MRT classes"[6] while incarcerated for a probation violation. However, respondent-mother did not complete the MRT program following her release from confinement on 8 October 2019 and did not obtain any additional substance abuse treatment at the time of the termination hearing. Finding of Fact 17 also favorably acknowledged respondent-mother's negative drug screens.

¶ 25 "A parent's failure to make progress in completing a case plan is indicative of a likelihood of future neglect." *In re M.A.*, 374 N.C. 865, 870, 844 S.E.2d 916, 921 (2020) (quoting *In re M.J.S.M.*, 257 N.C. App. 633, 637, 810 S.E.2d 370, 373 (2018)). Here, the trial court's findings of fact demonstrate an extended period of respondent-mother's failure to comply with the DSS case plan which she signed on 14 June 2018, with particular emphasis upon respondent-mother's failure to comply with the conditions of her case plan directly related to the issues of domestic violence and substance abuse. *See In re C.J.*, 373 N.C. 260, 263, 837 S.E.2d 859, 861 (2020); *In re M.A.W.*, 370 N.C. at 154–55, 804 S.E.2d at 517–18. The findings also emphasize respondent-mother's complete lack of involvement with Sarah since 21 August 2018. *See In re D.L.A.D.*, No. 123A20, 2020 WL 6815091, at *5 (N.C. Nov. 20, 2020) ("An extended period in which a parent does not attempt to visit the child could show ['a future propensity to be inattentive to the child.']"); *In re A.S.T.*, No. 18A20, 2020 WL 6815097, at *6 (N.C. Nov. 20, 2020) (relying in part on the respondent-father's failure to attempt to contact the child in affirming trial court's conclusion of a probability of future neglect). Respondent-mother's few weeks of attending a prison-based substance abuse program, followed by a brief period of apparent sobriety leading up to the termination of parental rights hearing, is insufficient to negate the trial court's determination that respondent-mother was likely to subject Sarah to further neglect if the child were returned to the custody of respondent-mother. *See In re O.W.D.A.*, No. 397A19, 2020 WL 6815126, at *6 (N.C. Nov. 20, 2020) ("[A]lthough respondent-father may have made some minimal progress during his most recent incarceration, . . . these eleventh-hour efforts did not outweigh the evidence of his persistent failures to make improvements while not incarcerated . . . ."); *In re A.S.T.*, No. 18A20, 2020 WL 6815097, at *6 (affirming adjudication under N.C.G.S. § 7B-1111(a)(1) where "[r]espondent has failed to appreciably address his substance abuse issues . . . and has only shown an extended abstinence from cocaine use

6. Moral Reconation Therapy (MRT) is "a cognitive behavioral program conducted in a group setting, designed to reduce criminal thinking and reinforce positive behaviors and habits." Jamie Markham, *A Visit to the Burke CRV Center*, North Carolina Criminal Law (May 23, 2019, 4:07 PM), https://nccriminallaw.sog.unc.edu/a-visit-to-the-burke-crv-center/.

while incarcerated"). Accordingly, we hold that the trial court properly concluded that grounds existed to terminate respondent-mother's parental rights to Sarah for neglect pursuant to N.C.G.S. § 7B-1111(a)(1).

¶ 26 Having upheld the trial court adjudication of neglect under N.C.G.S. § 7B-1111(a)(1), we need not review its additional adjudication of willful failure to make reasonable progress under N.C.G.S. § 7B-1111(a)(2). *In re J.S.*, 374 N.C. at 815, 845 S.E.2d at 71.

Conclusion

¶ 27 Although respondent-mother has identified some harmless inaccuracies in the trial court's adjudicatory findings of fact, the trial court's remaining findings of fact support its conclusions of law that grounds exist to terminate respondent-mother's parental rights for her neglect of the juvenile Sarah under N.C.G.S. § 7B-1111(a)(1). Because respondent-mother does not separately challenge the trial court's determination that terminating respondent-mother's parental rights to Sarah is in the best interests of the juvenile, we affirm the termination of parental rights order.

AFFIRMED.

IN RE C.B.C.B.

[376 N.C. 660 (2021)]

IN THE MATTER OF C.B.C.B.	)	From Catawba County

No. 521A20

ORDER

Respondent-appellant mother has two closely related cases pending at the appellate level: *In re C.B.C.B.*, No. 521A20, No. 19 JT 261, pending at this Court; and *In re C.B.C.B.*, No. COA21-11, No. 19 JA 261, pending at the Court of Appeals. This Court hereby allows respondent-appellant mother's petition for discretionary review prior to a decision by the N.C. Court of Appeals. On its own motion, this Court hereby consolidates *In re C.B.C.B.*, No. COA21-11, No. 19 JA 261 with *In re C.B.C.B.*, No. 521A20, No. 19 JT 261. In accordance with this consolidation, any party may move to amend the record filed with this Court.

This Court hereby allows respondent-appellant mother's motion for an extension of time to file her brief to the extent that respondent-appellant mother's brief will be due thirty (30) days from the entry of this order. The remainder of the briefing schedule will proceed according to Rules 13 and 28 of the N.C. Rules of Appellate Procedure. Respondent-appellant mother's motion to suspend the rules for expedited review is hereby dismissed as moot.

By order of the Court in Conference, this 27 day of January, 2021.

s/Berger, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 27 day of January, 2021.

AMY L. FUNDERBURK
Clerk of the Supreme Court

s/Amy L. Funderburk
~~Assistant~~ Clerk

I. BEVERLY LAKE, JOHN B. LEWIS, JR., EVERETTE M. LATTA, PORTER L. MCATEER, ELIZABETH S. MCATEER, ROBERT C. HANES, BLAIR J. CARPENTER, MARILYN L. FUTRELLE, FRANKLIN E. DAVIS, THE ESTATE OF JAMES D. WILSON, THE ESTATE OF BENJAMIN E. FOUNTAIN, JR., FAYE IRIS Y. FISHER, STEVE FRED BLANTON, HERBERT W. COOPER, ROBERT C. HAYES, JR., STEPHEN B. JONES, MARCELLUS BUCHANAN, DAVID B. BARNES, BARBARA J. CURRIE, CONNIE SAVELL, ROBERT B. KAISER, JOAN ATWELL, ALICE P. NOBLES, BRUCE B. JARVIS, ROXANNA J. EVANS, JEAN C. NARRON, AND ALL OTHERS SIMILARLY SITUATED	)	
	)	Gaston County
v.	)	
STATE HEALTH PLAN FOR TEACHERS AND STATE EMPLOYEES, A CORPORATION, FORMERLY KNOWN AS THE NORTH CAROLINA TEACHERS AND STATE EMPLOYEES' COMPREHENSIVE MAJOR MEDICAL PLAN, TEACHERS AND STATE EMPLOYEES' RETIREMENT SYSTEM OF NORTH CAROLINA, A CORPORATION, BOARD OF TRUSTEES OF THE TEACHERS AND STATE EMPLOYEES' RETIREMENT SYSTEM OF NORTH CAROLINA, A BODY POLITIC AND CORPORATE, JANET COWELL, IN HER OFFICIAL CAPACITY AS TREASURER OF THE STATE OF NORTH CAROLINA, AND THE STATE OF NORTH CAROLINA	)	

No. 436PA13-4

DISCLOSURE PURSUANT TO CANON 3D OF THE CODE OF JUDICIAL CONDUCT

This case arises from a challenge brought by a class of over 222,000 individuals consisting, as described in the class certification order entered by Judge Edwin G. Wilson, Jr., in the Superior Court, Gaston County, on 11 October 2016, of (1) "[a]ll members (or their Estates or personal representatives if they have deceased since July 1, 2009) of the N.C. Teachers' and State Employees' Retirement System ("TSERS") who retired before January 1, 1988; (2) TSERS members (or their Estates or

personal representatives if they have deceased since July 1, 2009) who retired on or after January 1, 1988, who were hired before October 1, 2006 and have 5 or more years of contributory services with the State and (3) surviving spouses (or their personal representatives if they have deceased since July 1, 2009) of (i) deceased retired employees, provided the death of the former plan member occurred prior to October 1, 1986; and (ii) deceased teachers, State employees, and members of the General Assembly who are receiving a survivor's alternate benefit under any of the State-supported retirement programs, provided the death of the former plan member occurred prior to October 1, 1986," to legislation enacted by the General Assembly requiring class members to pay a premium to order to obtain coverage under what plaintiffs describe in their complaint as the Regular State Health Plan. This case is currently before the Court on discretionary review of a decision of the Court of Appeals reversing an order entered by the trial court on 19 May 2017 granting partial summary judgment in favor of plaintiffs on the grounds that the State had breached its contract with the members of the plaintiff class and requiring the State, among other things, to (1) provide premium-free coverage under certain provisions of the State Health Plan to members of the plaintiff class and to (2) reimburse members of the plaintiff class for premiums that they had paid in order to obtain such coverage prior to the entry of the trial court's order. *Lake v. State Health Plan*, 264 N.C. App. 174, 825 S.E.2d 645 (2019). In light of the number of individuals potentially affected by the outcome of the present appeal and the amount of money that is potentially at issue in this case, the justices of the Supreme Court of North Carolina have, prior to consideration of this case on the merits, elected to provide the parties and their counsel with the following information:

1. According to Canon 3C(1)(d)(i) of the North Carolina Code of Judicial Conduct, "[a] judge should disqualify himself/herself in a proceeding in which the judge's impartiality could reasonably be questioned," including a case in which "[t]he judge or the judge's spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person," "[i]s a party to the proceeding . . . ." In addition, Canon 3D, which addresses "remittal of disqualification," provides that "a judge potentially disqualified by the terms of Canon 3C may, instead of withdrawing from the proceeding, disclose on the record the basis of the judge's potential disqualification" and that, "[i]f, based on such disclosure, the parties and lawyers, on behalf of their clients and independently of the judge's participation, all agree that the judge's basis for potential disqualification is immaterial or insubstantial, the judge is no longer disqualified, and may participate in the proceeding," with any

such agreement" to be "signed by all lawyers" and to be "incorporated in the record of the proceeding."

2. Pursuant to Canon 3D of the North Carolina Code of Judicial Conduct, the members of the Court, after making reasonable inquiry, hereby disclose the following information pertaining to members of their families who are within the third degree of kinship by blood or marriage and either are or may be members of the plaintiff class and who do not live in their immediate households:

a. Chief Justice Newby's mother is a retired teacher who taught in the Randolph and Guilford County public school systems and at Guilford Technical Community College.

b. Justice Ervin's deceased paternal grandfather served as a member of this Court and as a special judge of the Superior Court, his deceased father retired from a position as a Superior Court Judge, his mother taught in the Burke County public school system and at the western North Carolina School of the Deaf, and his brother-in-law is a retired special agent with the State Bureau of Investigation.

c. Justice Morgan's deceased maternal grandmother retired from her position as a teacher in the New Bern public schools.

d. Justice Berger's mother-in-law is a retired teacher who taught in the Forsyth County public school system and his wife's deceased maternal grandmother retired after teaching in the Yadkin and Durham County public school systems.

e. Justice Barringer's mother is a retired lunchroom cashier formerly employed by the Shelby City and Cleveland County public schools and her maternal aunt is a retired teaching assistant and bus driver formerly employed by the Shelby City Schools.

None of the family members identified in Paragraph No. 2 are serving as class representatives in this case.

3. Although the justices believe that they have, after reasonable inquiry, identified all of the members of their families within the third degree of kinship who are or may be members of the plaintiff class, they are unable to state definitively that other members of their families within the third degree of kinship are not also members of the plaintiff class.

4. The Court is mindful of its constitutional responsibilities as the judicial tribunal of last resort in North Carolina. *See* N.C. Const. art. VI (vesting the Supreme Court of North Carolina with appellate jurisdiction

and supervisory authority over all of the state courts in North Carolina). Pursuant to Canon 3D, the justices identified in Paragraph No. 2 are disqualified from participating in the consideration and decision of this case based upon one or more of the family relationships set forth above unless the parties and their lawyers file a written agreement stipulating that each justice's basis for disqualification is immaterial or insubstantial. In view of the fact that a minimum of four justices is necessary to constitute a "quorum for the transaction of the business of the court," N.C.G.S. § 7A-10(a) (2019), the parties to this proceeding will be denied an opportunity to be heard for lack of a quorum in the absence of further action by the parties or the Court.

5. According to the Rule of Necessity, "actual disqualification of a member of a court of last resort will not excuse such member from performing his official duty if failure to do so would result in a denial of a litigant's constitutional right to have a question properly presented to such a court." *Boyce v. Cooper*, 357 N.C. 655, 655, 588 S.E.2d 887, 888 (2003) (quoting *United States v. Will*, 449 U.S. 200, 214, 66 L. Ed. 2d 392, 405–06 (1980)); *see also Bacon v. Lee*, 353 N.C. 696, 717–18, 549 S.E.2d 840, 854–55 (2001) (holding that the Governor of North Carolina is permitted to consider a clemency petition submitted by a death-sentenced individual despite his prior service as Attorney General); *Long v. Watts*, 183 N.C. 99, 102, 110 S.E. 765, 767 (1922) (holding that the Court was required to hear a case challenging the application of a statewide income tax upon judicial salaries despite the potential impact of the resulting decision upon the members of the Court).

6. Prior to addressing whether the Rule of Necessity should be invoked in this proceeding and in order to give the parties a full and fair opportunity to be heard concerning the manner in which the Court should proceed in this case, the Court invites counsel on behalf of the parties to submit to the Court no later than 1 February 2021 either written objections to the participation of the justices identified herein or written consent of the parties and their counsel to the participation of the justices in the consideration and decision of this case on the grounds that the potential basis or bases for disqualification disclosed under Canon 3D is or are immaterial or insubstantial.

By order of the Court in conference, this the 26th day of January 2021.

s/Berger, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 26th day of January 2021.

AMY FUNDERBURK
Clerk, Supreme Court of
North Carolina

s/Amy Funderburk

M.C. Hackney
~~Assistant~~ Clerk, Supreme Court of
North Carolina

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

5 FEBRUARY 2021

1P21	State v. Rasheed Anthony	Def's Pro Se Motion for Verified Complaint - Motion to Compel	Dismissed **01/27/2021**
6P05-2	Jose Luis Garza v. State of North Carolina, NCDPS, Director Todd E. Ishee, Pender Correctional Institution, Superintendent, Bryan Wells	1. Petitioner's Pro Se Petition for Writ of Certiorari to Review Order of the COA (COA03-1330; COAP20-220) 2. Petitioner's Pro Se Motion to Proceed *In Forma Pauperis* 3. Petitioner's Pro Se Motion to Appoint Counsel	1. Denied **12/29/2020** 2. Allowed **12/29/2020** 3. Dismissed as moot **12/29/2020**
6P21	State v. Aijalon Derice Dove	1. Def's PDR Under N.C.G.S. § 7A-31 (COA20-143) 2. State's Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 2. Dismissed as moot
13P21	State v. Wallace Bradsher	1. Def's Motion for Temporary Stay (COA19-365) 2. Def's Petition for Writ of Supersedeas	1. Allowed **01/11/2021** 2. **Berger, J., recused**
15P21	State v. Jasper R. Marshall, III	Def's Pro Se Motion for Verified Complaint	Denied **01/25/2021**
16PA20	State of North Carolina, *ex rel.* Roy Cooper, Attorney General v. Kinston Charter Academy, a North Carolina Non-Profit Corporation; Ozie L. Hall, Jr., individually and as Chief Executive Officer of Kinston Charter Academy; and Demyra McDonald Hall, individually and as Board Chair of Kinston Charter Academy	1. North Carolina Coalition for Charter Schools' Motion for Leave to File Amicus Brief (COA18-688) 2. Pinnacle Classical Academy's Motion for Leave to File an Amicus Brief	1. Allowed **01/26/2021** 2. Allowed **01/26/2021** **Berger, J., recused**
22A21	Jerry Mace, Sr. & Mace Grading Co., Inc. v. Scott T. Utley, II, Jody Bell, Energy Partners, LLC & Energy Partners of NC, LLC, Utley Enterprises, LLC d/b/a Energy Partners of Mebane	1. Defs' Notice of Appeal Based Upon a Dissent (COA19-726) 2. Defs' PDR as to Additional Issues 3. Plts' Pro Se Motion for Extension of Time to File Response	1. --- 2. 3. Denied **01/26/2021**

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

5 FEBRUARY 2021

23A21	State v. Darrell Tristan Anderson	1. Def's Motion for Temporary Stay (COA19-841) 2. Def's Petition for Writ of Supersedeas	1. Allowed **01/19/2021** 2.
27A21	State v. Michael Devon Tripp	1. State's Motion for Temporary Stay (COA18-1286) 2. State's Petition for Writ of Supersedeas	1. Allowed **01/20/2021** 2.
28A21	State v. Deshandra Vachelle Cobb	1. State's Motion for Temporary Stay (COA19-681) 2. State's Petition for Writ of Supersedeas	1. Allowed **01/19/2021** 2.
29A20	Stacy Griffin, Employee v. Absolute Fire Control, Employer, Everest National Ins. Co. & Gallagher Bassett Servs., Carrier	1. Defs' Notice of Appeal Based Upon a Dissent (COA19-461) 2. Plt's PDR Under N.C.G.S. § 7A-31 3. Defs' Conditional PDR Under N.C.G.S. § 7A-31 4. Defs' Petition for Writ of Certiorari to Review Decision of the COA 5. Defs' Motion for Daniel J. Burke to Withdraw as Counsel of Record	1. — 2. Allowed **04/29/2020** 3. Allowed **04/29/2020** 4. 5. Allowed **12/29/2020**
30A21	State v. Robert Wayne Delau	1. State's Motion for Temporary Stay (COA19-1030) 2. State's Petition for Writ of Supersedeas	1. Allowed **01/20/2021** 2.
35P21	In the Matter of A.J.L.H., C.A.L.W., M.J.L.H.	1. Petitioner's PDR Under N.C.G.S. § 7A-31 (COA20-267) 2. Petitioner's Motion for Temporary Stay 3. Petitioner's Petition for Writ of Supersedeas 4. Respondent's Motion to Dissolve Temporary Stay (Emergency) 5. Respondent's Motion for Sanctions 6. Respondent's Motion for Sanctions	1. 2. Allowed **01/21/2021** 3. 4. Denied **02/01/2021** 5. 6.
38P21	Samantha Lee Gordon v. Joshua Bridges	Def's Pro Se Motion to Dismiss Case in North Carolina	Dismissed **01/25/2021**
40A98-2	State v. William Christopher Goode	Def's Pro Se Motion to Compel	Dismissed

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

5 FEBRUARY 2021

46P21	State v. Terry Lynn Best	1. Def's Pro Se Motion to Dismiss Case 2. Def's Pro Se Motion to Schedule Hearing	1. Dismissed **02/01/2021** 2. Dismissed **02/01/2021**
53P20	In the Matter of the Appeal of Lowe's Home Centers, LLC, from the Valuation and Taxation of Certain Real Property by Union County for Tax Year 2017	1. Union County's PDR Under N.C.G.S. § 7A-31 (COA19-125) 2. North Carolina Association of County Commissioners and Eleven Individual Counties' Motion for Leave to File Amicus Brief in Support of PDR	1. Denied 2. Dismissed
66P20	State v. Thurman Levone Burns	Def's Pro Se Motion for Writ of Rights (COAP19-324)	Dismissed
94PA13-4	State v. George Victor Stokes	Def's Pro Se Motion for Preparation of Opinion and Appellant Brief	Dismissed **01/07/2021**
104P20-2	State v. Reggie Joe Beal	Def's PDR Under N.C.G.S. § 7A-31 (COA19-469-2)	Denied **Ervin, J., recused**
105P20	State v. Matthew Joseph Taylor	Def's PDR Under N.C.G.S. § 7A-31 (COA19-593)	Denied
157P20	William Allen Cale v. Cleveland Atkinson, Jr., in his official capacity as Sheriff of Edgecombe County	Petitioner's Motion to Seal Document (COA19-296)	Denied **12/30/2020**
162P20	State v. Benson Moore	1. Def's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Rockingham County 2. Def's Pro Se Motion to Proceed *In Forma Pauperis* 3. Def's Pro Se Motion to Appoint Counsel	1. Dismissed 2. Allowed 3. Dismissed as moot **Ervin, J., recused** **Berger, J., recused**
174P20	Dirk Andrew Lammert, Jr. v. Brittany Gayle Morris	Def's Pro Se Motion for Remote Hearing	Dismissed

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

5 FEBRUARY 2021

183P19-4	State v. Coriante Pierce	Def's Pro Se Petition for Writ of Habeas Corpus (COAP19-265)	Denied **01/08/2021**
186P17-5	State v. Lenwood Lee Paige	1. Def's Pro Se Petition for Writ of Certiorari to Review Decision of the COA (COA06-3) 2. Def's Pro Se Petition for Writ of Habeas Corpus 3. Def's Pro Se Motion to Proceed *In Forma Pauperis*	1. Denied **12/17/2020** 2. Denied **12/17/2020** 3. Allowed **12/17/2020** **Hudson, J., recused**
187PA20	State v. Shanna Cheyenne Shuler	1. Def's PDR Under N.C.G.S. § 7A-31 (COA19-967) 2. Def's Motion to Amend Record on Appeal	1. Allowed **12/15/2020** 2. Allowed **01/12/2021**
193A20	In the Matter of R.D.M., Z.A.M., J.M.B., and J.J.B.	Respondent-Father's Petition for Writ of Certiorari to Review Decision of District Court, Wake County	Allowed **12/30/2020**
197PA20-2	State v. Jeremy Johnson	1. Def's Motion for Temporary Stay (COA19-529; 19-529-2) 2. Def's Petition for Writ of Supersedeas	1. Allowed **01/20/2021** 2. **Berger, J., recused**
203P20	Jerry McSwain, Employee v. Industrial Commercial Sales & Service, LLC, Employer, AIG/ Chartis Claims, Inc., Carrier	1. Plt's Motion to Admit Gayla S.L. McSwain Pro Hac Vice (COA19-740) 2. Plt's PDR Under N.C.G.S. § 7A-31 3. Defs' Conditional PDR Under N.C.G.S. § 7A-31	1. Allowed 2. Denied 3. Dismissed as moot
237P20	State v. Anthony Leon Hargett	Def's PDR Under N.C.G.S. § 7A-31 (COA19-718)	Denied **Berger, J., recused**

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

5 FEBRUARY 2021

241P20	Maria Hontzas Poulos v. John Emanuel Poulos, AJ Properties of Fayetteville, LLC, Bear One Investments, LLC, Bear Plus One, LLC, Bear Six Investments, LLC, Cumberland Research Associates, LLC, Fayetteville Endoscopy, LLC, Fayetteville Gastroenterology Associates, PA, Icarian Partners, LLC, JBV Rental Property, LLC, Jeem, LLC, JEP Investments, LLC, JZJ, LLC, KPC Commercial, LLC, Lumberton Square II, LLC, Meej, LLC, Meej II, LLC, PK Properties of Fayetteville, LLC, Village Ambulatory Surgery Associates, Inc., Ocie F. Murray, Jr., as Trustee of the John E. Poulos Family Trust, John Emanuel Poulos, as Trustee of the Koula Poulos Revocable Trust	Def's PDR Under N.C.G.S. § 7A-31 (COA19-340)	Denied
242P07-4	State v. Yilien Osnarque	Def's Pro Se Motion for PDR (COAP20-262)	Dismissed **Ervin, J., recused**
282P20	Karen Bauman v. Pasquotank County ABC Board	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA19-613) 2. Plt's Motion to Deem PDR Timely Filed 3. Plt's Petition for Writ of Certiorari to Review Decision of the COA 4. Def's Motion to Dismiss Petition for Writ of Certiorari 5. Def's Motion to Dismiss PDR	1. --- 2. Denied 3. Denied 4. Dismissed as moot 5. Allowed **Berger, J., recused**

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290P20	Chad Poovey and Angela Poovey, Plaintiffs v. Vista North Carolina Limited Partnership and APC Towers, LLC, Defendants v. 130 of Chatham, LLC, et al., Nominal Defendants	Plts' PDR Under N.C.G.S. § 7A-31 (COA19-302)	Denied
293P20	State v. Aaron Rashaun Byers	Def's PDR Under N.C.G.S. § 7A-31 (COA18-863)	Denied
298P20	State v. Travis Lashaun Watson	Def's PDR Under N.C.G.S. § 7A-31 (COA18-1254)	Denied **Berger, J., recused**
301P20	State v. Mark Allen Hartgrove	Def's Pro Se Motion for Dismissal (COA19-647)	Dismissed
302P20	State v. Larry Gene Kearney II	Def's PDR Under N.C.G.S. § 7A-31 (COA19-585)	Denied
306P10-2	State v. Anthony Patterson, Jr.	1. Def's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Durham County 2. Def's Pro Se Motion to Proceed *In Forma Pauperis* 3. Def's Pro Se Motion to Appoint Counsel 4. Def's Pro Se Motion for Leave to File Supplemental Brief	1. Dismissed 2. Allowed 3. Dismissed as moot 4. Dismissed as moot
311A20	In re Harris Teeter, LLC	Mecklenburg County's Motion to Continue Oral Argument	Allowed **02/02/2021**
312P18-2	State v. Aaron Lee Gordon	1. State's Motion for Temporary Stay (COA17-1077; 17-1077-2) 2. State's Petition for Writ of Supersedeas 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **04/02/2020** 2. Allowed 3. Allowed
317P20	State v. LeRon Kelly Owens	Def's Pro Se PDR Under N.C.G.S. § 7A-31 (COA19-1008)	Denied

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338P20	Andrea R. Wallace v. Keith M. Maxwell, MD; Southeastern Sports Medicine, PLLC; Southeastern Sports Medicine, PLLC d/b/a Hendersonville Sports Medicine and Rehabilitation; and Southeastern Sports Physician Services, PLLC	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA19-291) 2. Plt's Motion to Amend PDR	1. Denied 2. Allowed **Berger, J., recused**
339A18-2	The New Hanover County Board of Education v. Josh Stein, in his capacity as Attorney General of the State of North Carolina and North Carolina Coastal Federation and Sound Rivers, Inc., Intervenors	1. Attorney General's Motion for Temporary Stay (COA17-1374; 17-1374-2) 2. Attorney General's Petition for Writ of Supersedeas 3. Intervenors' Petition for Writ of Supersedeas 4. Intervenors' Notice of Appeal Based Upon a Dissent 5. Intervenors' PDR as to Additional Issues 6. Attorney General's Notice of Appeal Based Upon a Dissent 7. Attorney General's PDR as to Additional Issues	1. Allowed **12/31/2020** 2. 3. 4. 5. 6. 7. **Berger, J., recused**
350P20	Dacat, Inc., and Viet Group Investments, LLC v. Jones Legacy Transportation, LLC, and Victor A. Jones	Plts' PDR Under N.C.G.S. § 7A-31 (COA19-588)	Denied
359P19	State v. Ivan Jonathan Prudente-Anorve	Def's PDR Under N.C.G.S. § 7A-31 (COA18-827)	Denied **Berger, J., recused**

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361P20	Rachel E. Williams v. Enterprise Holdings, Inc., EAN Services, LLC, EAN Holdings, LLC, Enterprise Leasing Company Southeast, LLC	1. Plt's Pro Se Notice of Appeal Based Upon a Constitutional Question (COA19-730) 2. Plt's Pro Se PDR Under N.C.G.S. § 7A-31 3. Def's Motion to Dismiss Appeal 4. Plt's Pro Se Motion for Extension of Time to File Response to Motion to Dismiss 5. Plt's Pro Se Motion for Extension of Time to File Response to Motion to Dismiss 6. Plt's Pro Se Motion for Court Acceptance of Documents Under Seal	1. --- 2. Denied 3. Allowed 4. Allowed **08/28/2020** 5. Allowed **09/22/2020** 6. Allowed **09/22/2020** **Ervin, J., recused**
364P19	In the Matter of Custodial Law Enforcement Recording Sought by City of Greensboro	1. Petitioner's Notice of Appeal Based Upon a Constitutional Question (COA18-992) 2. Petitioner's Petition in the Alternative for Discretionary Review Under N.C.G.S. § 7A-31 3. Appellee's (Greensboro Police Officers) Motion to Dismiss Appeal 4. Amicus Curiaes' Conditional Motion for Leave to File Amicus Brief	1. Retained 2. Allowed 3. Denied 4. Allowed **Berger, J., recused**
379PA18-2	State v. Van Buren Killette, Sr.	1. Def's Petition for Writ of Mandamus 2. Def's Petition in the Alternative for Discretionary Review Under N.C.G.S. § 7A-31 (COA18-26-2)	1. Denied 2. Allowed **Berger, J., recused**
381P20	State v. Archie Lynn McNeill	1. Def's Motion for Temporary Stay (COA19-1081) 2. Def's Petition for Writ of Supersedeas 3. Def's PDR Under N.C.G.S. § 7A-31	1. Allowed **09/03/2020** Dissolved **02/03/2021** 2. Denied 3. Denied
383A19	Delia Newman, *et ux* v. Heather Stepp, *et ux*	Def's Petition for Rehearing	Denied **01/26/2021**

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390P20	State v. Thomas John Clark	1. Def's PDR Under N.C.G.S. § 7A-31 (COA19-446) 2. State's Motion to Dismiss Appeal	1. Denied 2. Dismissed as moot
392P20	In re E.P.-L.M.	1. Respondent-Mother's PDR Under N.C.G.S. § 7A-31 (COA19-803) 2. Petitioner's Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 2. Dismissed as moot
396A19	In re J.M.	Respondent's Petition for Rehearing	Denied **Berger, J., recused** **Barringer, J., recused**
402P17-2	Thelma Bonner Booth, Widow and Administratrix of the Estate of Henry Hunter Booth, Jr., Deceased-Employee v. Hackney Acquisition Company, f/k/a Hackney & Sons, Inc., f/k/a Hackney & Sons (East), f/k/a J.A. Hackney & Sons, Employer, North Carolina Insurance Guaranty Association on behalf of American Mutual Liability Insurance, Carrier, and on behalf of the Home Insurance Company, Carrier	Plt's PDR Under N.C.G.S. § 7A-31 (COA19-602)	Denied
407P20-2	Archie M. Sampson v. Erik Hooks, Secretary of Department of Public Safety	1. Petitioner's Pro Se Motion for Administrative Remedy 2. Petitioner's Pro Se Motion for Administrative Remedy	1. Dismissed 2. Dismissed

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409P20	Luon Nay, Employee v. Cornerstone Staffing Solutions, Employer, and Starnet Insurance Company, Carrier (Key Risk Management Services, Administrator)	1. Def's Motion for Temporary Stay 2. Def's Petition for Writ of Supersedeas 3. Def's PDR Under N.C.G.S. § 7A-31	1. Allowed **09/24/2020** 2. Allowed 3. Allowed **Berger, J., recused**
424P14-3	John S. Stritzinger v. Bank of America	1. Plt's Pro Se Motion for Petition to Reinstate Appeal 2. Plt's Pro Se Motion for Petition to Add Parties 3. Plt's Pro Se Motion to Appoint Counsel 4. Plt's Pro Se Motion to Reinstate NC Supreme Court Action	1. Dismissed 2. Dismissed 3. Dismissed as moot 4. Dismissed
433P20	State v. Glenn Warren Mayo, Jr.	Def's Pro Se Motion for Reconsideration of Motion for Appropriate Relief	Dismissed
436PA13-4	Lake, et al. v. State Health Plan For Teachers and State Employees, et al.	Disclosure Pursuant to Canon 3D of the Code of Judicial Conduct	Special Order **01/26/2021**
438P09-3	Darron Jermaine Jones v. Dean Locklear	Petitioner's Pro Se Motion for Notice of Appeal (COA08-1582)	Dismissed **12/17/2020**
438P09-4	Darron Jermaine Jones v. Dean Locklear	1. Petitioner's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Wayne County (COA08-1582) 2. Petitioner's Pro Se Motion to Appoint Counsel	1. Denied **12/21/2020** 2. Dismissed as moot **12/21/2020**
441P19	Richard Owen Shirey v. Stacie B. Shirey	Def's PDR Under N.C.G.S. § 7A-31 (COA18-1011)	Denied **Berger, J., recused**
448P20	Christy Rucker v. Anthony Culler and Renee Culler	Defs' Pro Se PDR Under N.C.G.S. § 7A-31 (COAP19-861)	Denied
469P20	State v. Regina M. Schmidt	Def's PDR Under N.C.G.S. § 7A-31 (COA19-1159)	Denied
472P20	State v. Torrance D. Crouell, Sr.	Def's Pro Se Motion to Compel	Dismissed

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474P20	State v. Pierre Jamar Walker	1. Def's Pro Se Petition for Writ of Certiorari to Review Decision of the COA (COAP20-536) 2. Def's Pro Se Motion to Proceed *In Forma Pauperis* 3. Def's Pro Se Motion to Appoint Counsel	1. Denied 2. Allowed 3. Dismissed as moot
477A20	State of North Carolina *ex rel.* Utilities Commission, Appellee v. Virginia Electric and Power Company d/b/a Dominion Energy North Carolina, Appellant Attorney General Joshua H. Stein, Cross-Appellant	Attorney General's Motion to Dismiss Cross-Appeal	Allowed **01/15/2021**
485PA19	State v. Cashaun K. Harvin	Def's Motion to Withdraw Request to Withdraw and to Set Due Date for Defendant's Brief (COA18-1240)	Allowed; Defendant's brief due 30 days from the date of this Order **02/03/2021**
488P19	State v. David Ocampo	Def's PDR Under N.C.G.S. § 7A-31 (COA19-20)	Denied **Berger, J., recused**
491P20	Ca'sey Rafael Tyler v. Scotland Correctional Institution	1. Petitioner's Pro Se Motion for PDR (COAP20-553) 2. Petitioner's Pro Se Petition for Writ of Habeas Corpus 3. Petitioner's Pro Se Motion for PDR	1. Dismissed 2. Denied 3. Dismissed
497P20	State v. Edward Lamont Womble	1. Def's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Moore County 2. Def's Pro Se Motion to Proceed *In Forma Pauperis* 3. Def's Pro Se Motion to Appoint Counsel	1. Dismissed 2. Allowed 3. Dismissed as moot
498P20	Dominique McFarrin Ford v. Freedom Mortgage Corporation	Plt's Pro Se Motion for Notice of Appeal	Dismissed

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505P20	State v. Rayquan Jamal Borum	1. State's PDR Under N.C.G.S. § 7A-31 (COA19-1022) 2. Def's Conditional PDR Under N.C.G.S. § 7A-31 3. State's Motion for Temporary Stay 4. State's Petition for Writ of Supersedeas	1. 2. 3. Allowed **01/27/2021** 4.
508A20	In the Matter of G.J.A.	Respondent-Mother's Motion to Withdraw Appeal	Allowed **01/14/2021**
509P20	Christy Joy NC Partners LLC d/b/a Cortland Whitehall, Nickolas Blake Wilson, Jane Doe, and John Doe v. Tigress McDaniel and Disabled Minor Child	1. Def's Pro Se Motion for Expedited Discovery 2. Def's Pro Se Motion for Stay of Proceedings 3. Def's Pro Se Motion for Recusal of Paulina Havelka 4. Def's Pro Se Motion for Notice of Appeal	1. Dismissed **12/17/2020** 2. Dismissed **12/17/2020** 3. Dismissed **12/17/2020** 4. Dismissed **12/17/2020**
510P20	State v. Johnny M. Cook	1. Def's Pro Se Motion for Notice of Default 2. Def's Pro Se Motion for Notice of Default	1. Dismissed **01/27/2021** 2. Dismissed **01/27/2021**
516P20	State v. Samuel Dewayne Gragg	Def's Pro Se Motion for Release from Avery County Jail	Dismissed **12/22/2020**
517P20	State v. Kevin Renard Joyner	Def's Pro Se Motion to Reduce Bail	Dismissed **12/21/2020**
521A20	In the Matter of C.B.C.B.	1. Respondent-Mother's PDR Under N.C.G.S. § 7A-31 Prior to a Determination by the COA 2. Respondent-Mother's Motion to Suspend the Rules to Allow Expedited Review 3. Respondent-Mother's Motion for Extension of Time to File Brief 4. Respondent-Mother's Motion to Amend the Filed Record	1. Special Order **01/27/2021** 2. Special Order **01/27/2021** 3. Special Order **01/27/2021** 4. Allowed
527P20	State v. Joshua Christian Bullock	1. State's Motion for Temporary Stay (COA20-187) 2. State's Petition for Writ of Supersedeas 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **12/23/2020** 2. 3.

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531P20-1	State v. Connell Dixon Hawkins, Chadley Tyrone Norris, and James Alexander Ray	1. Def's (James Alexander Ray) Pro Se Motion for PDR Under N.C.G.S. § 7A-31 (COA20-881) 2. Def's (James Alexander Ray) Pro Se Motion for PDR Under N.C.G.S. § 7A-31	1. Dismissed **01/15/2021** 2. Dismissed **01/15/2021**
531P20-2	State v. Connell Dixon Hawkins, Chadley Tyrone Norris, and James Alexander Ray	Def's (James Alexander Ray) Pro Se Motion for Conditional Acceptance for Value	Dismissed **02/02/2021**
533A20	State v. Lewie P. Robinson	1. State's Motion for Temporary Stay (COA19-474) 2. State's Petition for Writ of Supersedeas 3. State's Notice of Appeal Based Upon a Dissent	1. Allowed **12/31/2020** 2. Allowed **01/21/2021** 3. --- **Berger, J., recused**
534A20	In the Matter of S.M.	1. Respondent-Mother's Motion for Extension of Time to File Brief 2. Respondent-Mother's Motion to Withdraw and to Allow Parent Defender to Appoint Substitute Counsel	1. Allowed **01/25/2021** 2. Allowed **02/01/2021**
535A20	State v. Ciera Yvette Woods	1. Def's Motion for Temporary Stay (COA19-985) 2. Def's Petition for Writ of Supersedeas 3. Def's Notice of Appeal Based Upon a Dissent 4. Def's PDR Under N.C.G.S. § 7A-31	1. Allowed **12/31/2020** 2. 3. 4. **Berger, J., recused**
536P00-11	Terrance L. James v. State of North Carolina	Petitioner's Pro Se Motion for Emergency Application for Writ of Mandamus and Order of Res Judicata	Dismissed **12/29/2020** **Ervin, J., recused**
536P00-12	Terrance L. James v. N.C. Department of Public Safety, et al.	1. Petitioner's Pro Se Motion for Emergency Writ of Prohibition 2. Petitioner's Pro Se Motion to Proceed Without Fees Emergency	1. Dismissed **01/11/2021** 2. Allowed **01/11/2021** **Ervin, J., recused**

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536P20	State v. Siddhanth Sharma	1. Def's Pro Se Notice of Appeal Based Upon a Constitutional Question (COA19-591) 2. Def's Pro Se Motion for Extension of Time to File PDR 3. Def's Pro Se Second Motion for Extension of Time to File PDR	1. Dismissed *ex mero motu* 2. Denied 3. Denied **Berger, J., recused**
548A04-3	State v. Vincent Lamont Harris	1. State's Motion for Temporary Stay (COA18-952) 2. State's Petition for Writ of Supersedeas	1. Allowed **01/15/2021** 2. **Berger, J., recused**

BOARD OF LAW EXAMINERS

AMENDMENT TO THE RULES AND REGULATIONS OF THE BOARD OF LAW EXAMINERS APPROVED BY THE NORTH CAROLINA STATE BAR COUNCIL

The following amendment to the rules and regulations of the Board of Law Examiners was approved by the North Carolina State Bar Council at its quarterly meeting on January 27, 2021.

BE IT RESOLVED by the Council of the North Carolina State Bar and the Board of Law Examiners that the Rules and Regulations of the Board of Law Examiners, as particularly set forth in Section .0900, Examinations, of the Rules Governing Admission to the Practice of Law, be amended as shown below (additions are underlined, deletions are interlined):

Rule .0902 Dates

The written bar examinations shall be held in ~~Wake County or adjoining counties~~ North Carolina in the months of February and July on the dates prescribed by the National Conference of Bar Examiners.

NORTH CAROLINA
WAKE COUNTY

I, Alice Neece Mine, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendment to the Rules and Regulations of the Board of Law Examiners was approved by the Council of the North Carolina State Bar at a regularly called meeting on January 15, 2021.

Given over my hand and the Seal of the North Carolina State Bar, this the 27th day of January, 2021.

s/Alice Neece Mine
Alice Neece Mine, Secretary

After examining the foregoing amendment to the Rules and Regulations of the Board of Law Examiners approved by the Council of the North Carolina State Bar, it is my opinion that the same is not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 3rd day of February, 2021.

s/Paul Newby
Paul M. Newby, Chief Justice

BOARD OF LAW EXAMINERS

On this date, the foregoing amendment to the Rules and Regulations of the Board of Law Examiners was entered upon the minutes of the Supreme Court. The amendment shall be published in the forthcoming volume of the Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 3rd day of February, 2021.

s/Berger, J.
For the Court

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