387 N.C.—No. 2 Pages 159-444

DISCIPLINE AND DISABILITY OF ATTORNEYS;
CONTINUING LEGAL EDUCATION

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

MAY 28, 2025

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

THE SUPREME COURT

OF

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SUPREME COURT OF NORTH CAROLINA

CASES REPORTED

FILED 21 MARCH 2025

ORDERS

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of Appeals holding that, to preserve an issue for use in a motion for judgment notwithstanding the verdict (JNOV) pursuant to Civil Procedure Rule 50(b)—which is essentially a renewal of a motion for directed verdict (DV)—a party must first have timely moved for a DV on the issue, articulating the same specific argument or theory to the trial court. Here, because defendant's JNOV argument as to a conversion claim rested upon a theory raised in his DV motion only as to a separate claim (for embezzlement), the Business Court properly held that the JNOV argument was waived as to conversion. Likewise, the argument underlying defendant's JNOV motion as to a fraud claim—insufficient evidence of intent to deceive—was waived where his DV motion on that claim was based upon insufficient evidence of another element—his having made misrepresentations. **Vanguard Pai Lung, LLC v. Moody, 376.**

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Eighth Amendment—consecutive life sentences imposed—juvenile defendant—Miller factors—The Supreme Court upheld defendant's consecutive sentences of life without the possibility of parole, which were imposed after he was convicted of two counts of first-degree murder for killing his parents just before he turned eighteen years old, where the sentences did not violate the Eighth Amendment of the federal Constitution as interpreted by *Miller v. Alabama*, 567 U.S. 460 (2012) or Art. I, sec. 27 of the North Carolina constitution, which does not provide additional protections for juvenile defendants. The trial court expressly considered evidence

in mitigation with regard to each of the factors contained in N.C.G.S. § 15A-1340.19B —a statute that was enacted to address the *Miller* requirements—including defendant's youth and attendant circumstances, and defendant's capacity to consider the consequences of his actions, and did not abuse its discretion in weighing the evidence and the factors before reaching its sentencing decision. **State v. Borlase, 295.**

Waiver of right to counsel—statutory colloquy—range of permissible punishments—tantamount to a life sentence—Where defendant sought to waive his right to counsel and represent himself on numerous felony charges—arising from his assault, kidnapping, and rape of his mother—and the trial court, in undertaking the colloquy required by N.C.G.S. § 15A-1242, erroneously informed defendant (then 29 years old) that he could face a term of imprisonment of 75 to 175 years (the actual sentence imposed upon defendant's convictions totaled 121 to 178 years), the Supreme Court affirmed the Court of Appeals' determination that defendant was not entitled to a new trial because, despite the trial court's numerically inaccurate statement of the range of sentences defendant could receive, defendant was made aware that he faced what was tantamount to a life sentence; accordingly, no statutory error occurred. The Court of Appeals' decision was modified to clarify that the trial court was responsible for engaging defendant in a thorough colloquy as required by statute as to all charges—not just the most serious—and could not delegate that duty to the prosecutor. **State v. Fenner, 330.**

CONTRACTS

Breach—express contracts—sufficiency of allegations—motion to dismiss—evidence needed for trial—In a breach of contract action brought against the Board of Governors of the University of North Carolina (defendant) by students (plaintiffs) seeking refunds for mandatory fees and parking permits they paid for during the COVID-19 pandemic, plaintiffs' complaint alleged sufficient facts to overcome defendant's Civil Procedure Rule 12(b)(6) motion to dismiss for failure to state a claim; specifically, plaintiffs sufficiently alleged the existence of express contracts between the parties for specific on-campus benefits in exchange for payment. Although defendant's argument—that there was never a meeting of the minds between the parties to form a contract—was properly rejected at the motion-to-dismiss phase, plaintiffs would need to prove their allegations with evidence in order to defeat defendant's argument at trial. **Lannan v. Bd. of Governors of the Univ. of N.C., 239.**

DIVORCE

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regarding compliance with the PID Ordinance, the board's decision to reverse the planning director's denial was affirmed on appeal. To begin with, the board had statutory authority to substitute its judgment for the planning director's on factual and legal issues, including whether the company's application contained material misrepresentations. Further, the board's unchallenged (and therefore binding) factual findings showed that the alleged misrepresentations—concerning grading discrepancies, alleged setback violations, and production tonnage changes—were either immaterial or unsupported by the evidence. **Ashe County v. Ashe Cnty. Plan. Bd., 159.**

Permits—asphalt plant—ordinance moratorium—triggering of permit choice statute—timing of application's completion—In a case regarding a county planning board's decision to issue a permit under the county's Polluting Industries Development Ordinance (PID Ordinance) for a company to build an asphalt plant, where the board issued the permit after having repealed and replaced the PID Ordinance with a new one, the board's decision was affirmed because, at the time the company submitted its application (which was before a temporary moratorium went into effect), the application was sufficiently "complete" under the state's moratoria statute (N.C.G.S. § 160D-107(c)) to trigger the state's permit choice statute (N.C.G.S. § 160D-108(a)), which allows developers to choose which version of an ordinance applies if it is amended between the time an application was "submitted" and a permit decision is made. Specifically, a "complete" application refers not to a fully finalized application but rather to one accepted by the permitting authority as adequate to begin permit compliance review. Further, although the PID Ordinance prohibited permit issuance without state and federal permits, the fact that the company did not have a state permit in hand when it submitted its application did not render the application incomplete. **Ashe County v. Ashe Cnty. Plan. Bd., 159.**

SCHEDULE FOR HEARING APPEALS DURING 2025

NORTH CAROLINA SUPREME COURT

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

February 11, 12, 13, 18, 19, 20
April 15, 16, 17, 22, 23, 24
September 9, 10, 11, 16, 17, 18
October 28, 29, 30
November 4, 5, 6

ASHE COUNTY, NORTH CAROLINA
v.
ASHE COUNTY PLANNING BOARD AND APPALACHIAN MATERIALS, LLC

No. 249PA19-2

Filed 21 March 2025

1. Zoning—permits—asphalt plant—ordinance moratorium—triggering of permit choice statute—timing of application's completion

In a case regarding a county planning board's decision to issue a permit under the county's Polluting Industries Development Ordinance (PID Ordinance) for a company to build an asphalt plant, where the board issued the permit after having repealed and replaced the PID Ordinance with a new one, the board's decision was affirmed because, at the time the company submitted its application (which was before a temporary moratorium went into effect), the application was sufficiently "complete" under the state's moratoria statute (N.C.G.S. § 160D-107(c)) to trigger the state's permit choice statute (N.C.G.S. § 160D-108(a)), which allows developers to choose which version of an ordinance applies if it is amended between the time an application was "submitted" and a permit decision is made. Specifically, a "complete" application refers not to a fully finalized application but rather to one accepted by the permitting authority as adequate to begin permit compliance review. Further, although the PID Ordinance prohibited permit issuance without state and federal permits, the fact that the company did not have a state permit in hand when it submitted its application did not render the application incomplete.

2. Zoning—permits—asphalt plant—compliance with setback requirements—meaning of "commercial building"

In a case regarding a county planning board's decision to issue a permit under the county's Polluting Industries Development Ordinance (PID Ordinance) for a company to build an asphalt plant, the board's decision was affirmed where, because a mobile shed and a barn near the proposed plant site were not "commercial buildings" under the PID Ordinance, the company's permit application complied with the PID Ordinance's "commercial building" setback requirements. The mobile shed was not a "building" given its impermanence (it lacked a foundation, footers, and running water; and it was demonstrably easy to relocate), and the barn, though clearly a "building," was not being used primarily for "commercial" purposes.

3. Zoning—permits—asphalt plant—county planning board—authority to make factual determinations de novo—material misrepresentations in application

In a case regarding a county planning board's decision to issue a permit under the county's Polluting Industries Development Ordinance (PID Ordinance) for a company to build an asphalt plant, where the county planning director denied the company's permit application after finding that it contained material misrepresentations regarding compliance with the PID Ordinance, the board's decision to reverse the planning director's denial was affirmed on appeal. To begin with, the board had statutory authority to substitute its judgment for the planning director's on factual and legal issues, including whether the company's application contained material misrepresentations. Further, the board's unchallenged (and therefore binding) factual findings showed that the alleged misrepresentations—concerning grading discrepancies, alleged setback violations, and production tonnage changes—were either immaterial or unsupported by the evidence.

Appeal pursuant to N.C.G.S. § 7A-30(2) (2023) from the decision of a divided panel of the Court of Appeals, 284 N.C. App. 563 (2022), reversing an order entered on 30 November 2017 by Judge Susan E. Bray in Superior Court, Ashe County. Heard in the Supreme Court on 2 November 2023.

Womble Bond Dickinson (US) LLP, by William D. Curtis and John C. Cooke, for petitioner-appellee.

Van Winkle, Buck, Wall, Starnes & Davis, P.A., by Craig D. Justus, Brian D. Gulden, and Jonathan H. Dunlap, for respondent-appellant Appalachian Materials, LLC.

No brief for respondent-appellee Ashe County Planning Board.

Law Offices of F. Bryan Brice, Jr., by F. Bryan Brice, Jr., Andrea C. Bonvecchio, Anne M. Harvey, and Dresden Hasala, for Blue Ridge Environmental Defense League and its chapter, Protect Our Fresh Air, amicus curiae.

Morningstar Law Group, by William J. Brian, Jr. and Jeffrey L. Roether, and J. Michael Carpenter, for the North Carolina Home Builders Association, Inc., amicus curiae.

RIGGS, Justice.

This is the second appeal to this Court involving respondent Ashe County Planning Board's decision to issue a permit under Ashe County's Polluting Industries Development Ordinance (the PID Ordinance) to respondent Appalachian Materials, LLC for construction of an asphalt plant. We previously held that the Court of Appeals erred in treating a letter from the local planning director expressing preliminary approval of the permit as a binding decision. *Ashe County v. Ashe Cnty. Plan. Bd.*, 376 N.C. 1, 19 (2020) (*Ashe County II*).[1] On remand for reconsideration in light of that holding, a divided panel of the Court of Appeals held that the superior court erred in affirming the Ashe County Planning Board's decision to issue the permit because: (1) the benefits of our "Permit Choice" statutes—allowing a developer to elect which version of an ordinance applies when it is changed during permitting, N.C.G.S. § 143-755 (2023), N.C.G.S. § 153A-320.1 (2019) (repealed 2021), and N.C.G.S. § 160D-108 (2023)—did not trigger until a "complete" application was submitted; (2) Appalachian Materials did not submit a "complete" application until after a temporary moratorium went into effect; (3) permit choice was available only if a "complete" application was submitted prior to the temporary moratorium; and (4) regardless, the application was also subject to denial because it failed to show compliance with the PID Ordinance's commercial building setback requirements. *Ashe County v. Ashe Cnty. Plan. Bd.*, 284 N.C. App. 563, 571–75 (2022) (*Ashe County III*). After careful review, we reverse the Court of Appeals and hold the superior court did not err in affirming the Ashe County Planning Board's decision to issue the PID Ordinance permit.

I. FACTUAL BACKGROUND

A. Appalachian Materials' PID Permit Application

In June 2015, Appalachian Materials submitted an application to the Ashe County Director of Planning (the Planning Director) for a permit to build an asphalt plant under Ashe County's PID Ordinance. The PID Ordinance, in Chapter 159 of the Ashe County Code, imposed the following permitting conditions:

> (A) A permit is required from the Planning Department for any polluting industry. A uniform permit fee of $500.00 shall be paid at the time of the application

1. We refer to the Court of Appeals' initial decision in this case, *Ashe County v. Ashe Cnty. Plan. Bd.*, 265 N.C. App. 384 (2019), as "*Ashe County I*."

> for the permit. No permit from the planning department shall be issued until the appropriate Federal and State permits have been issued.
>
> (B) The location of a polluting industry, both portable and permanent shall not be within 1,000 feet, in any direction, of a residential dwelling unit or commercial building. The location of a polluting industry shall not be within 1,320 feet of any school, daycare, hospital or nursing home facility.
>
> > (1) Permanent roads, used in excess of six months, within the property site shall be surfaced with a dust free material (i.e. soil cement, portland cement, bituminous concrete).
> >
> > (2) Material piles and other accumulations of by-products shall not exceed 35 feet above the original contour and shall be graded so the slope shall not exceed a 45-degree angle.
> >
> > (3) A security fence, constructed of either wood, brick, or aluminum, shall be installed where the proposed extraction takes place. The fence shall be a minimum of 10 feet in height at the time of installation.
> >
> > (4) The operation of this type industry shall not violate the Ashe County Noise Ordinance.

Ashe County, N.C., Code of Ordinances § 159.06 (2016) (repealed 2016).

Appalachian Materials' application spanned 158 pages and included aerial images with drawn boundaries for the proposed site, topographical maps with the same drawn boundaries, a marked floorplan showing the equipment and layout of the proposed plant, and a pending air quality permit application to the North Carolina Department of Environment and Natural Resources, Division of Air Quality (the State Permit).[2] The aerial photographs and topographical surveys further showed the location of the proposed asphalt plant site in relation to existing buildings on

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2. Before the State Permit was issued, the Department of Environment and Natural Resources was renamed to the Department of Environmental Quality (NCDEQ). As for any federal permits, Appalachian Materials represented that no federal approvals were required, and nothing in the record suggests otherwise.

nearby tracts. State stormwater and mining permits already issued for the site were also included in the application.

Appalachian Materials represented in its application that the proposed asphalt plant complied with the PID Ordinance's setback, road paving, material accumulation, fencing, and noise requirements. It also promised to forward a copy of the State Permit to the Planning Director once it was issued. Finally, Appalachian Materials paid—and Ashe County accepted—the $500 PID Ordinance permitting fee.

B. The Planning Director's Review and Denial

The Planning Director reviewed the application materials, visited the proposed plant site, and created his own photographs and maps from Ashe County's Geographic Information Services system (GIS). In initial communications with Appalachian Materials following receipt and review of the permit application, the Planning Director stated that a provisional permit could not issue, but that he "could write a favorable recommendation, or letter stating that standards of our [PID Ordinance] have been met for this site, with the one exception [for lack of the State Permit]." He also gave an interview to a local news outlet, expressing that he "couldn't think of any limitations that would prevent construction of the plant." *Asphalt plant planned for Ashe County*, Ashe Post & Times, June 19, 2015, https://www.ashepostandtimes.com/news/asphalt-plant-planned-for-ashe-county/article_75cc4464-16c7-11e5-a2ff-c7601060f7ea.html.

On 22 June 2015, and consistent with his earlier communications, the Planning Director sent Appalachian Materials a letter stating, "The proposed site does meet[ ] the requirements of the [PID Ordinance]. However, the county ordinance does require that all state and federal permits be in hand prior to a local permit being issued. . . . Once we have received the [State Permit] our local permit can be issued for this site."

Public opposition to the asphalt plant grew in the ensuing weeks and, on 28 August 2015, the Ashe County Planning Department issued a staff report to the Ashe County Planning Board (the Board) deeming Appalachian Materials' application incomplete. It noted that "[i]ssues have been raised as to whether or not the proposed plans adequately protect the health, safety and welfare of the neighboring property owners," and offered the possibility of a temporary moratorium to further study the question. Ashe County (the County) adopted just such a moratorium on 19 October 2015, which ran until October 2016. Ashe County, N.C., Ordinance Establishing a Development Moratorium on Polluting Industries (Oct. 19, 2015) [hereinafter the Moratorium].

Appalachian Materials received the State Permit while the Moratorium was still in effect and forwarded it to the Planning Director on 29 February 2016. When the Planning Director did not rule on its application, Appalachian Materials threatened suit against the County on 21 March 2016. The Planning Director[3] subsequently denied Appalachian Materials' application by letter dated 20 April 2016 on the following bases: (1) the plant was within 1,000 feet of commercial and residential buildings, a fact the Planning Director believed Appalachian Materials had materially misrepresented in its application; (2) the application was incomplete on submission because the State Permit was pending at that time and grading had been performed without requesting or receiving a watershed permit; (3) the application contained several statements concerning the setback requirements, air quality permitting timeline, undisclosed grading, and amount of asphalt to be produced that the Planning Director deemed false, misleading, or misrepresentative; and (4) the June 2015 letter was not a decision of any kind. Appalachian Materials timely appealed the Planning Director's decision to the Board.[4]

C. The Board Reverses

The Moratorium expired and, on 3 October 2016, the County repealed the PID Ordinance and replaced it with a more stringent High Impact Land Use Ordinance. *Id.* The Board initially heard Appalachian Materials' appeal on 6 October 2016, receiving over 1,000 pages of exhibits and roughly six hours of witness testimony before adjourning without a decision. The Board met again on 20 October 2016 to resume deliberations, whereupon it voted to reverse the Planning Director's denial pending preparation and review of a final order. Then, following public comment at a 1 December 2016 meeting, the Board entered a lengthy formal order reversing the Planning Director's denial of the permit. *Id.* In that order, the Board found that: (1) the watershed permit, as a local permit, was not a prerequisite to issuance of a PID permit; (2) the

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3. This was the same Planning Director who had previously visited the site, prepared photographs and maps, and issued the June 2015 letter stating that the application "me[t] the requirements of the [PID] Ordinance."

4. A local government's governing board may create planning boards and boards of adjustment. N.C.G.S. §§ 153A-321, 153A-345.1, 160A-388 (2019) (repealed 2021); *see also* N.C.G.S. §§ 160D-301(a), 160D-302(a) (2023). The local governing board may also elect to "designate a planning board . . . to perform any of the duties of a board of adjustment." N.C.G.S. § 160A-388(a); *see also* N.C.G.S. § 160D-302(b) (2023). Vacancies on such a board are filled by appointment of the governing body—in this case, the Ashe County Board of Commissioners. N.C.G.S. §§ 153A-345.1, 160A-388(a); *see also* N.C.G.S. § 160D-310 (2023).

grading deemed problematic by the Planning Director was not done by Appalachian Materials and did not require an additional local watershed permit; (3) the asphalt plant would not be within 1,000 feet of any residential building, as the Planning Director based his contrary determination on a scrivener's error committed by NCDEQ in issuance of the State Permit; (4) the purported commercial buildings—a mobile shed owned by Appalachian Materials' parent company on an adjoining quarry and a barn—were shown on the aerial photographs submitted by Appalachian Materials; (5) the mobile shed and barn did not trigger the commercial setback requirements because the former was not a "building" and the latter was not used in connection with any business; and (6) NCDEQ's engineer prompted the increase in anticipated asphalt production seen in the State Permit and, in any event, the tonnage produced is irrelevant to issuance of a permit under the PID Ordinance.

Based on these findings, the Board concluded that: (1) the permit was "sufficiently complete to trigger the Permit Choice Statutes"; (2) the mobile shed and barn were not commercial buildings; (3) Appalachian Materials' application satisfied the PID Ordinance requirements; and (4) there were "no intended or material misrepresentations" in the application and any variances were irrelevant to the PID Ordinance's requirements. It also reversed the Planning Director on an alternative conclusion that the June 2015 letter was a binding final determination to issue the PID permit.

D. The County's First Appeal

The County appealed by certiorari to the superior court pursuant to N.C.G.S. § 160A-393 (2019) (repealed 2021). Under the statutorily prescribed standards of review, the superior court held that: (1) the Board's findings of fact were supported by competent evidence under the whole record test, as conceded by the County; and (2) the Board's conclusions of law were free from legal error on *de novo* review. The County again appealed and the Court of Appeals affirmed. *Ashe County I*, 265 N.C. App. at 394. That court held that: (1) the application was sufficiently complete to trigger the Permit Choice statutes; (2) the Moratorium had no impact on those statutory rights; (3) the June 2015 letter from the Planning Director was binding on the County as to the 1,000 ft. commercial building buffer; and (4) the Board was free to overrule the Planning Director's determination that the application contained misrepresentations. *Id.* at 388–394.

This Court subsequently considered the Court of Appeals' ruling on discretionary review. *Ashe County II*, 376 N.C. at 11. Our decision was

limited: we reversed the Court of Appeals' determination that the June 2015 letter was binding in any respect and remanded for reconsideration of the remaining issues in light of our holding. *Id.* at 20–21.[5]

E. The Instant Appeal

On remand, a majority of the Court of Appeals reversed the Board. *Ashe County III*, 284 N.C. App. at 575. The majority first held that the Permit Choice statutes did not apply because Appalachian Materials' application "was not 'submitted' within the meaning of the permit choice statutes until it was complete—on 29 February 2016, when counsel for Appalachian Materials . . . forwarded the [State Permit]." *Id.* at 571. It next held that no statutory exceptions to the Moratorium applied because Appalachian Materials' application had not been approved, permitted, or completed prior to the Moratorium's enactment; as a result, the Planning Director was barred from issuing the permit at the time he made his decision. *Id.* at 571–73. Lastly, the court held that "the record supports the Planning Director's conclusions regarding the location of these commercial buildings, and that the buildings did, in fact, qualify as commercial buildings within the meaning of the PID Ordinance in February 2016." *Id.* at 573. The majority declined to address whether Appalachian Materials made any misrepresentations in its application in light of these holdings. *Id.* at 574.

The dissenting judge disagreed with the majority's reversal of the Board's decision. *Id.* at 575 (Dillon, J., dissenting). On the question of permit choice, he would have held that Appalachian Materials' application was "submitted" within the meaning of the Permit Choice statutes because: (1) the term is undefined in the relevant statutes; (2) the General Assembly imposed an express completeness requirement under the moratoria statute but *not* the Permit Choice statutes; and (3) the majority's construction of the term is at odds with the legislature's desire to provide certainty to developers. *Id.* at 579–80. As for Appalachian Materials' compliance with the PID ordinance's commercial setback requirements, the dissenting judge would have affirmed the Board's conclusions that the shed and barn were not "commercial buildings" under the canons of construction applicable to land use ordinances. *Id.* at 580–81. He likewise would have affirmed the Board's determination that

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5. Our remand acknowledged these four issues, instructing the Court of Appeals to address: (1) the completeness of the application to trigger permit choice; (2) the authority of the Planning Director to deny the application under the Moratorium; (3) the 1,000 foot commercial setback requirement; and (4) the existence of any material misrepresentations. *Ashe County II*, 376 N.C. at 20.

there were no material misrepresentations in Appalachian Materials' application. *Id.* at 582.

Appalachian Materials now appeals the Court of Appeals' decision on the basis of the dissent. The County conditionally appeals—also on the basis of the dissent—the question of whether the Board properly determined Appalachian Materials' application was free from material misrepresentations.[6]

II. ANALYSIS

This appeal turns on three core questions, namely whether: (1) Appalachian Materials submitted a "complete" application in June 2015 such that Permit Choice applied as of that date; (2) the Board properly determined that the mobile shed and barn are not commercial buildings for purposes of the PID Ordinance's setback requirements; and (3) the

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6. The County has filed a motion to dismiss Appalachian Materials' appeal, and Appalachian Materials has filed a petition for writ of certiorari should that motion be granted. In seeking dismissal, the County first argues that the majority resolved issues 1–3, detailed *supra* note 5, against Appalachian Materials on remand and without reaching issue 4. However, the County argues, the dissent only explicitly addressed issues 1, 3, and 4, and did not mention issue 2—the authority of the Planning Director to deny the permit application under the Moratorium. The County asserts that issue 2 was dispositively decided by the majority, and its absence from the dissent precludes reversal. As to the remaining issues, the County asserts that the notice of appeal is jurisdictionally defective because Appalachian Materials' notice of appeal does not state issues 1–4 "strictly . . . [and] without variation or departure from the Supreme Court of North Carolina's remand and mandate [in *Ashe County II*]."

We disagree with each argument by the County. The Court of Appeals' majority addressed issue 2 but did not dispositively resolve issue 2 against Appalachian Materials such that denial of its application was mandated. The majority did not address whether the Moratorium affirmatively authorized or compelled *denial*; instead, it merely held that "under the [M]oratorium, . . . the Planning Director lacked the authority to *approve* the application." *Ashe County III*, 284 N.C. App. at 573 (emphasis added). Moreover, the dissent would have held that Permit Choice applied and the pre-Moratorium PID Ordinance authorized issuance of the permit, *id.* at 575 (Dillon, J., dissenting), and "agree[d] with the Planning Board's resolution on the issues of law which [were] before [the Court of Appeals]," *id.* at 582. Thus, the dissent necessarily rejected any notion that the Moratorium required denial. Finally, as to the other issues identified by this Court's remand in *Ashe County II*, we read the language of Appalachian Materials' notice of appeal to encompass the issues consistent with their framing by the dissent. Our jurisdiction in this case stems from the reasoning of the dissenting judge as it relates to the issues before the Court of Appeals, *Cryan v. National Council of YMCAs of the United States*, 384 N.C. 569, 570 (2023), and we see no jurisdictional defect in either the dissent or the notice of appeal based thereon. We deny the County's motion to dismiss, dismiss Appalachian Materials' petition for writ of certiorari as moot, and resolve all issues raised and briefed by the parties.

Board properly determined that Appalachian Materials made no material misrepresentations in its application.[7] We address each in turn.

A. Standard of Review

On an appeal from a superior court's ruling on a planning board decision, "[w]e review the trial court's order for errors of law. Our review asks two questions: Did the trial court identify the appropriate standard of review, and, if so, did it properly apply that standard?" *Morris Commc'ns Corp. v. City of Bessemer City Zoning Bd. of Adjustment*, 365 N.C. 152, 155 (2011) (citations omitted). What constitutes the "appropriate standard of review" to be employed by the reviewing court is dependent on the issues raised by the appellant. *Id.* Challenges to legal conclusions—such as the interpretation of an ordinance or statute—are reviewed *de novo*. *Id.*; *see also* N.C.G.S. § 160D-1402(j)(2) (2023) (identifying the legal errors subject to *de novo* review). Challenges to factual findings, however, are subject to the "whole record test." *Mann Media, Inc. v. Randolph Cnty. Plan. Bd.*, 356 N.C. 1, 13 (2002); *see also* N.C.G.S. § 160D-1402(j)(1)e (2023). (noting that an appeal asserting findings are "[u]nsupported by competent, material, and substantial evidence" subjects the order to examination "in view of the entire record").

The *de novo* and whole record standards "are distinct." *Mann Media*, 356 N.C. at 13. In the present case, the interpretation of the PID Ordinance, Permit Choice statutes, and moratoria statutes are all questions of law subject to *de novo* review. *Morris Commc'ns Corp.*, 365 N.C. at 155. We therefore "consider[ ] the case anew and may freely substitute [our] own interpretation of an ordinance for [the Board's] conclusions of law," *id.* at 156, and the same holds true for the interpretation and application of the relevant Permit Choice and moratoria statutes, *In re Foreclosure of a Lien by Exec. Office Park of Durham Ass'n Against Rock*, 382 N.C. 360, 362 (2022).

Of note and particular import to this case, the above standards apply to judicial appeals *from* planning boards; they do not apply to administrative appeals from planning directors' determinations *to* those boards. Planning boards instead "may reverse or affirm, wholly or partly, or may modify the decision appealed from and shall make any order, requirement, decision, or determination that ought to be made.

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7. Appalachian Materials raises a fourth argument that it had a vested right to permit choice. That argument is waived for failure to raise it before the Board. *See Godfrey v. Zoning Bd. of Adjustment*, 317 N.C. 51, 63–64 (1986) (noting it is not "appropriate . . . to affirm the decision of the Zoning Board of Adjustment by substituting for its basis a legal theory not relied upon by the Board").

The board shall have all the powers of the official who made the decision." N.C.G.S. § 160D-406(j) (2023); *see also* Ashe County, N.C., Code of Ordinances § 153.04(J)(3)(f) (2016) (giving the Board the authority to "uph[o]ld, modif[y], or overrule[ ] in part or in its entirety" the Planning Director's decision).

B. Appalachian Materials' June 2015 Application Was "Complete"

[1] The parties first disagree over the correctness of the Board's and Court of Appeals' differing determinations as to whether the June 2015 application was "complete" for purposes of the Permit Choice statutes. Appalachian Materials argues that the Board's determination was proper, contending: (1) Permit Choice triggers when the applicant pays any required fee and submits an application sufficiently complete to allow the reviewing body to begin evaluation of the permit; and (2) Appalachian Materials "submitted," *i.e.*, tendered the fee and a sufficiently complete application, in June 2015 even though it did not have the State Permit in hand. Appalachian Materials reasons this is so because the application allowed the Planning Director to determine compliance with the *County's* PID Ordinance requirements even without the *State* Permit.

The County disagrees, arguing that: (1) the timeframe for triggering Permit Choice was shortened due to the enactment of the Moratorium; and (2) an application is "complete" for purposes of Permit Choice under the moratoria statute when it is submitted truthfully, in good faith, and with a site plan showing the locations of all buildings and improvements contemplated by the developer. Reviewing the Permit Choice, moratoria, and other related statutes setting forth the powers and authority of local government over land use planning, we hold that the Board did not err in determining Appalachian Materials' application was complete for purposes of permit choice and in light of the text of the PID Ordinance upon its initial submission in June 2015, and the superior court likewise did not err in affirming that decision.

1. Permit Choice, Moratoria, and Completeness

Weighing developers' interests in a predictable regulatory environment and the desire of the public to update and amend land restrictions to foster or foreclose certain uses, N.C.G.S. § 160D-108(a), our General Assembly has enacted a Permit Choice statute that provides, "If a permit applicant *submits* a permit application for any type of development and a rule or ordinance is amended . . . between the time the development permit application *was submitted* and a development permit decision is made, the development permit applicant may choose which adopted

version of the rule or ordinance will apply to the permit." N.C.G.S. § 143-755(a) (emphasis added); *see also* N.C.G.S. § 160D-108(b) ("If a land development regulation is amended between the time a development permit application was submitted and a development permit decision is made . . . G.S. 143-755 applies."). No completeness requirement exists in the Permit Choice statutes.

There is, however, a completeness requirement that applies under the moratoria statute. It provides that "if a complete application for a development approval has been submitted prior to the effective date of a moratorium, [the Permit Choice statute] [N.C.]G.S. [§] 160D-108(b) applies when permit processing resumes." N.C.G.S. § 160D-107(c) (2023). The term "complete" is not defined by the statutory text and, under its ordinary definition, is well understood to mean "having all necessary parts, elements, or steps." *Complete*, Merriam-Webster's Collegiate Dictionary (10th ed. 1999); *see also Perkins v. Arkansas Trucking Servs., Inc.*, 351 N.C. 634, 638 (2000) ("[C]ourts may look to dictionaries to determine the ordinary meaning of words within a statute."). But that definition raises an obvious question: "having all necessary parts" *for what purpose*? The Court of Appeals and the parties all have different answers, offering distinct interpretations as to how the word applies in this case when considered in context. *See, e.g.*, *State v. Ludlum*, 303 N.C. 666, 671 (1981) ("Unless statutory words have acquired some technical meaning they are construed in accordance with their ordinary meaning unless some different meaning is definitely indicated by the context.").

Appalachian Materials contends "complete" should mean "having all necessary parts" to begin reviewing the application to determine substantive compliance with the relevant ordinances. The Court of Appeals majority effectively read "complete" to mean "having all necessary parts," *Complete*, Merriam-Webster's Collegiate Dictionary, to issue the permit, *Ashe III*, 284 N.C. App. at 572.[8] Finally, the County argues that an application is considered complete only if it facially satisfies, truthfully and in good faith, all elements of the permitting ordinance by including a site plan or survey tying all uses, structures, *etc.*, to the land. We resolve the ambiguous usage of "complete" consistent with Appalachian Materials' interpretation for the reasons set forth below.

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8. Though not explicit in its opinion, the Court of Appeals appears to have adopted this understanding, equating "completed . . . application[s]" to those that are approved and permitted. *Ashe County III*, 284 N.C. App. at 572.

2. Appalachian Materials' Reading Comports with Statutory Law and Established Local Government Permitting Practice

Reference to the statutory scheme and the permit review authority given to planning boards sitting as boards of adjustment resolves this dispute. *See State v. James*, 371 N.C. 77, 85 (2018) ("[T]he words in which a statute is couched should be read in context and with a view to their place in the overall statutory scheme." (cleaned up)). Here, the Permit Choice statutes directly contemplate some back-and-forth between the permitting body and the applicant, as well as supplementation of the permit application. *See* N.C.G.S. § 143-755(b1) (providing that permit choice is forfeited if "the applicant fails to respond to comments or provide additional information reasonably requested by the . . . government for a period of six consecutive months or more").[9] This comports with the ordinary practicalities of local government development permitting. *See Northwestern Fin. Grp., Inc. v. County of Gaston*, 329 N.C. 180, 189 (1991) ("The revised plans were essentially a part of the normal give and take between the applicant and the regulatory authorities.").

The moratoria statute, meanwhile, also suggests that a "complete application" is one that is submitted and *accepted by the local government as such* rather than full and final for permit issuance purposes. *See* N.C.G.S. § 160D-107(c) (providing that moratoria do not apply "to any project for which a special use permit application has been *accepted* as complete" (emphasis added)). This is consistent with how development permit application "completeness" is understood in the Permit Choice context. *See*, *e.g.*, Adam Lovelady, *Permit Choice Rule for Development Regulations*, UNC School of Government: Coates' Canons NC Local Government Law (Dec. 6, 2021), https://canons.sog.unc.edu/2021/12/permit-choice-rule-for-development-regulations/ (noting that "[i]n the normal course of permitting review, there is some natural back-and-forth," and "ensur[ing] that an application is sufficiently *complete to initiate the permit review process*" aids in "set[ting] a clear starting point for the permit choice rule" (emphasis added)).

Indeed, the General Assembly has vested local planning departments—and, by extension, reviewing planning boards acting as boards

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9. The County argues that this provision should bar Appalachian Materials' right to Permit Choice, as it did not forward the State Permit within six months of applying for the PID Ordinance. But nothing in the record shows that Appalachian Materials was dilatory in responding to any requests for information from the Planning Director, let alone that it delayed providing any requested information in its possession for six months or more.

of adjustment on *de novo* review, N.C.G.S. § 160D-406(j)—with authority to make completeness determinations separate from the question of permit issuance. *See* N.C.G.S. § 160D-402(b) (2023) ("Duties assigned to [local government planning] staff may include . . . determining whether applications for development approvals are complete; receiving and processing applications for development approvals; . . . [and] determining whether applications for development approvals meet applicable standards as established by law and local ordinance . . . ."). [10] Staff are empowered "to develop, administer, and enforce development regulations authorized by this Chapter," *id.* § 160D-402(a) (2021), including those concerning completeness determinations, *id.* § 160D-402(b). The General Assembly's intention to leave completeness determinations up to the local government is also evident in the moratoria statute. *See id.* § 160D-107(c) (providing that moratoria do not apply "to any project for which a special use permit application has been *accepted* as complete" (emphasis added)). And the reviewing planning board sitting as a board of adjustment is given full authority to revisit any planning staff completeness determination at a *de novo* hearing. *Id.* § 160D-406(j) ("The board shall have all the powers of the official who made the decision.").

In short, N.C.G.S. § 160D-402(b) authorizes local planning departments to make completeness determinations for the purposes of their local ordinances, and N.C.G.S. § 160D-406(j) allows reviewing planning boards sitting as boards of adjustment to revisit those completeness determinations *de novo*. This also accords with the General Assembly's intent "to foster cooperation between the public and private sectors in land-use planning and development regulation," *id.* § 160D-108(a), as it recognizes that the local government is best positioned to identify whether the application is acceptable for review as a complete application notwithstanding any future revisions or addenda that may be requested and required prior to issuance of the permit. *See id.* § 160D-107(c) (exempting from moratoria "any project for which a special use permit application has been accepted as complete"); *id.* § 143-755(b1) (noting that permit choice is abandoned if "the applicant

10. Though vested with authority to make their own completeness determinations, local governments cannot, of course, make determinations that are arbitrary, capricious, or otherwise prohibited by law. No such challenge is lodged here. They likewise must interpret and apply their ordinances in accordance with the law, which we address *infra* on *de novo* review. *See Arter v. Orange County*, 386 N.C. 352, 357 (2024) (noting that while "it is exclusively the judiciary's role 'to say what the law is[,]' . . . legislative bodies are free to define terms, provide grammatical rules, and take other steps to eliminate potential ambiguity in the text of written laws" (citations omitted)).

fails to respond to comments or provide additional information reasonably requested by the local or State government for a period of six consecutive months or more"); *cf. Northwestern Fin. Grp.*, 329 N.C. at 189 ("The revised plans were essentially a part of the normal give and take between the applicant and the regulatory authorities.").

Consistent with the above statutes and the practicalities of local land-use permitting, caselaw reveals that some local jurisdictions have enacted ordinances that bear upon application completeness determinations. Some provide that applications are evaluated on a case-by-case basis and need not always address every requirement of a governing ordinance to be complete. *See*, *e.g.*, *Richardson v. Union Cnty. Bd. of Adjustment*, 136 N.C. App. 134, 141 (1999) (deferring to a reviewing board's determination that an application was complete despite absence of certain details in the application in part because a local ordinance provided that "each development is unique, and therefore the permit issuing authority may allow less information or require more information to be submitted according to the needs of the particular case"). Others state that an application must address all of the ordinance's requirements to be reviewed while also making explicit the necessary contents of an application—including the necessity of a site plan. *See Wade v. Town of Ayden*, 125 N.C. App. 650, 652 (1997) (reviewing an ordinance that provided applications "shall include all of the requirements pertaining to it . . . and without such information cannot be processed for consideration by the Planning Board and Board of Commissioners" and provided that "applications shall include site plans and shall be prepared to provide a full and accurate description of the proposed use").[11]

With an eye to the overall statutory scheme governing local government permitting, Permit Choice, and moratoria—and keeping in mind that the affordance of Permit Choice rights renders that statute remedial and subject to broad construction, *see Wilkie v. City of Boiling Spring Lakes*, 370 N.C. 540, 545 (2018) (recognizing this general principle of statutory interpretation)—we hold that a "complete application" is not equivalent to a full and final application, but instead refers to one that is

11. No such ordinances appear of record here, and the statutory grant of authority to *local governments*, unlimited in this case by any public regulation outlining how and when completeness determinations are made by Ashe County, substantially undercuts the County's position that an application is complete if "*the applicant* ha[s] a reasonable expectation of receiving a permit under law when the application was submitted." (Emphasis added). In other words, whether an application is "complete" turns on the local governing body's ability to assess the application, not the reasonableness of the applicant's expectations.

accepted by the permitting authority as adequate to begin permit compliance review.

3. The Court of Appeals' and the County's Interpretations of "Complete" Are Contrary to Law

The other explanations put forth by the Court of Appeals and the County do not dissuade us from this conclusion. The Court of Appeals' interpretation equating "complete" with "final for permitting purposes" is untenable for several reasons. For one, reading the moratoria statute in this manner would impermissibly render redundant portions of N.C.G.S. § 143-755(b1) which extinguish permit choice for failure to reasonably supplement an application within six months. *See*, *e.g.*, *State v. Conley*, 374 N.C. 209, 215 (2020) ("It is a well-established rule of statutory construction that a statute must be considered as a whole and construed, if possible, so that none of its provisions shall not be rendered useless or redundant. It is presumed that the legislature did not intend any provision to be mere surplusage." (cleaned up)). Stated simply, if permit choice applies only to applications that are substantively finalized and are simply awaiting issuance, there would be no need for the legislature to establish a six-month permit choice preservation window expressly allowing for the provision of supplemental information. Such a reading would also allow local governments to negate permit choice in the many instances where such back-and-forth is required; a local government could simply enact a moratorium during this period of application revision, repeal and/or replace the ordinance, and deny the permit outright under the theory that the application was not "complete" at the time of the moratorium's enactment.

While there are times when some local advocates may prefer that new development proposals be denied for a multitude of different laudable reasons, this Court's ability to address such advocates' goals is limited both by fact-finding performed by local quasi-judicial bodies and by the policies established by the legislature absent some properly-lodged constitutional or statutory objection to those legislative policies. We cannot construe or apply statutory language to "eviscerate [a] statute's function," *In re Summons Issued to Ernst & Young, LLP*, 363 N.C. 612, 618 (2009), particularly when it runs contrary to the General Assembly's express intent in enacting Permit Choice to "ensure reasonable certainty, stability, and fairness in the development regulation process, to secure the reasonable expectations of landowners, and to foster cooperation between the public and private sectors in land-use and development regulation," N.C.G.S. § 160D-108(a). Finally, as a remedial statute, the Permit Choice and moratoria statutes should be read broadly to afford

the relief offered by the statute rather than to defeat colorable claims thereunder. *Wilkie*, 370 N.C. at 545.

The County's position—requiring, in all instances, that a complete application include "a site plan, spreadsheet or report" that specifies all the intended uses and ties them to the land—is equally untenable. That reading is itself at odds with the County's positions taken elsewhere in its briefing; for example, the County acknowledges that Permit Choice is intended to apply to a wide swath of development permitting, yet there is no factual or legal basis to assume that all such permitting ordinances require site plans, spreadsheets, or reports as permitting or application preconditions. *Compare Richardson*, 136 N.C. App. at 141 (reviewing an ordinance that allowed staff to accept more or less information than that required by the text of the permitting ordinance in making completeness determinations), *with Wade*, 125 N.C. App. at 652 (reviewing an ordinance that specifically required all applications include a site plan). Moreover, the County acknowledges that "Permit Choice does not change *the regulatory requirements . . . of the rule or ordinance chosen*," and yet the County reads the Permit Choice statutes to insert a detailed site plan requirement into all permitting ordinances, whether expressly included or not.[12] Put simply, the Permit Choice statutes do not import requirements of detailed site plans, spreadsheets, reports, and the like into regulations—like the PID Ordinance—where none exist.

The County also argues that Appalachian Materials' reading would create "differing rules across local governments" concerning when Permit Choice triggers. It is difficult to see how the General Assembly could have intended anything else; local governments are empowered to enact their own permitting ordinances, so whether an application has been "completed" or "submitted" will *always* vary from locality to locality—and even from ordinance to ordinance. Moreover, and as explained above, the General Assembly expressly contemplated local governments enacting their own application procedures and making their own completeness determinations thereunder. N.C.G.S. §§ 160D-402(a)–(b), 160D-107(c). Indeed, some jurisdictions have done so by adopting

12. The County relies on the statute's language providing that "the development permit applicant may choose which adopted version of the rule or ordinance *will apply to the permit and use of the building, structure, or land indicated in the permit application*," N.C.G.S. § 143-755 (emphasis added), for the proposition that detailed site plans, spreadsheets, or reports are required in all instances. This overreads the plain text of the statute—for example, it is entirely possible to identify "land" by written description without a site plan, spreadsheet, or report, as evinced by the countless real estate deeds recorded in North Carolina that do so.

ordinances of varying firmness and flexibility. *Compare Richardson*, 136 N.C. App. at 141 (reviewing an ordinance that allowed staff to accept more or less information than that required by the permitting ordinance in making completeness determinations), *with Wade*, 125 N.C. App. at 652 (reviewing an ordinance that required an application address all requirements of the permitting ordinance in order to be considered by the permitting authority and setting forth explicit elements that an application must contain).

Finally, the County argues that Appalachian Materials' application could not have been complete because it was: (1) false; (2) illegal due to the unpermitted grading; and (3) offered in bad faith. None of these formed the basis for the Court of Appeals' determination of incompleteness; to the contrary, the Court of Appeals held that the application *was* completed—albeit too late—on issuance of the State Permit. Nor are these conditions imposed in the PID Ordinance or the Permit Choice or moratoria statutes. We further disagree with these arguments as detailed below.

4. The Application Was Complete for Purposes of the PID Ordinance

Even setting aside the Board's statutory authority to determine permit application completeness, *de novo* interpretation and application of the PID Ordinance demonstrates Appalachian Materials' application was complete in June 2015 even without the State Permit. "[G]overnmental restrictions on the use of land are construed strictly in favor of the free use of real property." *Morris Commc'ns Corp.*, 365 N.C. at 157. Strictly construing the PID Ordinance, the only immediately obvious requirement imposed on the application itself is payment of the $500 fee. Ashe County, N.C., Code of Ordinances § 159.06(A). And it is evident that not all the provisions of the PID Ordinance apply at the application stage; subsection (B)(4) provides that "[t]he operation of this type industry shall not violate the Ashe County Noise Ordinance," a requirement that, by its very nature, cannot be satisfied prior to permit issuance. *Id.* § 159.06(B)(4). Similarly, the ordinance's requirements concerning paved roads and material piles likewise contemplate post-permitting conduct. *Id.* § 159.06(B)(1)–(2).

Other requirements do, however, appear applicable to the application itself. The definitional portion of the PID Ordinance provides that "distance requirements shall be measured from the *proposed* building to the existing dwelling or other structure." *Id.* § 159.05 (emphasis added) (repealed 2016). And subsection (B) of the PID Ordinance establishes

a 1,000 foot setback from residential and commercial buildings and a 1,320 foot setback from schools, daycares, hospitals, and nursing home facilities. *Id.* § 159.06(B). Relatedly, subsection (B)(3) provides that "[a] security fence . . . shall be installed where the *proposed* extraction takes place," again indicating that the application must at least propose what extraction, if any, will occur under the permit. *Id.* § 159.06(B)(3).

As for the state and federal permitting requirement, this does not appear to apply at the permit application stage under a strict construction of the ordinance; the PID Ordinance simply states that "[n]o permit from the planning department shall be issued until the appropriate Federal and State permits have been issued." *Id.* § 159.06(A). This, strictly construed, is a limitation on the ability of the County to issue a permit rather than a definition of what constitutes a completed application. As such, a completed application can be submitted under the ordinance without state or federal permits, but no PID Ordinance permit will issue until those permits, if required by some other authority, are supplied.

Appalachian Materials' application met these pre-permitting requirements. It included the $500 fee, provided a survey of the proposed site to allow review of the setback requirements, and disclaimed any proposed extraction. It further indicated that the State Permit was pending and that no federal permits were needed. Finally, it assured future compliance with the post-permitting, forward-looking provisions of the PID Ordinance. Indeed, it was sufficiently complete to allow the Planning Director to "visit[ ] the Property, create[ ] and review[ ] certain GIS Maps and photographs that identified all buildings in close proximity to the Property and create[ ] certain GIS shape files identifying any buildings that required buffering or setbacks . . . under the Ordinance," before determining in June 2015 that the "plans do meet the requirements of ou[r] ordinance." We hold the Board appropriately found and concluded, supported by competent evidence and the above interpretation of the relevant statutes and caselaw, that the June 2015 application was complete when submitted. The superior court did not err in affirming this decision.

C. Appalachian Materials' Application Complied with the PID Ordinance Setback Requirements

[2] Having held that the June 2015 PID Ordinance application was "complete" for purposes of Permit Choice under the moratoria statute, we now turn to whether the application satisfied that ordinance's requirements. The Court of Appeals held that it did not meet the commercial setback requirement based on the proposed plant's proximity

to a mobile shed on an adjoining quarry and a barn on a nearby farm, reasoning that "the record supports the Planning Director's conclusions regarding the location of the commercial buildings, and that the [mobile shed and barn] did, in fact, qualify as commercial buildings within the meaning of the PID Ordinance in February 2016." *Ashe III*, 284 N.C. App. at 573. Our *de novo* consideration of whether the shed or barn constituted "commercial buildings" leads us to reverse the Court of Appeals and affirm the superior court's and Board's orders.

The PID Ordinance does not define the phrase "commercial buildings." We therefore give those words their ordinary meanings. *In re Clayton-Marcus Co.*, 286 N.C. 215, 219 (1974). Some ordinary definitions of the word "building" denote permanence. *See, e.g.*, *Building*, Black's Law Dictionary (10th ed. 2014) ("A structure with walls and a roof, *esp. a permanent structure*." (emphasis added)); *Building*, Webster's New World Dictionary (3d Coll. ed., 1988) ("[A]nything that is built with walls and a roof . . . [,] the general term applied to a *fixed* structure in which people dwell, work, etc." (emphasis added)); *Building*, Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/building (last visited Mar. 8, 2025) ("[A] usually roofed and walled structure built for *permanent* use." (emphasis added)). The Court of Appeals, for its part, has previously held that the ordinary definition of "building" does indicate permanence. *Kroger Ltd. P'ship I v. Guastello*, 177 N.C. App. 386, 390–91 (2006); *see also Nash-Rocky Mount Bd. of Educ. v. Rocky Mount Bd. of Adjustment*, 169 N.C. App. 587, 590–91 (2005) (citing dictionary definitions denoting permanence and holding a parking lot was not within the undefined term "building" in a zoning ordinance in part because "it has no . . . kind of permanent, immovable features apart from a fence"). *But see Davidson County v. City of High Point*, 85 N.C. App. 26, 38 (adopting an ordinary definition of "building" that did not indicate permanence), *modified and aff'd*, 321 N.C. 252, 256 (1987) (declining to affirm based on the Court of Appeals' definition of "building," and doing so instead "for a different and narrower reason"). Other definitions, however, do not suggest "a building" is fixed to the land. *See, e.g.*, *Building*, The American Heritage Dictionary (3d ed. 1992) ("Something that is built as for human habitation.").

To the extent that there is any ambiguity that arises from these conflicting definitions, it is to be resolved in favor of Appalachian Materials: "This Court has long held that governmental restrictions on the use of land are construed strictly in favor of the free use of real property." *Morris Commc'ns Corp.*, 365 N.C. at 157. The Court of Appeals' relatively recent decisions in *Kroger* and *Nash-Rocky Mount Bd. of Educ.*

ascribing permanence to the ordinary meaning of the word "building" in land use restrictions further support that reading. The purpose of the PID Ordinance to protect "*established* . . . commercial areas in Ashe County," Ashe County, N.C., Code of Ordinances § 159.02 (2016) (emphasis added) (repealed 2016), likewise suggests that temporary commercial structures—like a mobile shed that is movable via forklift—are not intended to be protected by the regulation. Nor does the PID Ordinance, considered in context, suggest it is intended to protect a polluting industry from itself.[13]

The facts as found by the Board support the conclusion that the mobile shed on the adjacent quarry is not a "commercial building" by virtue of its impermanence. The Board found that "[t]he mobile shed . . . lacks a foundation, has no footers, and does not having running water," it was previously "relocated with minimal effort and equipment," and the property owner would and could have moved it if asked by the Planning Director. Construing the undefined term "building" in favor of the free use of land and in keeping with the purposes of the PID Ordinance, the shed was not a "commercial building" as that term is used in the PID Ordinance's set-back requirements.

We reach the same ultimate conclusion as to the barn, but for different reasons. A barn is unquestionably a "building," and our analysis thus turns on whether it can be considered "commercial." That word is generally defined as "[o]f, relating to, or involving the buying and selling of goods." *Commercial*, Black's Law Dictionary (10th ed. 2014). In determining whether property is better described as commercial or residential in land use restrictions that leave those terms undefined, we have generally looked to the purposeful use of the building. For example, in *J.T. Hobby & Son, Inc. v. Family Homes of Wake Cnty., Inc.*, 302 N.C. 64 (1981), we held that a group home for persons with intellectual disabilities subject to a restrictive covenant limiting the property to "residential purposes" was not a prohibited commercial venture, *à la* a boarding house, simply because the group home received payments for its services from residents. *Id.* at 72. We explained:

> That defendant is compensated for the services it renders does not render its activities at the home

13. Rock quarries, asphalt plants, and rock crushing operations were the only polluting industries jointly and specifically identified as polluting industries by the County in the Moratorium enacted to study revisions to the PID Ordinance. Thus, Appalachian Materials' proposed asphalt plant and the neighboring quarry housing the shed at issue would both appear to be polluting industries.

> commercial in nature. While it is obvious that the home would not exist if it were not for monetary support being provided from some source, that support clearly is not the objective behind the operation of this facility. That defendant is paid for its efforts does not detract from the essential character of its program . . . . Clearly, the receipt of money to support the care of more or less permanent residents is incidental to the scope of defendant's efforts. In no way can it be argued that a significant motivation behind the opening of the group home by defendant was its expectation of monetary benefits.

Id. at 73.

Our resort to the property's "essential purpose," *id.* at 72, makes logical sense; an old tobacco barn previously used to store tobacco may lose its agricultural character and adopt a commercial one when it is renovated and exclusively rented out as a wedding venue and event space. Conversely, the mere fact that some commercial activity takes place in a location does render it a "commercial building" as that phrase is ordinarily understood—a person who hosts Tupperware parties in their home has not converted it into a "commercial building."

The Board's findings support the conclusion that the barn at issue here was not a "commercial building." It found that "[t]he barn is not used to conduct business, is not used in connection with any commercial activity, has no parking or other access for anyone other than the property owner, has no road access, and does not have electricity or air conditioning." It further found that "[t]he County's tax card does not list the barn as a commercial building and signs on the barn state 'Keep Out' and 'No Trespassing.' " These findings are sufficient to conclude that the barn is not a "commercial building" within the common usage of the phrase; while there was some evidence that the owner stored harvesting equipment and hay in the barn—and that the latter was sold to cover his property taxes—there were no findings to that effect. And even that evidence is insufficient to establish the barn is substantially, predominantly, or exclusively used for commerce in light of the Board's other supported findings. *Cf. id.* at 72–73.

D. The Board's Material Misrepresentation Determination

[3] In its final argument, the County asserts that the Board erred in determining that Appalachian Materials' application did not contain material misrepresentations. Its contention proceeds along three

lines: (1) the Court of Appeals applied the wrong standard in reviewing whether the Board properly concluded that there were no intended or material misrepresentations; (2) the Board erred in placing the burden of proving the existence of fraudulent intent on the County; and (3) the application did contain material misrepresentations requiring denial of the permit. None of these contentions have merit, particularly when planning boards sitting as boards of adjustment are statutorily authorized to freely substitute their own factual and legal determinations for those of planning directors. N.C.G.S. § 160D-406(j).

The County's first line of argument fails because the Court of Appeals expressly declined to address the question of whether the Board appropriately resolved the material misrepresentation issue and thus could not have applied the incorrect standard to that issue. *Ashe County III*, 284 N.C. App. at 574 ("[W]e do not reach the issue of whether the alleged material misrepresentations . . . constituted an independent basis for denying the PID Ordinance application . . . ."). The County's second argument—that it was improperly burdened with showing fraudulent intent—is likewise misplaced, as the Board concluded there were "no intended *or* material misrepresentations in the Application and any inaccuracies were irrelevant and should not be a reason for denial of the permit." (Emphasis added.) Put another way, there is no suggestion in the record that the burden of proving fraudulent intent was improperly allocated. The whole record test obligates us—and the reviewing superior court—to afford the Board, in sifting through the substantial evidence it received on the issue, deference to its findings on factual questions of deceptive or fraudulent intent. *See*, *e.g.*, *Johnson v. Beverly-Hanks & Assocs., Inc.*, 328 N.C. 202, 209 (1991) (observing that whether a defendant knowingly made false representations with intent to deceive is an issue of fact).

As to the third argument, both the County and Appalachian Materials agree that only *material* misrepresentations should doom a permit. And, as Appalachian Materials rightly notes, materiality is a question of fact. *See*, *e.g.*, *Henderson v. Rochester Am. Ins. Co.*, 254 N.C. 329, 333 (1961) ("[C]ourts generally hold the question of materiality and prejudice is a question for the jury.").[14]

14. The County argues that materiality is not a question of fact based on *In re Moore*, 301 N.C. 634 (1981). The County is incorrect; *Moore* simply held that a finding of materiality on the part of the Board of Law Examiners was too indefinite to permit appellate review of its order denying the applicant from sitting for the bar, as the order "did not indicate which statements it considered to be untruthful" and thus could not be tested

Notwithstanding our lack of authority to disregard the Board's unchallenged findings, the County's evidentiary assertions in support of alleged material misrepresentations also fall short. It first contends that the property had been illegally graded before the application was submitted and that no determination of the "original contour" could thus be made under the PID Ordinance. But nothing in the record supports that assertion of illegality, as the evidence shows the grading was done under existing permits and there are no citations or judgments from any jurisdiction in connection with the grading. It also does not appear that any difference in grading between that recorded on the aerial map or survey and the true physical grading on the property was in any way material because—assuming representations concerning grading were even required by the PID Ordinance—the Planning Director physically visited the site *after* receiving the application and *before* telling Appalachian Materials that it satisfied all county-level PID Ordinance permitting conditions. In short, the Planning Director's actions demonstrate that any pre-application grading that was performed did not impact the ability of the Planning Director to assess Appalachian Materials' compliance with the operative provisions of the PID Ordinance.

The County next claims that Appalachian Materials misrepresented its compliance with the required 1,000 ft. setback. As explained above, two of the buildings complained of—the shed and the barn—were not "commercial buildings" subject to the setback and were present in the material submitted in the application. A third setback violation asserted by the County is not a violation at all, but rather a scrivener's error on the part of NCDEQ in issuing the State Permit. A fourth purported violation—that access to a public road would be within 1,000 feet of a residence—was not preserved, as it was not the Planning Director's basis for denial, addressed by the Board in its findings or conclusions, appealed to superior court, or argued to or addressed by the Court of Appeals. *See Godfrey*, 317 N.C. at 63 (noting that we should not reach factual and legal issues not resolved by the planning board and that "[f]act finding is not a function of our appellate courts"). Moreover, access roads are also not explicitly governed by the PID Ordinance, nor are they strictly required as part of an application under the Ordinance.

The final purported material misrepresentation involves a disparity between the upper limit of tons produced under the State Permit

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against the evidence. *Id.* at 640–41. Here, the Board made unchallenged findings of fact that there were no material misrepresentations, and it detailed how those alleged misrepresentations were neither material nor misrepresentations at all.

application and the final permit released by NCDEQ. But this was neither a misrepresentation nor material; the application disclosed Appalachian Materials' initial intended production, the increase was done at the encouragement of NCDEQ, and the amount produced is, in any event, left completely unregulated by the PID Ordinance.

In sum, the Board had full authority on *de novo* review to make its own factual determination as to any material misrepresentations in Appalachian Materials' permit application. Those findings went unchallenged below and are binding on appeal, and the record evidence cited by the County fails to establish any such material misrepresentations. We affirm the superior court's affirmance of the Board's determination that Appalachian Materials' application was free of material misrepresentations.

III. CONCLUSION

We hold that the Court of Appeals erred in concluding that the State Permit was required to complete the PID Ordinance application and trigger the Permit Choice statutes. Construing the relevant Permit Choice and moratoria provisions *in pari materia*, considering the overall local government development permitting scheme, and consistent with the statutes' purposes and relevant canons of construction, Appalachian Materials' application was sufficiently "complete" to trigger Permit Choice at the time it submitted its application. We likewise hold that the Court of Appeals erred in concluding that the mobile shed and barn are "commercial buildings" for purposes of the PID Ordinance. Finally, we hold that the Board had full authority to substitute its judgment for that of the Planning Director on all factual and legal issues, including whether any material misrepresentations existed and/or precluded permit issuance. For these reasons, we reverse the Court of Appeals and direct the Board to issue the permit under the PID Ordinance.

REVERSED.

Justice BERGER did not participate in the consideration or decision of this case.

JUDITH M. AYERS
v.
CURRITUCK COUNTY DEPARTMENT OF SOCIAL SERVICES

No. 110A24

Filed 21 March 2025

Appeal pursuant to N.C.G.S. § 7A-30(2) (2023) from the decision of a divided panel of the Court of Appeals, 293 N.C. App. 184 (2024), affirming an order entered on 31 January 2023 by Administrative Law Judge Melissa Owens Lassiter in the Office of Administrative Hearings. Heard in the Supreme Court on 18 February 2025.

Hornthal, Riley, Ellis & Maland, L.L.P., by John D. Leidy, for petitioner-appellee.

Teague Campbell Dennis & Gorham, LLP, by Jennifer B. Milak and Natalia K. Isenberg; and The Twiford Law Firm, by Courtney Hull, for respondent-appellant.

PER CURIAM.

Justice DIETZ did not participate in the consideration or decision of this case. The remaining members of the Court are equally divided, with three members voting to affirm and three members voting to reverse the decision of the Court of Appeals. Accordingly, the decision of the Court of Appeals is left undisturbed and stands without precedential value. *See City of Charlotte v. Univ. Fin. Props., LLC*, 373 N.C. 325 (2020) (per curiam) (affirming by an equally divided vote a Court of Appeals decision without precedential value).

AFFIRMED.

CHARLES SCHWAB & CO., INC.
v.
LAUREN ELIZABETH MARILLEY AND PETER JOSEPH MARILLEY

No. 210A24

Filed 21 March 2025

Appeal pursuant to N.C.G.S. § 7A-27(a)(3) from an order dated 20 February 2024 entered by Judge Julianna Theall Earp, Special Superior Court Judge for Complex Business Cases, in Superior Court, Mecklenburg County, after the case was designated a mandatory complex business case by the Chief Justice pursuant to N.C.G.S. § 7A-45.4(a). Heard in the Supreme Court on 12 February 2025.

Baker Donelson Bearman Caldwell & Berkowitz, P.C., by Thomas G. Hooper; and Baritz & Colman LLP, by Neil S. Baritz, for plaintiff-appellee Charles Schwab & Co., Inc.

Eric Spengler for defendant-appellee Lauren Elizabeth Marilley.

TLG Law, by Tyler A. Rhoades and David G. Redding, for defendant-appellant Peter Joseph Marilley.

PER CURIAM.

Defendant Peter Joseph Marilley appealed from the order of the North Carolina Business Court entered on 20 February 2024 denying his Motion to Stay Proceedings and Compel Arbitration. That order is hereby affirmed. Defendant Lauren Elizabeth Marilley's request to this Court for attorneys' fees and sanctions pursuant to Rule 34(a)(2) of the North Carolina Rules of Appellate Procedure is hereby denied.

AFFIRMED.[1]

1. The order of the North Carolina Business Court, 2024 NCBC Order 17, is available at https://www.nccourts.gov/assets/documents/orders-of-significance/2024%20NCBC%20Order%2017.pdf?VersionId=cMpMO3lnjirOrgKEgw9maeMSxYdYuT2x.

HAPPEL v. GUILFORD CNTY. BD. OF EDUC.

[387 N.C. 186 (2025)]

EMILY HAPPEL, INDIVIDUALLY, TANNER SMITH, A MINOR, AND EMILY HAPPEL ON BEHALF OF TANNER SMITH AS HIS MOTHER
v.
GUILFORD COUNTY BOARD OF EDUCATION AND OLD NORTH STATE MEDICAL SOCIETY, INC.

No. 86PA24

Filed 21 March 2025

Immunity—federal public emergency act—unwanted vaccination during pandemic—tort claims barred—no preemption of state constitutional claims

A county board of education and a medical provider affiliated with the county school system (defendants) were not completely shielded from suit filed by plaintiffs (a fourteen-year-old student and his mother) arising from the student being given a COVID-19 vaccine against his and his mother's wishes. The federal Public Readiness and Emergency Preparedness (PREP) Act, activated in response to the COVID-19 pandemic, provided immunity from tort injuries caused by the administration of any "covered countermeasure" during a public health emergency and, therefore, defendants were immune from plaintiffs' state law battery claims. However, contrary to the decision of the Court of Appeals, the PREP Act did not preempt plaintiffs' claims under the North Carolina constitution (regarding the mother's right to control the upbringing of her son and both plaintiffs' shared right to the son's bodily integrity), which did not constitute "claims for loss" under the Act. Therefore, the lower appellate court's opinion barring all of plaintiffs' claims was affirmed in part and reversed in part, and the matter was remanded to that court to resolve the remaining state constitutional issues raised in the parties' briefs.

Justice BERGER concurring.

Justice BARRINGER joins in this concurring opinion.

Justice RIGGS dissenting.

Justice EARLS joins in this dissenting opinion.

On discretionary appeal pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 292 N.C. App. 563, 899 S.E.2d 387 (2024), affirming an order entered on 1 March 2023 by Judge Lora C. Cubbage in Superior Court, Guilford County, granting defendants' motion to dismiss. Heard in the Supreme Court on 23 October 2024.

Walker Kiger, PLLC, by David Steven Walker, for plaintiff-appellants.

Tharrington Smith, LLP, by Stephen G. Rawson, for defendant-appellee Guilford County Board of Education; and Beacon Legal, PLLC, by Gavin J. Reardon, for defendant-appellee Old North State Medical Society, Inc.

Justine G. Tanguay for Children's Health Defense, amicus curiae.

Law Office of B. Tyler Brooks, PLLC, by B. Tyler Brooks, for Rep. Neal Jackson, Rep. Brian Biggs, Rep. Mark Brody, Rep. Keith Kidwell, Rep. Donnie Loftis, Rep. Joseph Pike, Rep. Frank Sossamon, and Rep. Jeff Zenger, amici curiae.

Deborah J. Dewart and Tami Fitzgerald for NC Values Institute, amicus curiae.

NEWBY, Chief Justice.

This case concerns a fourteen-year-old boy's attempt to seek a legal remedy after his school's chosen medical provider injected him with a COVID-19 vaccine against his and his mother's wishes. Plaintiffs, the child and his mother, present claims for battery and violations of their state constitutional rights. Defendants, the school board and the medical society with which it partnered, argue that the federal Public Readiness and Emergency Preparedness (PREP) Act completely immunizes them from plaintiffs' suit because it preempts all of their state law claims. Thus, we are tasked with considering whether Congress intended the PREP Act to immunize state actors who forcibly vaccinate a child without his or his parent's consent, thereby committing a battery and infringing their fundamental rights under the state constitution.

The PREP Act's plain text leads us to conclude that its immunity only covers tort injuries. Because tort injuries are not constitutional

violations, the PREP Act does not bar plaintiffs' constitutional claims.[1] We therefore affirm the decision below as to plaintiffs' battery claim, reverse as to their constitutional claims, and remand for further proceedings.

I. Background and Procedural History

During the COVID-19 pandemic, "we may have experienced the greatest intrusions on civil liberties in the peacetime history of this country." *Arizona v. Mayorkas*, 143 S. Ct. 1312, 1314 (2023) (statement of Gorsuch, J.). "Fear and the desire for safety are powerful forces. They can lead to a clamor for action—almost any action—as long as someone does something to address a perceived threat." *Id.* at 1315. Government officials across the Nation "imposed lockdown orders forcing people to remain in their homes. They shuttered businesses and schools, public and private. They closed churches even as they allowed casinos and other favored businesses to carry on." *Id.* at 1314. And in our State, medical workers affiliated with a public school forcibly vaccinated a fourteen-year-old boy despite knowing they lacked consent from both the child and his mother.

In August 2021, Western Guilford High School notified its football players and their parents, including fourteen-year-old Tanner Smith and his mother, Emily Happel, that it had identified a cluster of COVID-19 cases among the team.[2] It therefore suspended all team activities and required players to undergo COVID-19 testing or be "cleared by a public health professional" before returning to practice. The school provided a list of three locations at which players could receive free testing, one of which was a dual testing and vaccination clinic hosted at the school itself and operated in partnership with defendant Old North State Medical Society (ONSMS). The letter sent to players and their parents, however, only stated that the school clinic offered COVID-19 *tests*. It did not explain that the school clinic also provided COVID-19 *vaccines*, nor did it state that the school clinic required students to bring a signed parental consent form before they could be vaccinated.

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1. Unless otherwise noted, the words "constitutional" and "unconstitutional" refer to the state constitution.

2. This matter comes to this Court following the trial court's grants of motions to dismiss under Rules 12(b)(1) and 12(b)(6) of the North Carolina Rules of Civil Procedure. As such, we take all of plaintiffs' unproven allegations as true for purposes of our review. *See United Daughters of the Confederacy v. City of Winston-Salem ex rel. Joines*, 383 N.C. 612, 624, 881 S.E.2d 32, 43 (2022).

A few days later, Smith's stepfather drove him to the school clinic to be tested. Smith did not want to be vaccinated. He did not bring a signed consent form and was unaware that the school clinic even offered vaccines until arriving that day. Clinic workers nonetheless attempted to contact the child's mother over the phone to obtain consent to vaccinate her son. Happel did not answer, at which point one of the workers instructed another to "give it to [Smith] anyway." The workers made no effort to contact Smith's stepfather, who was waiting outside in the parking lot. Ignoring additional protests from Smith himself, the workers forcibly injected him with the first dose of the Pfizer/BioNTech vaccine.

Plaintiffs sued the local school board and ONSMS for battery and violations of their state and federal constitutional rights. Both defendants moved to dismiss under Rules 12(b)(1) and 12(b)(6) of the North Carolina Rules of Civil Procedure. In support of their motions, defendants cited the PREP Act, a federal law passed in 2005 "to encourage the expeditious development and deployment of medical countermeasures during a public health emergency." *Hudak v. Elmcroft of Sagamore Hills*, 58 F.4th 845, 849 (6th Cir. 2023) (internal alterations omitted) (quoting *Cannon v. Watermark Ret. Cmtys., Inc.*, 45 F.4th 137, 139 (D.C. Cir. 2022)).[3] The PREP Act confers broad protections on certain "covered person[s]" during public health emergencies, rendering them "immune from suit and liability under Federal and State law with respect to all claims for loss caused by, arising out of, relating to, or resulting from the administration to or the use by an individual of a covered countermeasure." 42 U.S.C. § 247d-6d(a)(1). To effectuate this purpose, the Act expressly overrides, or "preempts," any conflicting state laws. *Id.* § 247- 6d(b)(8).

The United States Secretary of Health and Human Services (HHS) triggers and "controls the scope" of the Act's protections by issuing an emergency declaration. *Saldana*, 27 F.4th at 687. On 10 March 2020, HHS

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3. *Hudak* is one of several federal cases considering whether the PREP Act "completely preempts" state law. 58 F.4th at 857; *see also*, *e.g.*, *Saldana v. Glenhaven Healthcare LLC*, 27 F.4th 679, 687 (9th Cir. 2022); *Solomon v. St. Joseph Hosp.*, 62 F.4th 54, 60 (2d Cir. 2023). While these cases provide helpful background about the PREP Act, they do not address the immunity issue before this Court. They instead discuss a federal jurisdictional doctrine misleadingly called "complete preemption." As such, they do not apply to this case. *See Politella v. Windham Se. Sch. Dist.*, 325 A.3d 88, 97 (Vt. 2024) ("[The plaintiffs] point to various federal decisions concluding that the PREP Act does not preempt state-law claims. These cases are inapposite because they address the question of whether the PREP Act creates federal-question subject-matter jurisdiction over certain health-care-related claims."); *see also Hudak*, 58 F.4th at 852 (distinguishing between complete and "ordinary" preemption).

Secretary Alex Azar issued a declaration identifying the COVID-19 outbreak as a public health emergency and activating the Act's immunity provision. *Declaration Under the Public Readiness and Emergency Preparedness Act for Medical Countermeasures Against COVID-19*, 85 Fed. Reg. 15198, 15198–15203 (Mar. 17, 2020) [hereinafter *Secretary's Declaration*]. Relevant here, the declaration identified "[a]ny vaccine[ ] used to treat, diagnose, cure, prevent, or mitigate COVID-19" as a covered countermeasure. *Id.* at 15202.

The trial court agreed with defendants' arguments about the PREP Act and dismissed the suit. Plaintiffs appealed to the Court of Appeals. There plaintiffs abandoned their federal constitutional arguments but contended that the PREP Act did not cover battery and violations of their rights under Article I, Sections 1, 13, and 19 of the state constitution—specifically, Happel's right to control her child's upbringing and both plaintiffs' right to Smith's bodily autonomy. The lower court unanimously affirmed, holding that the PREP Act's "extremely broad" immunity shielded defendants from liability on all of plaintiffs' claims. *Happel v. Guilford Cnty. Bd. of Educ.*, 292 N.C. App. 563, 569, 899 S.E.2d 387, 392 (2024).

In support of its decision, the Court of Appeals primarily relied on three cases from other jurisdictions applying PREP Act immunity to similar factual scenarios. *Id.* at 570, 899 S.E.2d at 393. First, the court looked at *Parker v. St. Lawrence County Public Health Department*, 954 N.Y.S.2d 259, 260–61 (N.Y. App. Div. 2012), a pre-COVID case about a nurse who negligently administered the H1N1 influenza vaccine to a minor without parental consent. *Happel*, 292 N.C. App. at 570, 899 S.E.2d at 393. In *Parker*, a New York state appellate court held that the PREP Act prevented the child's parents from bringing state law claims for negligence and battery. 954 N.Y.S.2d at 260–61.

Next, the Court of Appeals cited *Cowen v. Walgreen Co.*, an unreported federal case from the Northern District of Oklahoma. *Happel*, 292 N.C. at 570, 899 S.E.2d at 393. The plaintiff in *Cowen* went to a Walgreens pharmacy intending to receive an influenza vaccine; instead, the employee accidentally gave her a COVID-19 vaccine. No. 22-CV-157, slip op. at 2–3 (N.D. Okla. Dec. 13, 2022) (unreported), *appeal dismissed*, No. 23-5003, 2023 WL 4419805 (10th Cir. June 5, 2023). Although the plaintiff sued Walgreens for negligence and vicarious liability, the court held that the PREP Act preempted her claims. *Id.* at 6. It therefore granted the company's motion to dismiss. *Id.*

Finally, the Court of Appeals examined *M.T. ex rel. M.K. v. Walmart Stores, Inc.*, 528 P.3d 1067, 1070 (Kan. Ct. App. 2023), a decision from

Kansas's intermediate appellate court. *Happel*, 292 N.C. App. at 570–71, 899 S.E.2d at 393. The plaintiff in *M.T.* sued Walmart and one of its pharmacists for administering a COVID-19 vaccine to her fifteen-year-old daughter without parental consent. *M.T.*, 528 P.3d at 1071. The teenager herself had told the pharmacist that she wanted to be vaccinated, and the pharmacist mistakenly advised her that Kansas law did not require parental consent for fifteen-year-olds. *Id. See generally* Kan. Stat. Ann. § 38-123(b) (2021) (requiring parental consent for minors under the age of *sixteen*). When the mother found out, she brought state law claims including battery, negligence, violation of parental rights, and invasion of privacy. *M.T.*, 528 P.3d at 1071. She did not, however, bring constitutional claims. *Id.* at 1084. Like *Parker* and *Cohen*, *M.T.* held that the PREP Act fully immunized the defendants from suit. *Id.*

The Court of Appeals concluded that these three cases provided "instructive [and] persuasive" support for dismissing plaintiffs' case. *Happel*, 292 N.C. App. at 571, 899 S.E.2d at 393. The court explained that the PREP Act's broad scope "constrained" and "[b]ound" its decision. *Id.* at 571, 899 S.E.2d at 394. "Wisely or not, the plain language of the PREP Act includes claims of battery and violations of state constitutional rights within the scope of its immunity, and it therefore shields [d]efendants from liability for [p]laintiffs' claims." *Id.* at 569, 899 S.E.2d at 392. In closing, the Court of Appeals acknowledged, "We are not to question the wisdom or policy of the statute under consideration, but should enforce it as it is written, unless we conclude that there is an unmistakable conflict with the organic law." *Id.* at 571, 899 S.E.2d at 394 (quoting *Faison v. Bd. of Comm'rs*, 171 N.C. 411, 415, 88 S.E. 761, 763 (1916)).

Plaintiffs filed a petition for discretionary review with this Court, proposing five issues for our consideration. *See generally* N.C.G.S. § 7A-31 (2023). We allowed the petition as to the first issue only: whether the lower courts erred by concluding that the PREP Act preempted plaintiffs' claims in their entirety.

II. Analysis

We conduct our review de novo, "view[ing] the allegations as true and the supporting record in the light most favorable to the non-moving party." *United Daughters*, 383 N.C. at 624, 881 S.E.2d at 43 (quoting *Mangum v. Raleigh Bd. of Adjustment*, 362 N.C. 640, 644, 669 S.E.2d 279, 283 (2008)). This standard of review applies "regardless of whether the complaint is dismissed for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) or for failure to state a claim upon which relief could be granted pursuant to Rule 12(b)(6)." *Id.*

For purposes of this opinion, we assume without deciding that plaintiffs present valid "*Corum* claims" for violations of their constitutional rights. *See generally Corum v. Univ. of N.C.*, 330 N.C. 761, 413 S.E.2d 276 (1992). "*Corum* offers a common law cause of action when existing relief does not sufficiently redress a violation of a particular constitutional right." *Kinsley v. Ace Speedway Racing, Ltd.*, 904 S.E.2d 720, 725 (N.C. 2024) (quoting *Askew v. City of Kinston*, 902 S.E.2d 722, 728 (N.C. 2024)). *Corum* claims have three elements:

> First, the complaint must allege that a state actor violated the claimant's state constitutional rights. Second, "the claim must be colorable," meaning that the claim "must present facts sufficient to support an alleged violation of a right protected by the [s]tate [c]onstitution." Third, there must be no other "adequate state remedy" for this alleged constitutional violation.

Id. at 726 (citations omitted) (quoting *Deminski ex rel. C.E.D. v. State Bd. of Educ.*, 377 N.C. 406, 413, 858 S.E.2d 788, 793–94 (2021)).

A. Fundamental Rights Under the State Constitution

Plaintiffs assert that this case implicates a pair of fundamental rights implicitly protected by the state constitution's Law of the Land Clause: Happel's parental right to control the upbringing of her son and plaintiffs' shared right to Smith's bodily autonomy.[4] The Law of the Land Clause, found at Article I, Section 19, provides, "No person shall be taken, imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner deprived of his life, liberty, or property, but by the law of the land." N.C. Const. art. I, § 19. "The Law of the Land Clause guarantees the famous trinity of life, liberty, and property. It traces its antecedents back to the Magna Carta, and it has existed in similar form in all three iterations of our constitution." *McKinney v. Goins*, 911 S.E.2d 1, 11 (N.C. 2025) (citations and quotations omitted).

We consider the Law of the Land Clause our State's analogue to the Due Process Clause of the Fourteenth Amendment. *Halikierra Cmty. Servs. LLC v. N.C. Dep't of Health & Hum. Servs.*, 385 N.C. 660, 663, 898 S.E.2d 685, 688–89 (2024). Like the Due Process Clause, which encompasses a limited category of non-enumerated "substantive due

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4. A parent generally shares in her child's rights. *Cf. Parham v. J.R.*, 442 U.S. 584, 600, 99 S. Ct. 2493, 2503 (1979) ("Normally, however, since [the child's] interest is inextricably linked with the parents' interest in and obligation for the welfare and health of the child, the private interest at stake is a combination of the child's and parents' concerns.").

process" rights, *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2246 (2022), the "libert[ies]" protected under our Law of the Land Clause include a few fundamental rights not mentioned elsewhere in the constitution, *see N.C. Dep't of Transp. v. M.M. Fowler, Inc.*, 361 N.C. 1, 4–5, 637 S.E.2d 885, 889 (2006).

Both this Court and the Supreme Court of the United States "tread carefully before recognizing a fundamental liberty interest" implicit in the due process clauses of our respective constitutions. *See Standley v. Town of Woodfin*, 362 N.C. 328, 332, 661 S.E.2d 728, 730 (2008); *accord Dobbs*, 142 S. Ct. at 2247. We do so in recognition that the legislature, not the judiciary, is the appropriate branch for making policy. When courts venture beyond the constitutional text in search of implied rights, they risk "usurp[ing] authority . . . entrust[ed] to the people's elected representatives." *Dobbs*, 142 S. Ct. at 2247. In other words, "[w]e are designed to be a government of the people, not of the judges." *Harper v. Hall*, 384 N.C. 292, 299, 886 S.E.2d 393, 399 (2023).

Accordingly, the relevant test asks whether the asserted right is "objectively, deeply rooted in this Nation's [or State's] history and tradition and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if [it] were sacrificed." *Standley*, 362 N.C. at 331, 661 S.E.2d at 730 (quoting *Washington v. Glucksberg*, 521 U.S. 702, 720–21, 117 S. Ct. 2258, 2268 (1997)); *cf. Johnston v. Rankin*, 70 N.C. 550, 555 (1874) (concluding that the Law of the Land Clause implicitly protects the right to just compensation for takings of private property because "the principle is so grounded in natural equity[ ] that it has never been denied to be a part of the law of North Carolina"). By conducting this stringent inquiry, we "guard against the natural human tendency to confuse [the constitutional meaning of 'liberty'] with our own ardent views about the liberty that [the people] should enjoy." *Dobbs*, 142 S. Ct. at 2247.

Perhaps unsurprisingly, the Supreme Court of the United States recognizes "[p]recious few rights" as "fundamental in nature." *Standley*, 362 N.C. at 332, 661 S.E.2d at 730. The Due Process Clause's implicit protections "have for the most part been accorded to matters relating to marriage, family, procreation, and the right to bodily integrity." *Albright v. Oliver*, 510 U.S. 266, 272, 114 S. Ct. 807, 812 (1994). *But see Dobbs*, 142 S. Ct. at 2242 (recognizing that "any such right must be deeply rooted in . . . history and tradition and implicit in the concept of ordered liberty" (citations and quotations omitted)). The right of a parent to make medical decisions on her child's behalf fits comfortably within this narrow framework, as does the right to refuse forced, nonmandatory medical

treatment.[5] Indeed, the Supreme Court has consistently recognized and affirmed their existence under the Due Process Clause for decades. We therefore consider those decisions instructive in construing the scope of the rights plaintiffs claim under our Law of the Land Clause. *See Bacon v. Lee*, 353 N.C. 696, 721, 549 S.E.2d 840, 856–57 (2001) (explaining that federal opinions about the Due Process Clause offer persuasive value for this Court's interpretation of the Law of the Land Clause). We address plaintiffs' asserted interests in turn.

1. Parental Right to Control

First, we agree that the state constitution protects a parent's right to control her child's upbringing, including her right to make medical decisions on her child's behalf. At this point, there can be little doubt that our State and Nation have each fiercely guarded parental rights and consider them integral to the preservation of liberty and justice. The Supreme Court of the United States has unequivocally recognized that parents possess a fundamental right to dictate their children's upbringing. *See*, *e.g.*, *Troxel v. Granville*, 530 U.S. 57, 66, 120 S. Ct. 2054, 2060 (2000) (collecting cases). Given our State's own longstanding protection of parental rights, *see*, *e.g.*, *Atkinson v. Downing*, 175 N.C. 244, 246, 95 S.E. 487, 488 (1918), we see no reason to interpret our Law of the Land Clause differently here.

"It is through the family that we inculcate and pass down many of our most cherished values, [both] moral and cultural." *Moore v. City of E. Cleveland*, 431 U.S. 494, 503–04, 97 S. Ct. 1932, 1938 (1977). Parents, as the traditional heads of the family unit, spearhead that process. *See In re Watson*, 157 N.C. 340, 354, 72 S.E. 1049, 1054 (1911) ("It is to be remembered that the public has a paramount interest in the virtue and knowledge of its members . . . . That parents are ordinarily [e]ntrusted with [their children's education] is because it can seldom be put into better hands . . . ." (quoting *Ex parte Crouse*, 4 Whart. 11, 11 (Pa. 1839))). The right to control the upbringing of one's own child is deeply rooted in "[t]he history and culture of Western civilization" and is "now established beyond debate as an enduring American tradition." *Troxel*, 530 U.S. at 66, 120 S. Ct. at 2060 (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 232, 92 S. Ct. 1526, 1541–42 (1972)). The Supreme Court therefore reads the Due Process Clause to protect "broad parental authority over minor children," *id.* (quoting *Parham*, 442 U.S. at 602, 99 S. Ct. at 2504), and "reject[s] any notion that a child is 'the mere creature of the State,' "

5. By "nonmandatory," we mean not otherwise lawfully required.

Parham, 442 U.S. at 602, 99 S. Ct. at 2504 (quoting *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 535, 45 S. Ct. 571, 573 (1925)). The Court has gone so far as to describe "the interest of parents in the care, custody, and control of their children" as "perhaps the oldest of the fundamental liberty interests" it has recognized. *Troxel*, 530 U.S. at 65, 120 S. Ct. at 2060 (citing *Meyer v. Nebraska*, 262 U.S. 390, 399, 401, 43 S. Ct. 625, 626–27 (1923)). "In light of this extensive precedent, it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children." *Id.* at 66, 120 S. Ct. at 2060.

This Court affirmed "the paramount right of parents to custody, care, and nurture of their children" even earlier than the Supreme Court of the United States. *Petersen v. Rogers*, 337 N.C. 397, 402, 445 S.E.2d 901, 904 (1994). As far back as the early twentieth century, this Court explained that North Carolina law "fully recognized" the natural and substantive rights of parents to "the custody and control of their infant children." *Atkinson*, 175 N.C. at 246, 95 S.E. at 488. These rights "grow[ ] out of the parent's duty to provide for their helpless offspring" and are "grounded in the strongest and most enduring affections of the human heart." *In re Jones*, 153 N.C. 312, 315, 69 S.E. 217, 218 (1910).

Although parental rights are not absolute, government interference is not justified "except when the good of the child clearly requires it." *Atkinson*, 175 N.C. at 246, 95 S.E. at 488. "The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions." *Parham*, 442 U.S. at 602, 99 S. Ct. at 2504. Parents presumably act in the best interests of their children, and parents, not the State, presumably know what those best interests are.

Defendants argue that since our parental rights caselaw only covers literal custody and control, it does not apply to the sort of parental right asserted in this case—the right to consent on the child's behalf. Contrary to defendants' arguments, our precedents expressly contemplate that parental rights extend further. This Court's decision in *Spitzer v. Lewark*, for example, answered a narrow question: whether competent evidence supported awarding custody to a mother with a history of serious mental illness. 259 N.C. 50, 52, 129 S.E.2d 620, 621 (1963). But in upholding the custody decision, this Court also explained, "As a general rule at common law, and in this State, parents have the natural and legal right to the custody, companionship, *control*, *and bringing up* of their infant children, and the same being a natural and substantive right may not lightly be denied or interfered with by action of the courts." *Id.* at

53–54, 129 S.E.2d at 623 (emphasis added); *cf. Adams v. Tessener*, 354 N.C. 57, 60, 550 S.E.2d 499, 501 (2001) ("[A] parent enjoys a fundamental right 'to make decisions concerning the care, custody, and control' of his or her children under the Due Process Clause of the Fourteenth Amendment to the United States Constitution." (quoting *Troxel*, 530 U.S. at 66, 120 S. Ct. at 2060)).

Indeed, the constitutional right to full "custody and control" over one's minor children would ring hollow if it did not include the right to consent on the child's behalf, as well as the right to seek a constitutional remedy when the State disregards the absence of that consent. *Cf. In re Stumbo*, 357 N.C. 279, 287, 582 S.E.2d 255, 260 (2003) ("[S]o long as a parent adequately cares for his or her children (i.e., is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children." (alteration in original) (quoting *Troxel*, 530 U.S. at 68–69, 120 S. Ct. at 2061)). Our state constitution and caselaw have long implied the existence of the precise right plaintiffs claim here. We directly recognize it today.

2. Right to Bodily Integrity

Next, we examine whether the Law of the Land Clause confers a right to bodily autonomy. Although we do not construe this right as broadly as plaintiffs argue, we agree that the Law of the Land Clause protects the right to bodily integrity, which we define as the right of a competent person to refuse forced, nonmandatory medical treatment.[6] *See Glucksberg*, 521 U.S. at 725, 117 S. Ct. at 2270 ("The right [to refuse medical treatment is] *not simply deduced from abstract concepts of personal autonomy*." (emphasis added)). Our conclusion aligns with the Supreme Court's understanding of the bodily integrity right under the Due Process Clause, which traces its roots to common-law battery. *See Cruzan*, 497 U.S. at 278, 110 S. Ct. at 2851 (stating that previous Supreme Court cases implied a right to refuse medical treatment); *Vacco v. Quill*, 521 U.S. 793, 807, 117 S. Ct. 2293, 2301 (1997) (explaining

6. When litigants assert the right to bodily integrity under the Federal Constitution, they sometimes make First Amendment religious freedom arguments. *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 270, 110 S. Ct. 2841, 2847 (1990). Similarly, plaintiffs' complaint here also cites Article I, Section 13 of the state constitution, which guarantees that "no human authority shall, in any case whatsoever, control or interfere with the rights of conscience." N.C. Const. art. I, § 13. Because we hold that the Law of the Land Clause independently protects the interest plaintiffs assert in this case, we do not address its relationship with Article I, Section 13.

that the reasoning of *Cruzan*, which assumed the existence of a federal constitutional right to refuse medical treatment, was grounded in "well-established, traditional rights to bodily integrity and freedom from unwanted touching"); *see also*, *e.g.*, *Rochin v. California*, 342 U.S. 165, 174, 72 S. Ct. 205, 210 (1952).

"At common law, even the touching of one person by another without consent and without legal justification was a battery." *Cruzan*, 497 U.S. at 269, 110 S. Ct. at 2846 (citing W. Page Keeton et al., *Prosser & Keeton on the Law of Torts* 39–42 (5th ed. 1984)). From that high standard developed the American tort law rule that medical treatment generally requires the patient's informed consent, which itself led to judicial recognition of the fundamental right to bodily integrity under the Federal Constitution. *Id.* This constitutional right includes a competent person's ability to refuse "[t]he forcible injection of medication" into his own body, *Washington v. Harper*, 494 U.S. 210, 229, 110 S. Ct. 1028, 1041 (1990), a natural conclusion given the common-law tort backdrop from which the right emerged.

Although the constitutional right to bodily integrity originated in common-law battery, the two are not equivalent. The constitutional right "is infringed by a serious, as distinct from a nominal or trivial, battery. The qualification is important. Because any offensive touching (unless consented to, which removes the offense) is a battery, most batteries are too trivial to amount to deprivations of liberty." *Alexander v. DeAngelo*, 329 F.3d 912, 916 (7th Cir. 2003) (citations omitted). Fundamental constitutional liberties are "not a 'font of tort law,' " *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 848, 118 S. Ct. 1708, 1718 (1998) (quoting *Paul v. Davis*, 424 U.S. 693, 701, 96 S. Ct. 1155, 1160–1161 (1976)), and the Supreme Court has "rejected the lowest common denominator of customary tort liability as any mark of sufficiently shocking conduct" to support a violation of constitutional rights, *id.* at 848–49, 118 S. Ct. at 1718; *see also Rubek v. Barnhart*, 814 F.2d 1283, 1285 (8th Cir. 1987) (explaining that it is "well established that not every violation of state tort or criminal assault laws . . . results in a constitutional violation"). Nonconsensual medical treatment, however, satisfies these criteria: "The right to be free of state-sponsored invasion of a person's bodily integrity is protected by the [constitutional] guarantee of due process." *Guertin v. Michigan*, 912 F.3d 907, 921 (6th Cir. 2019) (quoting *In re Cincinnati Radiation Litig.*, 874 F. Supp. 796, 810–11 (S.D. Ohio 1995)).

Nonetheless, the bodily integrity right is not absolute. Courts across the United States have overwhelmingly held that the fundamental right to refuse medical treatment does not imply a fundamental right

to disregard a vaccine mandate. *See, e.g.*, *Children's Health Def., Inc. v. Rutgers, the State Univ. of N.J.*, 93 F.4th 66, 78 n.25 (3d Cir. 2024) (collecting cases), *cert. denied*, 144 S. Ct. 2688 (2024). Litigants in these cases frequently attempt to invoke the broad right "to refuse medical treatment" articulated in *Cruzan*, a case that considered the right to terminate life support. *Id.* at 79 (quoting *Cruzan*, 497 U.S. at 277, 110 S. Ct. at 2851). But courts instead continue to look to the Supreme Court's much older decision in *Jacobson v. Massachusetts*, 197 U.S. 11, 25 S. Ct. 358 (1905), which sustained a criminal conviction for refusing a smallpox vaccine. *Children's Health Def.*, 93 F.4th at 78. These courts reiterate *Jacobson*'s acknowledgement that " '[t]here are manifold restraints to which every person is necessarily subject for the common good,' including a community's 'right to protect itself against an epidemic of disease which threatens the safety of its members.' " *Id.* at 78–79 (alteration in original) (citations omitted) (quoting *Jacobson*, 197 U.S. at 26–27, 25 S. Ct. at 361).

Like the Supreme Court itself, courts confronting this issue distinguish *Cruzan* from *Jacobson* by reasoning that public welfare may sometimes justify vaccination mandates; purely individualized medical decisions, on the other hand, do not implicate such concerns. *See id.* at 79–80 ("*Cruzan* . . . explained *Jacobson* as a case where 'an individual's liberty interest in declining an unwanted smallpox vaccine' was outweighed by 'the State's interest in preventing disease.' " (quoting *Cruzan*, 497 U.S. at 278, 110 S. Ct. at 2851)). This Court issued a pair of analogous decisions at the start of the twentieth century. First, in *State v. Hay*, it held that local governments could enact ordinances requiring vaccination and impose criminal punishment for noncompliance. 126 N.C. 999, 1001, 35 S.E. 459, 460 (1900). Four years later, in *Hutchins v. School Committee*, it reasoned that schools could condition student admission on vaccination status. 137 N.C. 68, 71, 49 S.E. 46, 47 (1904).

Those cases, however, do not apply to the particular constitutional claims before us today. Plaintiffs do not argue that they have a categorical right to disobey a vaccine mandate. Rather, their argument is essentially about the existence of a right to resist an unwanted, nonmandatory medical touching that in this instance just so happened to be a vaccine. Indeed, they write in their opening brief: "[Plaintiffs' battery and state constitutional] claims would result regardless of what substance had been administered to [Smith]. It matters not whether it was a COVID-19 vaccine, a chickenpox vaccine, an [a]spirin, or open-heart surgery."

Tellingly, defendants do not attempt to justify the workers' behavior, nor do they claim Smith's vaccination was necessary to protect the

health of his football teammates, the school population, or the general public. Instead, defendants simply contend that they are not *liable* for this action, whether because of PREP Act immunity, the principal-agent relationship, or another legal theory. Both sides acknowledge that defendants only required Smith to undergo testing or be otherwise cleared by a medical professional, a requirement with which he dutifully complied. The parties also recognize that defendants' policy required parental consent as a condition of vaccination and that parental consent was not given here.

Despite the ultimate holdings of *Jacobson*, *Hay*, and *Hutchins*, each stressed the importance of individual liberty and justified its restraints by emphasizing that the liberty of one person was no more valuable than the liberty of others. *See Jacobson*, 197 U.S. at 26, 25 S. Ct. at 361 ("Real liberty for all could not exist under the operation of a principle which recognizes the right of each individual person to use his own, . . . regardless of the injury that may be done to others."); *Hay*, 126 N.C. at 1000, 35 S.E. at 460 ("All government is a necessary evil. It is, however, a much lesser evil than the intolerable state of things which would exist if there were no government to bridle the absolute right of every man to do that which seems right in his own eyes . . . ."); *Hutchins*, 137 N.C. at 71–72, 49 S.E. at 47 ("That [the plaintiff's daughter] cannot safely be vaccinated may make it preferable that she herself should run the risk of taking the smallpox, but is no reason that the children of the public school should be exposed to like risk . . . ."). Those public good rationales are glaringly absent from this case.

Plaintiffs assert a straightforward right to refuse forced, nonmandated medical treatment, a right that springs from the common-law right to refuse unwanted touching, *see Cruzan*, 497 U.S. at 269, 110 S. Ct. at 2846, and falls squarely within the boundaries of our constitution's Law of the Land Clause.[7] Accordingly, we do not apply *Jacobson*, *Hay*, and *Hutchins*. *Cf. Calvary Chapel Dayton Valley v. Sisolak*, 140 S. Ct. 2603,

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7. Furthermore, both this Court and the Supreme Court of the United States have recognized that the government's use of a needle to make "a compelled physical intrusion beneath [a person's] skin and into his veins" is an inherently invasive act warranting constitutional protection in the context of searches and seizures. *Missouri v. McNeely*, 569 U.S. 141, 148, 133 S. Ct. 1552, 1558 (2013); *see, e.g.*, *State v. Burris*, 289 N.C. App. 535, 538, 890 S.E.2d 539, 542 (2023), *aff'd*, 386 N.C. 600, 906 S.E.2d 465 (2024) (per curiam). The Supreme Court considers this intrusion so severe that police officers collecting evidence from suspected drunk drivers must ordinarily obtain a warrant before drawing blood, even though a warrant is not needed to compel the "significantly less intrusive" alternative of a breath test. *Birchfield v. North Dakota*, 579 U.S. 438, 475–76, 136 S. Ct. 2160, 2185

2608 (2020) (Kavanaugh, J., dissenting) ("[I]t is a mistake to take language in *Jacobson* as the last word on what the Constitution allows public officials to do during the COVID-19 pandemic. Language in *Jacobson* must be read in context . . . ."). We conclude that the Law of the Land Clause protects both a parent's right to control her child's upbringing and the right to bodily integrity, defined as the right of a competent person to refuse forced and nonmandatory medical treatment.

B. Federal Preemption of State Law

Nonetheless, if defendants are correct that Congress fully barred plaintiffs' claims, the state constitution would have no practical effect on this case's outcome. *See* U.S. Const. art. VI, cl. 2; N.C. Const. art. I, § 5; *see also DTH Media Corp. v. Folt*, 374 N.C. 292, 306, 841 S.E.2d 251, 261 (2020) ("Generally, if a state law conflicts with a federal law that regulates the same conduct, the federal law prevails under the doctrine of preemption."). We must therefore determine to what extent Congress preempted state law when it passed the PREP Act. To do so, we consider North Carolina's place in this Nation's federalist system of government.

1. Overview of Federal Preemption and Related Principles

"Federalism was our Nation's own discovery. The Framers split the atom of sovereignty. It was the genius of their idea that our citizens would have two political capacities, one state and one federal, each protected from incursion by the other." *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838, 115 S. Ct. 1842, 1872 (1995) (Kennedy, J., concurring). "It is appropriate to recall these origins, which instruct us as to the nature of the two different governments created and confirmed by the [Federal] Constitution." *Id.* at 838–39, 115 S. Ct. at 1872.

(2016); *see also Mitchell v. Wisconsin*, 139 S. Ct. 2525, 2543–44 (2019) (Sotomayor, J., dissenting) (exploring the rationales behind the Supreme Court's precedent on this subject).

Of course, the constitutional protection against compelled blood draws is not equivalent to the constitutional right to refuse medical treatment. But the Supreme Court frames both around the concept of bodily integrity. *Compare McNeely*, 569 U.S. at 148, 133 S. Ct. at 1558 ("Such an invasion of bodily integrity implicates an individual's most personal and deep-rooted expectations of privacy." (internal quotation omitted)), *with Cruzan*, 497 U.S. at 269, 110 S. Ct. at 2846 ("This notion of bodily integrity has been embodied in the requirement that informed consent is generally required for medical treatment."). Moreover, when the Supreme Court first recognized the right to refuse forced intravenous medication, it cited an early case about warrantless blood draws. *See Harper*, 494 U.S. at 229, 110 S. Ct. at 1041 (citing *Schmerber v. California*, 384 U.S. 757, 772, 86 S. Ct. 1826, 1836–37 (1966)).

In 1789, the American people memorialized this power-sharing relationship upon ratifying the Federal Constitution. The year before ratification, James Madison explained how the structure would work:

> The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. . . . The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.

The Federalist No. 45, at 289 (James Madison) (Clinton Rossiter ed., 1961); *cf.* U.S. Const. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."). Thus, under the Federal Constitution, our State often exercises legal authority beyond the purview of the federal government. This Court, for instance, is the ultimate interpreter of our state constitution. *State v. Tirado*, 911 S.E.2d 51, 59 (N.C. 2025).

But North Carolina does not have free rein to ignore the federal government altogether. The Framers clearly intended federal law to trump conflicting state law, even state constitutional law. The Supremacy Clause of Article VI to the Federal Constitution provides, "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; . . . shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any state to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2; *see also* N.C. Const. art. I, § 5 ("Every citizen of this State owes paramount allegiance to the Constitution and government of the United States, and no law or ordinance of the State in contravention or subversion thereof can have any binding force."). Under the Supremacy Clause, Congress may enact laws explicitly or implicitly preempting state law. *See Va. Uranium, Inc. v. Warren*, 139 S. Ct. 1894, 1901 (2019).

Given the strong language the Framers used to emphasize both the sovereignty of the States and the supremacy of federal law, the Supreme Court of the United States has grappled with the boundaries of preemption for centuries. *See, e.g.*, *McColloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 427 (1819); *Va. Uranium*, 139 S. Ct. at 1900. The Supreme Court's modern precedent considers congressional purpose "the ultimate touchstone" in every preemption analysis. *Wyeth v. Levine*, 555 U.S. 555, 565,

129 S. Ct. 1187, 1194 (2009) (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485, 116 S. Ct. 2240, 2250 (1996)). Importantly, these cases establish a "starting presumption that Congress does not intend to supplant state law," *N.Y. State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 654, 115 S. Ct. 1671, 1676 (1995), and assume "that the historic police powers of the States are not to be superseded by [a federal statute] unless that was the clear and manifest purpose of Congress," *Altria Grp., Inc. v. Good*, 555 U.S. 70, 77, 129 S. Ct. 538, 543 (2008) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S. Ct. 1146, 1152 (1947)). "That assumption applies with particular force when Congress has legislated in a field traditionally occupied by the States." *Id.*[8]

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8. The dissent proclaims that the Supreme Court's "more recent precedents clarify that such presumptions do not apply where the act contains an express preemption clause" and that prior decisions applying that presumption, like *Altria*, are "outdated." To the contrary, the scope of the lone Supreme Court case the dissent cites, *Puerto Rico v. Franklin California Tax-Free Trust*, 579 U.S. 115, 125, 136 S. Ct. 1938, 1946 (2016), is an open question. *See, e.g.*, *Cal. Rest. Ass'n v. City of Berkeley*, 89 F.4th 1094, 1108 (9th Cir. 2024) (O'Scannlain, J., concurring) ("[T]he law [after *Franklin*] remains troubling and confused—beset by tensions in Supreme Court precedents, disagreement among the circuits, and important practical questions still unanswered."). *Franklin* did not overrule prior cases applying the presumption to express preemption cases. *Id.* at 1110. Nor has the Supreme Court cited *Franklin* for that principle in the nearly nine years since its issuance.

Even the circuits that have read *Franklin* as dispensing altogether with the presumption in express preemption cases have acknowledged this uncertainty. *See, e.g.*, *Air Evac EMS, Inc. v. Cheatham*, 910 F.3d 751, 762 n.1 (4th Cir. 2018) ("The Supreme Court has made somewhat varying pronouncements on presumptions in express preemption cases. . . . We think the best course is simply to follow as faithfully as we can the wording of the express preemption provision, without applying a presumption one way or the other."); *Dialysis Newco, Inc. v. Cmty. Health Sys. Grp. Health Plan*, 938 F.3d 246, 258 (5th Cir. 2019) (collecting cases and recognizing the circuit split).

When it comes to this case, we find the logic of the Third Circuit compelling:

> We disagree with [the defendant]'s assertion that "any presumption against express preemption no longer exists." [The defendant] relies on [*Franklin*,] a Supreme Court case that addressed whether the federal Bankruptcy Code's express preemption provision preempts a Puerto Rico statute, but that case did not address preemption of claims invoking historic state regulation of matters of health and safety, such as the products liability claims at issue here. As that case does not directly control here, we leave to the Supreme Court the prerogative of overruling its own decisions and continue to apply the presumption against preemption to claims, like those in this case, that invoke the historic police powers of the States.

In cases of express preemption, like the PREP Act, the inquiry must begin by "focus[ing] on the plain wording of the clause, which necessarily contains the best evidence of Congress'[s] pre-emptive intent." *Sprietsma v. Mercury Marine*, 537 U.S. 51, 62–63, 123 S. Ct. 518, 526 (2002) (quoting *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664, 113 S. Ct. 1732, 1737 (1993)). "[W]hen the text of a pre-emption clause is susceptible of more than one plausible reading, courts ordinarily accept the reading that disfavors pre-emption." *Altria*, 555 U.S. at 77, 129 S. Ct. at 543 (internal citations omitted). "[T]here is no factual basis for [assuming] . . . that every policy seemingly consistent with federal statutory text has necessarily been authorized by Congress and warrants pre-emptive effect." *Wyeth*, 555 U.S. at 602, 129 S. Ct. at 1216 (Thomas, J., concurring in judgment). "Instead, our federal system in general, and the Supremacy Clause in particular, accords pre-emptive effect to only those policies that are actually authorized by and effectuated through the statutory text." *Id.*

2. Application to the PREP Act

With these interpretative principles in mind, we consider whether the PREP Act preempts claims brought under our state constitution. As explained at the outset of our opinion, Congress passed the PREP Act to expedite the development, distribution, and administration of responsive measures to ongoing public health emergencies as defined by the contours of the HHS Secretary's emergency declaration. *See Hudak*, 58 F.4th at 849; 42 U.S.C. § 247d-6d(b)(1) ("[T]he Secretary may make a declaration . . . stating that [the immunity] is in effect *with respect to the activities so recommended*." (emphasis added)); *Saldana*, 27 F.4th at 687 (explaining that the Secretary "controls the scope" of the PREP Act's immunity).[9]

Shuker v. Smith & Nephew, PLC, 885 F.3d 760, 771 n.9 (3d Cir. 2018) (citations, quotations, and alterations omitted); *see also Lupian v. Joseph Cory Holdings LLC*, 905 F.3d 127, 131, 131 n.5 (3d Cir. 2018); *cf. King v. Town of Chapel Hill*, 367 N.C. 400, 406, 758 S.E.2d 364, 369 (2014) (recognizing the State's historic police power "to protect or promote the health, morals, order, safety, and general welfare of society" (quoting *Standley*, 362 N.C. at 333, 661 S.E.2d at 731)).

9. The emergency declaration here strongly implies—if not outright requires—that immunity only apply to situations in which the covered persons attempted to comply with the law:

> I[, HHS Secretary Azar,] have determined that liability immunity is afforded to Covered Persons *only for Recommended Activities involving Covered Countermeasures that are related to*:

The PREP Act's immunity provision reads:

> Subject to the other provisions of this section, a covered person shall be immune from suit and liability under Federal and State law with respect to all claims for loss caused by, arising out of, relating to, or resulting from the administration to or the use by an individual of a covered countermeasure . . . .

42 U.S.C. § 247d-6d(a)(1). Thus, there are essentially four elements to the PREP Act's immunity: (1) a covered person, (2) a claim for loss, (3) the administration or use of a covered countermeasure, and (4) a causal relationship between the administration or use of the covered countermeasure and the claim for loss. *See* Kevin J. Hickey, Cong. Rsch. Serv., LSB10443, *The PREP Act and COVID-19*, *Part 1: Statutory Authority to Limit Liability for Medical Countermeasures* 2–3 [hereinafter *The PREP Act and COVID-19*]. Plaintiffs dispute at least two of these elements here. First, is the administration or use of covered countermeasures in a manner that violates fundamental constitutional rights subject to the PREP Act's protections? And second, are plaintiffs' claims properly considered claims "for loss"?

a. Immunization of Unconstitutional Conduct

As an initial matter, the ambiguity of the PREP Act's language requires us to consider whether Congress intended to include even

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> (a) Present or future federal contracts, cooperative agreements, grants, other transactions, interagency agreements, memoranda of understanding, or other federal agreements; or
>
> (b) *Activities authorized in accordance with the public health and medical response of the Authority Having Jurisdiction* to prescribe, administer, deliver, distribute or dispense the Covered Countermeasures following a Declaration of an emergency.
>
> As used in this Declaration . . . [t]he Authority Having Jurisdiction means the public agency or its delegate that has legal responsibility and authority for responding to an incident, based on political or geographical (e.g., city, county, tribal, state, or federal boundary lines) or functional (e.g., law enforcement, public health) range or sphere of authority.

Secretary's Declaration at 15202 (emphases added); *see also id.* at 15201 (defining "Recommended Activities" as "the manufacture, testing, development, distribution, administration, and use of the Covered Countermeasure").

unconstitutional conduct within the immunity's broad scope. Defendants ask us to adopt this literal reading. Plaintiffs, on the other hand, contend that Congress could not have intended to immunize—indeed, even *incentivize*—unconstitutional conduct.

We agree with plaintiffs. The literalist interpretation defendants urge us to adopt today defies even the broad scope of the statutory text. Under this view, Congress gave carte blanche to *any* willful misconduct related to the administration of a covered countermeasure, including the State's deliberate violation of fundamental constitutional rights, so long as it fell short of causing "death or serious physical injury." *See* 42 U.S.C. § 247d 6d(d)(1) ("[T]he sole exception to the immunity . . . shall be for an exclusive Federal cause of action against a covered person for death or serious physical injury proximately caused by willful misconduct."). The ramifications of this approach are deeply repugnant to our constitutional traditions and the history of this State and Nation. Defendants' interpretation would permit a state actor to vaccinate an unconscious patient, or a public school nurse to deliberately exaggerate the efficacy of a medical treatment to secure a parent's "consent." According to this literalist reading, both scenarios would be covered because neither led to death or serious physical injury. The fundamental and paramount constitutional rights to bodily integrity and parental control would be discarded without second thought. That simply cannot be what Congress intended. Nor could it have been the goal of the HHS Secretary, whose emergency declaration repeatedly predicated immunity on lawful, voluntary conduct. *See Secretary's Declaration* at 15202 ("I have also determined that, for governmental program planners only, liability immunity is afforded only to the extent such program planners obtain Covered Countermeasures through voluntary means . . . ."); *see also id.* (conditioning liability immunity for program planners and qualified persons on their "reasonabl[e] belie[f]" that the recipient was in the geographic area covered by the declaration).

It is similarly unconvincing to insist that the PREP Act merely displaces the remedy for a constitutional violation, as opposed to destroying the underlying right. As this Court has repeated for decades: "Where there is a right, there is a remedy. This is a foundational principle of every common law legal system, including ours." *Washington v. Cline*, 385 N.C. 824, 825, 898 S.E.2d 667, 668 (2024); *see also Von Glahn v. Harris*, 73 N.C. 323, 332 (1875) (calling this a "time-honored maxim"). Constitutional rights and constitutional remedies are inseparable. The judiciary has a sacred duty to ensure it stays that way. *See Corum*, 330 N.C. at 783, 413 S.E.2d at 290 ("It is the state judiciary that has the

responsibility to protect the state constitutional rights of the citizens; this obligation to protect the fundamental rights of individuals is as old as the State.").

Textual interpretation seeks to give statutes their plain and ordinary meaning. Literalism is not proper textual analysis; we must reject readings that defy our common sense. *See, e.g.*, *Biden v. Nebraska*, 143 S. Ct. 2355, 2379 (2023) (Barrett, J., concurring) ("Context also includes common sense, which is another thing that 'goes without saying.' Case reporters and casebooks brim with illustrations of why literalism—the antithesis of context-driven interpretation—falls short.").

Consider an example from our state constitution: Article I, Section 18 states in part that "[a]ll courts shall be open." N.C. Const. art I, § 18. Does this provision require that the courts operate twenty-four hours a day, seven days a week, and 365 days a year? Does it prohibit courts from closing during severe winter storms? Does it grant litigants an unconditional right to file, argue, and appeal frivolous claims? Of course not. Instead, we construe the provision's words in a manner that effectuates their plain purpose: to ensure that North Carolinians always have a forum to seek justice under the law. John V. Orth & Paul Martin Newby, *The North Carolina State Constitution* 65–66 (2d ed. 2013) [hereinafter *State Constitution*] ("Justice would be available to all who were injured; to this end, the courts would be 'open.' The word meant not that the judges would sit round-the-clock or that every spectator would always be welcome, but that legal remedies would not be withheld.").

We must do the same with the PREP Act. Its plain text, like Article I, Section 18, is extremely broad. But it is not unlimited. "In [a preemption analysis], as in any field of statutory interpretation, it is our duty to respect not only what Congress wrote but, as importantly, what it didn't write." *Va. Uranium*, 139 S. Ct. at 1900. We do not believe that the PREP Act intended to effectively erase deeply engrained and fundamental constitutional rights.

b. "All Claims for Loss"

Nevertheless, it is unnecessary to fully develop the foregoing point because plaintiffs have a second convincing argument: that their state constitutional claims are not "claims for loss."[10] Again, we agree.

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10. A few days after oral argument in this case, the District of Utah issued an in-depth opinion considering the kinds of claims that satisfy the PREP Act's causal relationship element. *Dressen v. AstraZeneca AB*, No. 2:24-CV-00337, slip op. at 6–27 (D. Utah Nov. 4, 2024). The court held that the text of the PREP Act did not support extending the

We presume that when the legislature enacts a statute, it intentionally includes and gives meaning to every word therein. *See State v. Geter*, 383 N.C. 484, 491, 881 S.E.2d 209, 214 (2022) (explaining the canon against surplusage); *accord Pulsifer v. United States*, 144 S. Ct. 718, 731–32 (2024). Although Congress could have applied the immunity to "all claims," it instead limited immunity to "all claims *for loss*." 42 U.S.C. § 247d-6d(a)(1) (emphasis added). That choice implies the existence of some subset of claims outside the immunity's reach because they are not "for loss."

The question therefore becomes what "loss" means. In paragraph (a)(2), entitled "Scope of Claims for Loss," the PREP Act itself gives the following definition:

> For purposes of this section, the term "loss" means any type of loss, including—
>
> (i) death;
>
> (ii) physical, mental, or emotional injury, illness, disability, or condition;
>
> (iii) fear of physical, mental, or emotional injury, illness, disability, or condition, including any need for medical monitoring; and
>
> (iv) loss of or damage to property, including business interruption loss.
>
> Each of clauses (i) through (iv) applies without regard to the date of the occurrence, presentation, or discovery of the loss described in the clause.

Id. § 247d-6d(a)(2)(A). Immediately after this definition, the statute explains that:

> [t]he immunity . . . applies to any claim for loss that has a causal relationship with the administration to or use by an individual of a covered countermeasure,

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immunity to contract claims because contract claims, unlike tort claims, are not "*causally* related to the [PREP Act's] specified set of immunized activities." *Id.* at 15. Plaintiffs subsequently filed a memorandum of additional authority with this Court, citing *Dressen*. Because we hold that state constitutional claims are not "claims for loss," however, we do not address whether plaintiffs' claims "relat[e] to" the administration or use of a covered countermeasure. *See* 42 U.S.C. § 247d-6d(a)(1).

> including a causal relationship with the design, development, clinical testing or investigation, manufacture, labeling, distribution, formulation, packaging, marketing, promotion, sale, purchase, donation, dispensing, prescribing, administration, licensing, or use of such countermeasure.

Id. § 247d-6d(a)(2)(B).

"When Congress takes the trouble to define the terms it uses, a court must respect its definitions as 'virtually conclusive.' " *Dep't of Agric. Rural Dev. Rural Hous. Serv. v. Kirtz*, 144 S. Ct. 457, 472 (2024) (quoting *Sturgeon v. Frost*, 587 U.S. 28, 56, 139 S. Ct. 1066, 1086 (2019)). Whereas we would normally look to the plain meaning of "loss" to understand how the legislature intended it, *see, e.g.*, *N.C. Farm Bureau Mut. Ins. Co., Inc. v. Hebert*, 385 N.C. 705, 711, 898 S.E.2d 718, 724 (2024), we may not ignore the PREP Act's definition "merely because it 'varies from [the] term's ordinary meaning,' " *Kirtz*, 144 S. Ct. at 472 (alteration in original) (quoting *Digital Realty Tr., Inc. v. Somers*, 583 U.S. 149, 160, 138 S. Ct. 767, 776 (2018)); *accord Sturdivant v. N.C. Dep't of Pub. Safety*, 909 S.E.2d 483, 490 (N.C. 2024) ("[I]t would be quite abnormal for the General Assembly to define a term and then decline to use that definition . . . . Doing so undermines the very reason that the General Assembly would add a statutory definition in the first place."). The PREP Act's definition controls, even if it conflicts with how we might ordinarily understand "loss."

Here the first part of the statutory definition, "the term 'loss' means any type of loss," is circular and thus unhelpful. Fortunately, the second part of the definition provides four examples of losses that tease out the word's meaning. We therefore begin with the second part of the definition and work backwards: first using the examples to understand "loss," then applying that understanding to interpret "any type of loss."

Examples help limit the scope of words that might otherwise be subject to a wider interpretation. *See Begay v. United States*, 553 U.S. 137, 142, 128 S. Ct. 1581, 1585 (2008) ("If Congress . . . meant the statute to be all encompassing, it is hard to see why it would have needed to include the examples at all."), *abrogated on other grounds by Johnson v. United States*, 576 U.S. 591, 135 S. Ct. 2551 (2015); *cf. Pulsifer*, 144 S. Ct. at 731–32 (explaining that the canon against surplusage "applies with special force" if ignoring it would "render[ ] an entire subparagraph meaningless" (alteration and quotation omitted)). The Supreme Court of the United States recently used a football analogy to explain this concept:

> [A] football league might adopt a rule that players must not "grab, twist, or pull a facemask, helmet, or other equipment with the intent to injure a player, or otherwise attack, assault, or harm any player." If a linebacker shouts insults at the quarterback and hurts his feelings, has the linebacker nonetheless followed the rule? Of course he has. The examples of prohibited actions all concern dangerous physical conduct that might inflict bodily harm; trash talk is simply not of that kind.

Fischer v. United States, 144 S. Ct. 2176, 2184 (2024).

The above reasoning aligns with a pair of related canons of statutory construction. First, *noscitur a sociis* provides that a word is better understood by considering the meanings of neighboring words. *Id.* at 2183–84. And second, *ejusdem generis* provides that "a general or collective term at the end of a list of specific items is typically controlled and defined by reference to the specific classes that precede it."[11] *Id.* at 2184 (internal quotation marks and ellipses omitted). Together, these interpretative canons "track the common sense intuition that Congress would not ordinarily introduce a general term that renders meaningless the specific text that accompanies it." *Id.*

When we apply that logic to the PREP Act's examples of loss—e.g., death, physical injury, and property damage—we conclude that each example is of the measurable and compensable type ordinarily associated with tort law. *See, e.g.*, *Radiator Specialty Co. v. Arrowood Indem. Co.*, 383 N.C. 387, 407, 881 S.E.2d 597, 610–11 (2022) (using "loss" to refer to "property damage or bodily injury" (quoting Thomas M. Jones & Jon D. Hurwitz, *An Introduction to Insurance Allocation Issues in Multiple-Trigger Cases*, 10 Vill. Envt'l L.J. 25, 37–38 (1999))); *Carey v. Piphus*, 435 U.S. 247, 257–58, 98 S. Ct. 1042, 1049–50 (1978) (discussing how the common law of torts assigns monetary value to injuries); *Loss*,

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11. Courts typically limit *ejusdem generis* to sequences in which a general catch-all term follows specific examples. *See* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 203–05 (2012). In the PREP Act's case, however, the general term "loss" comes before the specific examples. Nonetheless, we apply the canon here in light of the Supreme Court's frequent warnings against construing a statute's preemptive reach too liberally. *See, e.g.*, *Altria*, 555 U.S. at 76, 129 S. Ct. at 543; *cf. Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 868, 120 S. Ct. 1913, 1918 (2000) ("We have found no convincing indication that Congress wanted to pre-empt, not only state statutes and regulations, but also common law tort actions, in such circumstances. Hence the broad reading cannot be correct.").

Black's Law Dictionary (12th ed. 2024) (defining "loss" as a "disappearance or diminution of value"). The "sole exception" to the PREP Act's immunity, "an exclusive[ly] Federal cause of action against a covered person for death or serious physical injury proximately caused by willful misconduct," further confirms that Congress viewed the immunity through a tort law lens, *see* 42 U.S.C. § 247d-6d(d)(1), as do the myriad examples of the immunity's scope, *see id.* § 247d-6d(a)(2)(B) (applying the immunity to claims for loss causally related to the "design, development, clinical testing or investigation, manufacture, labeling, distribution, formulation, packaging, marketing, promotion, sale, purchase, donation, dispensing, prescribing, administration, licensing, or use of" a covered countermeasure).

This limitation becomes even clearer upon considering the sentence immediately following the four tort-like examples: "Each of clauses (i) through (iv) applies without regard to the date of the occurrence, presentation, or discovery of the loss described in the clause." *Id.* § 247d-6d(a)(2)(A). It would be highly unusual to give a non-exhaustive list of examples of covered claims but then provide additional protection only to those supposedly illustrative examples. Given the tort-like examples and the subsequent sentence about the statutory scope, it makes more sense to interpret "all claims for loss" as all claims for *tort* loss—notwithstanding the apparently broad sweep of the word "including." *Cf. Samantar v. Yousuf*, 560 U.S. 305, 317, 130 S. Ct. 2278, 2287 (2010) ("[The u]se of the word 'include' can signal that the list that follows is meant to be illustrative . . . . But even if the list [here] is merely illustrative, it still suggests that 'foreign state' does not encompass [individuals], because the types of defendants listed are all entities.").

Loss under tort law, though serious in its own right, is not equivalent to loss in the constitutional sense. Tort law protects the people from each other under a system of sometimes arbitrary rules created by judges over a span of centuries. *See Carey*, 435 U.S. at 257–58, 98 S. Ct. at 1049–50. In contrast, the state constitution protects the people from their government, *Corum*, 330 N.C. at 782–83, 413 S.E.2d at 289–90, according to an order of natural rights far older than the document itself, *State Constitution* at 45 ("The drafters cautiously refer to the rights being 'defined and affirmed,' rather than created or conferred; the constitution, in other words, safeguards preexisting human rights, traceable . . . to the divinely ordained order of things." (quoting N.C. Const. pmbl.)). Indeed, as we detailed at length earlier in this opinion, the seriousness of a run-of-the-mill battery claim pales in comparison to the State's deliberate deprivation of one's fundamental constitutional liberties.

Because ordinary tort loss is distinct from constitutional loss, the tort-based examples included in the PREP Act suggest that Congress did not intend for the immunity to block state constitutional claims. *See Begay*, 553 U.S. at 142, 128 S. Ct. at 1585. Therefore, when the statute defines loss as "any type of loss," it means any type of tortious injury: physical injury, property damage, loss of use, and so on. Although that definition encompasses plaintiffs' battery claim, it does not cover their claims under the state constitution. The Court of Appeals erred in holding otherwise.

3. Preemption of State Family Law

The Supreme Court's historic reluctance to tamper with state family law further supports our conclusion that the PREP Act does not preempt plaintiffs' state constitutional claims predicated on Happel's right to control Smith's upbringing. The parental right to control the upbringing of one's child lies directly at the intersection of constitutional law and family law, and family law is "an area that has long been regarded as a virtually exclusive province of the States." *Sosna v. Iowa*, 419 U.S. 393, 404, 95 S. Ct. 553, 559 (1975); *see also Haaland v. Brackeen*, 599 U.S. 255, 378, 143 S. Ct. 1609, 1687 (2023) (Alito, J., dissenting) ("No one denies that the States, at the time of the adoption of the Constitution, possessed full power over ordinary family relations; and the Constitution delegated no authority to the Government of the United States in this area." (quotations omitted)).

In line with that history, the Supreme Court has explained its approach to family law preemption as follows:

> We have consistently recognized that *the whole subject* of the domestic relations of husband and wife, *parent and child*, belongs to the laws of the States *and not to the laws of the United States*. On the rare occasion when state family law has come into conflict with a federal statute, this Court has limited review under the Supremacy Clause to a determination [of] whether Congress has *positively required by direct enactment* that state law be pre-empted.

Rose v. Rose, 481 U.S. 619, 625, 107 S. Ct. 2029, 2033 (1987) (emphases added) (internal punctuation and citations omitted). State family law "must do major damage to clear and substantial federal interests" before it may be preempted. *Id.* As plaintiffs point out, shortly before Smith's vaccination, our General Assembly enacted legislation recognizing a parent's right to control whether her child received a vaccine

under emergency use authorization.[12] Before medical providers may administer that kind of treatment, state law requires them to obtain written parental consent. *See* N.C.G.S. § 90-21.5(a1) (2023). By enacting the statute, the General Assembly directly exercised this State's "virtually exclusive" authority to regulate domestic relations. *See Sosna*, 419 U.S. at 404, 95 S. Ct. at 559.

It is difficult to see how our State's parental consent statute "do[es] major damage" to the "clear and substantial federal interests" contained in the PREP Act. *See Rose*, 481 U.S. at 625, 107 S. Ct. at 2033–34. Although the PREP Act clearly preempts tort law, its application to other areas of the law is at best speculative. *See The PREP Act and COVID-19* at 2 ("This language [about loss] seemingly includes, at a minimum, most state law tort, medical malpractice, and wrongful death claims arising from the administration of covered countermeasures."); *Dressen*, slip op. at 19–23 (denying vaccine manufacturer's motion to dismiss breach-of-contract case because the PREP Act's text was limited to "tort-like claims"); *Leonard v. Ala. State Bd. of Pharmacy*, 61 F.4th 902, 915 (11th Cir. 2023) ("With the text of the [PREP Act] pulling in one direction and Congress's purpose arguably pulling in the other, 'it is not absolutely clear to us, *i.e.*, facially conclusive' that we should resolve this tension in favor of finding preemption [of an administrative claim]." (quoting *Hughes v. Att'y Gen. of Fla.*, 377 F.3d 1258, 1271 (11th Cir. 2004))).[13]

Indeed, the HHS Secretary's declaration, which "controls the scope of the immunity . . . within the confines of the PREP Act," *Maglioli v. All. HC Holdings LLC*, 16 F.4th 393, 401 (3d Cir. 2021), only provided tort-like examples of covered claims, *see Secretary's Declaration* at 15200 ("[T]he Act precludes, for example, liability claims alleging negligence

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12. An Act to Authorize Immunizing Pharmacists to Dispense, Deliver, and Administer Certain Treatment and Medications and to Require Parental Consent for Administration of Vaccines Under an Emergency Use Authorization to a Minor, S.L. 2021 110, § 9, 2021 N.C. Sess. Laws 416, 419 (codified as amended at N.C.G.S. § 90-21.5(a1) (2023)).

13. The Eleventh Circuit's opinion in *Leonard* addressed the clarity of the PREP Act as it related to *Younger* abstention, another federal jurisdictional doctrine not at issue in this case. That court's *Younger* abstention caselaw allows it to interfere with state court proceedings in "only the clearest of federal preemption claims." *Leonard*, 61 F.4th at 913 (quoting *Hughes*, 377 F.3d at 1265). But regardless of the precise reason for the court's evaluation of the PREP Act's preemptive clarity, its ultimate conclusion—that the PREP Act only clearly preempts tort claims—is relevant here to support our conclusion that the Act does not demonstrate a clear and substantial interest in preempting state family law. *See id.* at 915 ("[T]he few cases to have addressed PREP Act preemption have generally concluded that state tort law is preempted with respect to the administration of covered countermeasures." (citing *Parker*, 954 N.Y.S.2d 259)).

by a manufacturer in creating a vaccine, or negligence by a health care provider in prescribing the wrong dose" or "a slip-and-fall injury or vehicle collision by a recipient receiving a countermeasure . . . ."). Nothing in the PREP Act "positively requires" state family law's preemption, *Rose*, 481 U.S. at 625, 107 S. Ct. at 2033, nor is there any evidence in the statute or declaration that the federal government intended to invade this "virtually exclusive province of the States," *Sosna*, 419 U.S. at 404, 95 S. Ct. at 559. That failure provides even more reason to conclude that Congress did not intend to preempt the state constitutional claims plaintiffs bring in this case.[14]

C. Precedents from Other Jurisdictions

Defendants point to several cases from other jurisdictions that they believe to be on point here and support dismissal. These decisions include the trio of cases cited by the Court of Appeals—*Parker*, *Cowen*, and *M.T.*—as well as the Vermont Supreme Court's ruling in *Politella v. Windham Southeast School District*, issued in between the Court of Appeals' decision and oral argument at this Court. Defendants also cite *Maney v. Brown*, in which the Ninth Circuit held that federal constitutional claims brought under 42 U.S.C. § 1983 were claims "for loss" under the PREP Act. 91 F.4th 1296, 1303 (9th Cir. 2024). None of the cited cases persuade us that the PREP Act preempts claims brought under our state constitution.

1. Parker, Cowen, and M.T.

First, we consider each of the decisions cited by the Court of Appeals meaningfully distinguishable from the instant case. The plaintiffs in

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14. Even in the rare instances where the Supreme Court has held that Congress validly preempted family law, the statutes in question regulated either "the economic aspects of domestic relations" or the welfare of Indian children. *See Haaland*, 143 S. Ct. at 1630 (collecting cases); *see also id.* at 1687 (Alito, J., dissenting) ("[Until *Haaland*, the Supreme Court had] never held that Congress under any of its enumerated powers may regulate the very nature of [domestic] relations . . . . Nor could we and remain faithful to our founding.").

Those caveats do not apply here. In *Haaland*, the Supreme Court upheld the constitutionality of the Indian Child Welfare Act, a federal law requiring state family courts "to place an Indian child with an Indian caretaker, if one is available." *Id.* at 1622. While the plaintiffs there made several constitutional arguments, including one based on the Supreme Court's traditional reluctance to find family law preempted, *Haaland*'s reasoning primarily focused on Congress's plenary authority to regulate Indian affairs. *See id.* at 1627 (collecting cases); *see also* U.S. Const. art. I, § 8, cl. 3. The Supreme Court did, however, note that "the Constitution does not erect a firewall around family law." *Haaland*, 143 S. Ct. at 1630.

Parker and *Cowen*, for instance, did not bring constitutional claims. Instead, they only brought tort claims that fit comfortably within the PREP Act's tort-based examples of loss. *See Parker*, 954 N.Y.S.2d at 260–61 (bringing state law claims for negligence and battery); *Cowen*, slip op. at 3 (bringing state law claims for negligence and vicarious liability).

Similarly, while the plaintiff in *M.T.* alleged a violation of her parental rights, she did not raise a constitutional issue, nor did the court there consider one. *M.T.*, 528 P.3d at 1084 ("Because this case can be decided on the text of the Act and [the plaintiff] never advanced any constitutional claim, we adhere to the long-standing doctrine of judicial self-restraint known as constitutional avoidance."). Moreover, the minor in *M.T.*, unlike Smith, wanted to be vaccinated. *Id.* at 1071. Defendants particularly stress one sentence from *M.T.*: "In other words, [immunity from] 'all claims' means all claims, not 'all claims except for those based on a violation of a fundamental right.' " *Id.* at 1083. As discussed above, however, the PREP Act does not cover "all claims." It covers "all claims *for loss*." In sum, these three cases do not support dismissal of plaintiffs' constitutional claims here.

2. Politella

Nor do we believe the Vermont Supreme Court's decision in *Politella* to be on point. That case, like this one, involved a lawsuit brought by the parents of a child whose school vaccinated him against the parents' will. *Politella*, 325 A.3d at 92. The plaintiffs asserted various tort claims against their son's school district and later added a state constitutional claim in an amended complaint. *Id.* In holding that the PREP Act completely immunized the defendants, the court did not distinguish the plaintiffs' constitutional claim from their other state law claims. *See id.* at 97–98. As justification, the court summarily cited the PREP Act's preemption provision and the decisions of "[o]ther state courts faced with similar facts"—specifically, *M.T.*, *Parker*, and our Court of Appeals' *Happel* opinion. *See id.* at 98. But as previously noted, *M.T.* and *Parker* do not apply here because they did not consider constitutional claims. And given our de novo standard of review, we afford no independent weight to the opinion of our Court of Appeals. Defendants' reliance on *Politella* is misplaced.

3. Maney

Finally, we are unpersuaded by the Ninth Circuit's decision in *Maney* for several reasons. First, and perhaps most importantly, *Maney* did not address preemption of state law. The plaintiffs there brought federal constitutional claims via a federal procedural vehicle, section

1983,[15] and the defendants asserted immunity under another federal statute, the PREP Act. *Maney*, 91 F.4th at 1302. "Congress . . . may specifically foreclose a remedy under [section] 1983," *id.* (alteration and quotation omitted), much like it can preempt state law. But courts analyze these actions differently. *See id.* (discussing how courts determine whether "Congress intended to preclude reliance on [section] 1983 as a remedy for the deprivation of a *federally* secured right" (emphasis added) (quoting *Price v. City of Stockton*, 390 F.3d 1105, 1114 (9th Cir. 2004))). Because Congress enacted both section 1983 and the PREP Act, the latter statute can restrict the former without raising preemption concerns.

The same is not true of this case. This Court has explained that our state constitution confers a direct cause of action to remedy constitutional harms. *Corum*, 330 N.C. at 782, 413 S.E.2d at 289. North Carolinians seeking to vindicate their state constitutional rights do not need to rely on a procedural mechanism like section 1983 to enter the courthouse doors; if state law does not already provide an "adequate remedy" for a constitutional violation, the judicial branch will use its "inherent constitutional power" to fashion one. *Id.* at 784–85, 413 S.E.2d at 291; *see also* N.C. Const. art. IV (describing the judicial power). Indeed, we have explicitly noted that *Corum* claims are "not [the] state law equivalent of [section] 1983" in numerous respects. *Washington*, 385 N.C. at 830, 898 S.E.2d at 672. "Simply put, *Corum* is the embodiment of 'where there is a right, there is a remedy.' . . . [It] creates a common law cause of action." *Id.*

Moreover, *Maney* couched its reasoning and conclusion in less-than-definite terms. It first noted that the PREP Act covers "all claims for loss," *Maney*, 91 F.4th at 1302, and then asserted that "[t]he use of 'all' indicates a sweeping statutory reach," *id.* (quoting *AK Futures LLC v. Boyd St. Distro, LLC*, 35 F.4th 682, 690–91 (9th Cir. 2022)). Its language, however, became progressively less forceful: "Of course, the PREP Act limits the scope of covered claims to those related to the administration or use of covered countermeasures. But that limitation *does not categorically exclude* constitutional claims." *Id.* at 1302–03 (emphasis added). The opinion then stated that the PREP Act's one exception to immunity—the exclusive federal cause of action in section 247d-6d(a)—"*may*

15. Section 1983 permits a plaintiff whose federal constitutional rights have been harmed by a person acting "under color of" state law to hold that person liable "in an action at law, suit in equity, or other proper proceeding for redress . . . ." 42 U.S.C. § 1983. "The law regarding the interpretation of [s]ection 1983 is labyrinthine," as this Court once noted. *Corum*, 330 N.C. at 770, 413 S.E.2d at 282.

provide a remedy for [federal] constitutional claims that involve willful misconduct, as defined by the Act. But that exception *does not categorically exempt* federal constitutional claims from the Act's protection." *Id.* at 1303 (emphases added).

This Court understands the statute's lack of a categorical exemption for constitutional claims to mean something much different, and *Maney* is far from a definitive rejection of this Court's theory. The PREP Act's inclusion of the words "for loss" must be given meaning; the plain text of the statute leads us to conclude that Congress did not intend to preempt state constitutional claims.

III. Conclusion

We hold that the plain text of the PREP Act does not bar claims brought under our state constitution. On remand, the Court of Appeals should decide the remaining state constitutional issues raised by the parties in their briefs to that court. These questions include whether plaintiffs' complaint sufficiently alleged that defendant ONSMS was a state actor and whether plaintiffs have an adequate state remedy available for their constitutional claims. *See generally Corum*, 330 N.C. 761, 413 S.E.2d 276; *see also*, *e.g.*, *Craig ex rel. Craig v. New Hanover Cnty. Bd. of Educ.*, 363 N.C. 334, 340, 678 S.E.2d 351, 355 (2009); *Deminski*, 377 N.C. at 413, 858 S.E.2d at 793; *Washington*, 385 N.C. at 829–30, 898 S.E.2d at 671–72; *Kinsley*, 904 S.E.2d at 729–30.

"The [state] constitution is our foundational social contract and an agreement among the people regarding fundamental principles." *Harper*, 384 N.C. at 297, 886 S.E.2d at 398. "The people speak through the express language of their state constitution . . . ." *Id.* In Article I, Section 18 of their state constitution, the people declared, "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. The express language of this provision unambiguously demands that we allow plaintiffs to seek constitutional remedies here. We lack evidence of the clear and manifest congressional intent that would require us to do otherwise.

The decision of the Court of Appeals is affirmed with respect to plaintiffs' battery claim, reversed with respect to their state constitutional claims, and remanded for further proceedings consistent with this opinion.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

Justice BERGER concurring.

I concur fully in the majority opinion as "forced medication [is] a battery, and the[re is a] long legal tradition protecting the decision to refuse unwanted medical treatment." *Washington v. Glucksberg*, 521 U.S. 702, 703 (1997). That legal tradition is rooted in the Lockean notion of self-ownership – that bodily autonomy is the height of personal freedom and fundamental property rights, provided however that your actions do not harm others. *See* John Locke, *Two Treatises of Government* (each individual "has a Property in his own Person. This no Body has any Right to but himself.").

I write separately to note that the sweeping grant of immunity in the PREP Act seems contrary to this basic understanding. The government's reading of the Act appears to override state consent laws such that intentional torts may be cloaked with immunity when the harm inflicted falls short of death or serious physical injury. *See* 42 U.S.C. § 247d-6d(d)(1). But shouldn't immunity under the PREP Act be predicated on a lawful administration of a covered countermeasure?

Consider the following: you're waiting for your morning coffee at the local café. While standing with other customers, a healthcare official authorized to administer a covered countermeasure walks in and injects everyone in the coffee shop without asking or otherwise obtaining consent. All have been the victim of a battery. But under the government's reading of the PREP Act, unless death or serious physical injury results, the healthcare worker has blanket immunity for these intentional acts.

Common sense tells us that although the grant of immunity under the Act is broad, it is not limitless. The statute on its face appears to encourage beneficial conduct. However, the PREP Act could be understood as immunizing forcible administration of medication similar to the scenario described above, if not worse. Given the fundamental principles articulated by Locke and echoed in *Glucksberg*, it is difficult to concede that the PREP Act confers immunity for outright wrongful acts.

Justice BARRINGER joins in this concurring opinion.

Justice RIGGS dissenting.

Self-described textualists and originalists have historically professed to avoid "turn[ing] somersaults" to reach particular interpretations of

the written law. *Riegel v. Medtronic, Inc.*, 552 U.S. 312, 325 (2008). The majority here should abandon any such pretense; through a series of dizzying inversions, it explicitly rewrites an unambiguous statute to exclude state constitutional claims from the broad and inclusive immunity "from suit and liability under Federal and State law with respect to all claims for loss" established by the Public Readiness and Emergency Preparedness Act (PREP Act). 42 U.S.C. § 247d-6d(a)(1). The majority also recognizes two implied fundamental state constitutional rights—one arbitrarily defined without any apparent principle—a right to bodily integrity divorced from bodily autonomy—and the other defined in principle but applied arbitrarily—the right of parents to direct the raising of their children. So, while I agree that the constitution protects rights to bodily integrity and those of parents to care for their children, I cannot concur in their articulation here. Because I find both the PREP Act and constitutional analyses fundamentally unsound, I respectfully dissent.

In the first of many backflips, the majority starts by assuming—and then, questionably, by announcing—the existence of two unenumerated state constitutional rights before turning to the question of whether the PREP Act establishes immunity from claims under *Corum v. Univ. of N.C.*, 330 N.C. 761 (1992). *See* majority *supra* Section II (starting its substantive analysis by "assum[ing] without deciding that plaintiffs present adequate '*Corum* claims' for violations of their constitutional rights" before explicitly recognizing two such constitutional rights, detailing their contours, and proceeding to exempt them from immunity under the PREP Act). I will begin where the majority should have started: first addressing whether the PREP Act immunizes defendants from the "suit and liability" asserted in this case. 42 U.S.C. § 247d-6d(a)(1); *see* majority *supra* Section II.B. (recognizing that "if defendants are correct that Congress fully barred plaintiffs' claims, the state constitution would have no practical effect on this case's outcome."). And, because I believe that the PREP Act does so immunize the defendants, the analysis would ordinarily stop there. *See, e.g.*, *Anderson v. Assimos*, 356 N.C. 415, 416 (2002) ("[T]he courts of this State will avoid constitutional questions, even if properly presented, where a case may be resolved on other grounds."). But, because the majority erroneously decides that question and goes further to resolve these constitutional issues, I will then explain my disagreement with its treatment of those rights.

I. PREP Act Applicability

I agree with the majority that "congressional purpose [is] 'the ultimate touchstone' " in determining whether the PREP Act's grant of immunities is intended to preclude state constitutional claims. *See Cipollone*

v. Liggett Group, Inc., 505 U.S. 504, 545 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part) ("The ultimate question in each [pre-emption] case, as we have framed the inquiry, is one of Congress's intent, as revealed by the text, structure, purposes, and subject matter of the statutes involved." (citations omitted)). Shockingly absent from the majority opinion's interpretive analysis, however, is any substantive engagement with what the PREP Act was intended to achieve or accomplish and, between its prefatory praise of implied constitutional rights and the genius of federalism,[1] one might come away from that opinion with the impression that Congress's primary concern was with protecting state constitutional rights from federal intrusion. This, however, is manifestly not the case.

A. The PREP Act's Purposes and Full Context

The 109th Congress and the George W. Bush administration had one key objective in passing and signing the PREP Act:

> Congress enacted the PREP Act in 2005 "[t]o encourage the expeditious development and deployment of medical countermeasures during a public health emergency" by allowing the HHS Secretary "to limit legal liability for losses relating to the administration of medical countermeasures such as diagnostics, treatments, and vaccines."

Cannon v. Watermark Ret. Cmtys., Inc., 45 F.4th 137, 139 (D.C. Cir. 2022) (alteration in original) (quoting Kevin J. Hickey, Cong. Rsch. Serv., LSB10443, *The PREP Act and Covid-19, Part 1: Statutory Authority to Limit Liability for Medical Countermeasures* 1 [hereinafter *The PREP Act and COVID-19*]). The PREP Act's "scope of immunity is broad," *Maglioli v. Alliance HC Holdings LLC*, 16 F.4th 393, 401 (3d Cir. 2021), and for good reason: "In the PREP Act, Congress made the judgment that, in the context of a public health emergency, immunizing certain persons and entities from liability was necessary to ensure that potentially life-saving countermeasures will be efficiently developed, deployed, *and administered*," *The PREP Act and COVID-19* at 1 (emphasis added).

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1. After recounting the factual and procedural background of the case, the majority engages in a remarkable *18 pages* of discussion of these subjects before returning to any analysis of the PREP Act—the act that, by the majority's own recognition, presents the dispositive issue in this appeal.

The text of the PREP Act makes clear that Congress intended this protection to apply in an almost universal[2] fashion. In describing the laws preempted under its provisions, the PREP Act provides, in relevant part:

> [A]t *any* time with respect to conduct undertaken in accordance with [an emergency] declaration, no State or political subdivision of a State may establish, enforce, or continue in effect with respect to a covered countermeasure *any* provision of law or legal requirement that—
>
> (A) is different from, or is in conflict with, *any* requirement applicable under this section; and
>
> (B) relates to . . . the prescribing, dispensing, or administration by qualified persons of the covered countermeasure, or to *any* matter included in a requirement applicable to the covered countermeasure under this section . . . .

42 U.S.C. § 247d-6d(b)(8) (emphases added). Usage of the unambiguous word "any" throughout this section shows a plain and clear intention to preempt and immunize against *all* causally linked State law claims for loss that conflict with the PREP Act, regardless of whether they sound in tort, equity, a state constitution, or any other source of redressable rights. The terms of art employed by Congress are likewise expansive; as the Supreme Court of the United States has recognized, the federal legislature resorts to the term "requirement" to describe "a rule of law that must be obeyed," *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 445 (2005), a meaning which "reaches beyond positive enactments, such as statutes and regulations, to embrace common-law duties," *id.* at 443. *See also Cipollone*, 505 U.S. at 521 (plurality opinion) ("The phrase 'no requirement or prohibition' sweeps broadly." (cleaned up)); *id.* at 548–49 (Scalia, J., concurring in the judgment in part and dissenting in part). The same is true of other language here and elsewhere in the PREP Act. *See*, *e.g.*, *Coventry Health Care of Mo., Inc. v. Nevils*, 581 U.S. 87, 95–96 (2017) ("Congress' use of the expansive phrase 'relate to' shores up that understanding. We have repeatedly recognized that the phrase 'relate to' in a preemption clause expresses a broad pre-emptive purpose." (cleaned up)).

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2. As detailed herein, "[t]here is *one* exception to this statutory immunity." *Maglioli*, 16 F.4th at 401 (emphasis added).

The text of the immunity provision reinforces the PREP Act's wide preemptive and inoculating reach. It broadly provides that:

> [A] covered person shall be immune *from suit and liability* under *Federal and State law* with respect to *all* claims for loss caused by, arising out of, relating to, or resulting from the administration to or the use by an individual of a covered countermeasure if a declaration . . . has been issued with respect to such countermeasure.

42 U.S.C. § 247d-6d(a)(1) (emphases added). From there, in subsection (a)(2), titled "Scope of claims for loss," it continues to define "loss" *in outright expansive and strictly inclusive terms*:

> (A) Loss
>
> For purposes of this section, the term "loss" means *any* type of loss, *including*—
>
> (i) death;
>
> (ii) physical, mental, or emotional injury, illness, disability, or condition;
>
> (iii) fear of physical, mental, or emotional injury, illness, disability, or condition, including any need for medical monitoring; and
>
> (iv) loss of or damage to property, including business interruption loss.
>
> Each of clauses (i) through (iv) applies without regard to the date of the occurrence, presentation, or discovery of the loss described in the clause.

Id. § 247d-6d(a)(2)(A) (emphases added); *see also Fed. Land Bank v. Bismarck Lumber Co.*, 314 U.S. 95, 100 (1941) ("[T]he term 'including' *is not one of all-embracing definition*, but connotes simply an illustrative application of the general principle." (emphasis added)).

It is the next subsection, subsection (a)(2)(B), "Scope," that limits the reach of the expansive immunities against *any* losses—albeit, and importantly, in a very proscribed fashion—by imposing a causality requirement:

> The immunity under paragraph (1) applies to *any* claim for loss that has a causal relationship with the

> administration to or use by an individual of a covered countermeasure, *including* a causal relationship with the design, development, clinical testing or investigation, manufacture, labeling, distribution, formulation, packaging, marketing, promotion, sale, purchase, donation, dispensing, prescribing, administration, licensing, or use of such countermeasure.

Id. § 247d-6d(a)(2)(B) (emphases added).[3]

This clear trend towards the expansive continues in the identification of those granted immunity. *Anyone*, *anywhere*, connected *in any way* to the development, deployment, and administration of the covered countermeasure pursuant to the declaration is covered by the PREP Act. A "covered person" is defined as:

> (A) the United States; or
>
> (B) a person or entity that is-
>
> (i) a manufacturer of such countermeasure;
>
> (ii) a distributor of such countermeasure;
>
> (iii) a program planner of such countermeasure;
>
> (iv) a qualified person who prescribed, administered, or dispensed such countermeasure; or
>
> (v) an official, agent, or employee of a person or entity described in clause (i), (ii), (iii), or (iv).

Id. § 247d-6d(i)(2). Driving the point home that the PREP Act is intended to cut across all jurisdictions and through any divisions between the public and private sectors, Congress also expressly eliminated any distinctions between natural persons, private corporations and entities, and government agents of any level: "The term 'person' includes an individual, partnership, corporation, association, entity, or public or private corporation, including a Federal, State, or local government agency or department." *Id.* § 247d-6d(i)(5).

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3. This singular causality limitation is reinforced by the subsection that immediately follows, which states that immunity only applies to covered countermeasures when: (1) delivered during a declaration, (2) in connection with the public health threat identified therein, and (3) in the case of program planners or countermeasure administrators, to a population and geographic area subject to the declaration. 42 U.S.C. § 247d-6d(a)(3), (4).

Notwithstanding "the breadth of the preemption clause[,] . . . the sweeping language of the statute's immunity provision," *Parker v. St. Lawrence Cnty. Pub. Health Dep't*, 954 N.Y.S.2d 259, 262 (N.Y. App. Div. 2012), and the obvious expansiveness of the other provisions discussed *supra*, Congress included "*one* exception to this statutory immunity," *Maglioli*, 16 F.4th at 401 (emphasis added), where the desire to ensure robust participation—across the public and private sectors and between all levels of government—in response to a nationwide public health emergency gave way to the need to punish bad actors and allow recovery for injured parties. That "sole exception to the immunity from suit and liability . . . [is] an exclusive Federal cause of action against a covered person for death or serious physical injury proximately caused by willful misconduct," 42 U.S.C. § 247d-6d(d)(1), and it denotes not only the obvious expansiveness of the PREP Act's intended reach, but also the extremely limited nature of the intended exclusion. Congress enacted this singular narrow exception alongside another form of relief—the Covered Countermeasure Process Fund, 42 U.S.C. § 247d-6e—plainly weighing the need to enact a sweeping immunity and preemption regime against a limited avenue for full litigatory redress and the availability of compensation through the Fund.

The majority functionally ignores most of these provisions, and it's easy to see why: "The text of the preemption provision must be viewed in context, with proper attention paid to the history, structure, and purpose of the regulatory scheme in which it appears." *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 529 (2001) (Stevens, J., concurring in part, concurring in the judgment in part, and dissenting in part); *see also Cipollone*, 505 U.S. at 545 (Scalia, J., concurring in the judgment in part and dissenting in part). That context includes both the intention behind the act and the preemption clause's presence in the wider legislative scheme. *See Riegel*, 552 U.S. at 324–25 (refusing to narrowly construe a preemption provision to exclude common law claims because, "in the context of this legislation excluding common-law duties from the scope of pre-emption would make little sense"); *id.* at 325 ("That perverse distinction [between regulatory laws and common law claims] is not required or even suggested by the broad language Congress chose in the [act]."); *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 320 (2014) (recognizing "the fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme" (cleaned up)).

Indeed, it is not possible to square the majority's reading with the purposes of the PREP Act and the almost uniformly broad language

used to effectuate it.[4] Allowing plaintiffs to skirt around the immunity granted by the PREP Act by simply recasting their otherwise-preempted claims as state constitutional injuries would create a glaring loophole that undermines the very protections Congress intended to provide.[5] Elevating a claim's form over its substance to avoid the application of a preemption provision—especially when it frustrates the purpose of the overall act—is plainly contrary to law. *See Riegel*, 552 U.S. at 325 (declining to adopt a distinction between state regulatory and tort law for purposes of an express preemption provision because "[s]tate tort law . . . [could] disrupt[ ] the federal scheme no less than state regulatory law"). To analogize to the Supreme Court of the United States' interpretation of another federal preemption statute in the Airline Deregulation Act, which sought to curtail state and federal regulation of the airline industry:

> Exempting common-law claims would also disserve the central purpose of the ADA. . . . What is important . . . is the effect of a state law, regulation, or provision, not its form, and the ADA's deregulatory aim can be undermined just as surely by a state common-law rule as it can by a state statute or regulation.

Northwest, Inc. v. Ginsberg, 572 U.S. 273, 283 (2014) (citation omitted). Likewise, constitutional claims—just as much as tort claims—frustrate Congress's intent in enacting the PREP Act to "immuniz[e] certain persons and entities from liability" in order to "ensure that potentially

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4. The majority suggests, in citing to and relying on *Leonard v. Ala. State Bd. of Pharmacy*, 61 F.4th 902, 915 (11th Cir. 2023), that recognizing a broad grant of immunity somehow works against the aims of the PREP Act. Contrary to the majority's assertion, *Leonard*'s very limited reference to tort claims is distinguishable and not persuasive here for more reasons than just the involvement of *Younger* abstention. In that case, the Eleventh Circuit recognized that the PREP Act seeks to "encourage the administration of covered countermeasures," and yet the state was attempting to impose licensing discipline on a medical provider for actions involving administration of those covered countermeasures. *Leonard*, 61 F.4th at 915 (cleaned up). The *Leonard* court therefore acknowledged that it "would seem odd for Congress to immunize covered persons from private suits for damages, while still subjecting them to government administrative actions seeking to revoke their licenses for the same conduct." *Id.* That tension—where "the text of the statute [is] pulling in one direction and Congress's purpose [is] arguably pulling in the other," *id.*—is simply not present in this case.

5. Consider, for example, our state constitution's Fruits of Their Own Labor Clause. Allowing a party to recast an injury otherwise preempted by the PREP Act under that constitutional clause would run headlong into the PREP Act's bar against suit and recovery for "loss of or damage to property, *including business interruption loss*." 42 U.S.C. § 247d-6d(a)(2)(A)(iv) (emphasis added).

life-saving countermeasures will be efficiently developed, deployed, and administered." *The PREP Act and COVID-19* at 1. That the majority would allow such a result for a constitutional right to bodily integrity *that it explicitly ties* to "common-law battery" and "the American tort law rule that medical treatment generally requires the patient's informed consent," only heightens the absurdity.

B. The Majority's Reversed Reading and Misapplied Presumptions

Rather than confront this reality, the majority quite literally reasons backwards to avoid it. It does so, it says, because "the first part of the statutory definition, " 'loss' means any type of loss,' is circular and thus unhelpful." But this attempt at lawyerly sleight of hand is as clumsy as it is unconvincing.

Black's Law Dictionary has historically "defined over 30 types of loss, including 'capital loss,' 'economic loss' and 'passive loss.' " *United States v. Boler*, 115 F.4th 316, 330 n.1 (4th Cir. 2024) (Quattlebaum, J., dissenting) (quoting Black's Law Dictionary (6th ed. 1990)). By my count, the definition of "Loss" from Black's Law Dictionary cited by the majority identifies *42* different types of loss. *Loss*, Black's Law Dictionary (12th ed. 2024). And this generally assumes that "loss" is being used as a term of art, *Boler*, 115 F.4th at 330 n.1 (Quattlebaum, J., dissenting); the ordinary meaning of "loss" further expands the word's potential reach, and the "multiple and varied [ordinary] definitions . . . demonstrate that 'loss' could mean a number of different things depending on the dictionary of one's choice," *id.* at 324–25. "[T]here is no single right answer to the meaning of 'loss' based on its plain reading." *Id.* at 325. Congress resolved this ambiguity in the simplest, most straightforward way possible: by stating "loss means *any type* of loss." 42 U.S.C. § 247d-6d(a)(2)(A) (emphasis added). With this ambiguity eliminated by the PREP Act's plain language, there's no need to reinject uncertainty into the statutory text by reading the clause in reverse.[6]

The majority's solutions to its entirely reinvented ambiguity are, for those of a certain generation, reminiscent of Homer Simpson's declaration—famously shouted from the bottom of a hole—that "we'll dig our way out!" The majority first asserts that the entire (and entirely

6. There is no meaningful analytical analogy between this section of the PREP Act—which expressly and unambiguously defines "loss," 42 U.S.C. § 247d-6d(a)(2)(A)—and the undefined usage of the term "open" in our state constitution, N.C. Const. art I, § 18. And, as explained below, the purported nonsensical results that the majority rely upon to draw its connection simply do not exist in this case.

unnecessary) interpretive exercise should begin with the "starting presumption that Congress does not intend to supplant state law." Majority *supra* Section II.B.1. (quoting *N.Y. State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 654 (1995)). But the Supreme Court's more recent precedents clarify that such presumptions do not apply where the act contains an express preemption clause. *See Puerto Rico v. Franklin Cal. Tax-Free Tr.*, 579 U.S. 115, 125 (2016) ("[B]ecause the statute 'contains an express pre-emption clause,' we do not invoke *any* presumption against pre-emption." (cleaned up) (emphasis added)); *Dialysis Newco, Inc. v. Cmty. Health Sys. Grp. Health Plan*, 938 F.3d 246, 258 (5th Cir. 2019) (recognizing that "the Supreme Court has since changed its position on the presumption against preemption where there is an express preemption clause"). In other words, where there is an express preemption clause and a court is tasked with discerning whether it applies to a particular law, we now engage in a "textual analysis without any presumptive thumb on the scale for or against preemption." *Cal. Rest. Ass'n v. City of Berkeley*, 89 F.4th 1094, 1101 (9th Cir. 2024) (cleaned up); *see also Daniels v. Exec. Dir. of Fla. Fish and Wildlife Conservation Comm'n*, No. 23-13577, slip op. at 16 (11th Cir. Feb. 6, 2025) (observing that under current Supreme Court precedent, "where Congress has enacted an express-preemption provision, we identify the state law that it preempts according to ordinary principles of statutory interpretation, and no presumption against preemption applies" (cleaned up)). It makes little sense, then for the majority to depart from traditional limitations on *ejusdem generis*—which ordinarily constrain the doctrine "to sequences in which a general catch-all term follows specific examples"—because of now-outdated Supreme Court decisions' "frequent warnings against construing a statute's preemptive reach too liberally."[7]

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7. As the majority notes, there is a disagreement—an overwhelmingly lopsided one—as to the full effect of *Franklin*. With a single exception, every federal circuit to have addressed the question, including our own, has given the text of *Franklin* its full due by declining to employ any presumptions regarding preemption when a federal statute contains an express preemption clause. *See Atay v. County of Maui*, 842 F.3d 688, 699 (9th Cir. 2016) (recognizing no presumptions when an express preemption clause exists); *EagleMed LLC v. Cox*, 868 F.3d 893, 903 (10th Cir. 2017) (same); *Watson v. Air Methods Corp.*, 870 F.3d 812, 817 (8th Cir. 2017) (same); *Air Evac EMS, Inc. v. Cheatham*, 910 F.3d 751, 762 n.1 (4th Cir. 2018) (same); *Dialysis Newco*, 938 F.3d at 258 (same); *Medicaid and Medicare Advantage Prods. Ass'n of P.R., Inc. v. Emanuelli Hernández*, 58 F.4th 5, 11–12 (1st Cir. 2023) (same); *Carson v. Monsanto Co.*, 72 F.4th 1261, 1267 (11th Cir. 2023) (same); *Ye v. GlobalTranz Enters.*, 74 F.4th 453, 465 (7th Cir. 2023) (same); *Buono v. Tyco Fire Prods., LP*, 78 F.4th 490, 495 (2nd Cir. 2023) (same). *But see Shuker v. Smith & Nephew, PLC*, 885 F.3d 760, 771 n.9 (3d Cir. 2018) (declining, in a footnote, to extend

The majority also purports to rely on a presumption against preemption of family law and, because the parental consent in N.C.G.S. § 90-21.5(a1) (2023) apparently does not seriously impede the PREP Act, the Act should thus not be read preemptively here. But this fundamentally confuses the issue presented by this case. The PREP Act does not expressly seek to preempt the state constitutional rights of parents to care for their children, but it does explicitly seek to foreclose any vehicle to sue or recover for violation of those rights when caused by a covered person administering a covered countermeasure in connection with a PREP Act declaration. *See* 42 U.S.C. § 247d-6d(a)(1) ("[A] covered person shall be immune from suit or liability under Federal and State law with respect to all claims for loss . . . ."). Of course N.C.G.S. § 90-21.5(a1) does no violence to the immunity provisions of the PREP Act—the state statute does not purport to convey any private right of action whatsoever. As for whether that law statutorily reflects a state constitutional right of parents, that right is only vindicated through litigation pursuant to *Corum*. Said differently, this case does not ask us to determine whether covered persons were still legally required by state law to seek parental consent in light of the PREP Act; instead, we have been asked to decide whether plaintiffs can sue to recover for any conduct that violated state constitutional law. So, what's actually preempted in this case is not state family law, but *Corum*. To the extent the statute also provides a basis for common law battery—as pleaded by plaintiffs in their complaint—that claim is barred even under the

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Franklin outside the bankruptcy context); *Lupian v. Joseph Cory Holdings, LLC*, 905 F.3d 127, 131 n.5 (3d Cir. 2018) (same).

State court caselaw is similarly imbalanced in favor of a broad application of *Franklin*. *See Conklin v. Medtronic, Inc.*, 431 P.3d 571, 504 (Ariz. 2018) (recognizing *Franklin* extinguished any presumptions against preemption where the statute contains an express preemption clause); *Griffioen v. Cedar Rapids and Iowa City Ry. Co.*, 914 N.W.2d 273, 281 (Iowa 2018) (same); *Snyder v. Prompt Med. Transp., Inc.*, 131 N.E.3d 640, 652 (Ind. Ct. App. 2019) (same); *BNSF Ry. Co. v. Eddy*, 459 P.3d 857, 865 (Mont. 2020) (same); *X-Gen Pharm., Inc. v. Dep't of Fin. and Prof'l Regulation*, 224 N.E.3d 825, 829 (Ill. App. Ct. 2022) (same); *Quishenberry v. UnitedHealthcare, Inc.*, 532 P.3d 239, 243 (Cal. 2023) (same). *Cf. City of Weyauwega v. Wis. Central Ltd.*, 919 N.W.2d 609, 617 (Wis. Ct. App. 2018) (declining to address whether *Franklin* squarely extinguished presumptions against preemption, but noting that the presumption applies "with considerably reduced (if any) force in cases in which there is an express preemption clause" (citations omitted)); *Hendrix v. United Healthcare Ins. Co. of the River Valley*, 327 So.3d 191, 204 (Ala. 2020) (noting, without deciding, that other courts have extended *Franklin* beyond the bankruptcy context). *But see FMS Nephrology Partners N. Cent. Ind. Dialysis Ctrs., LLC v. Meritain Health, Inc.*, 144 N.E.3d 692, 702 (Ind. 2020) (declining to expressly extend *Franklin* to ERISA preemption). Indeed, no state court has relied on *Shuker* or *Lupian* as the majority does here.

majority's interpretation, *see* majority *supra* Section II.B.2.b. (holding the majority's definition "encompasses plaintiffs' battery claim").

As to whether N.C.G.S. § 90-21.5(a1)'s requirement for parental consent could be preempted by the other provisions of the PREP Act, we need not decide that question. But, contrary to the majority's representations, there are certainly instances in which that state statute could manifestly frustrate the Act, such as a PREP Act declaration in response to a nationwide medical emergency that was particularly deadly or dangerous to children. Moreover, it is not entirely clear that the statute is of the type of state "family law" that is generally seen as the exclusive province of the states as opposed to a statute that is principally related to medical treatment. Indeed, the federal government already legislates in the arena of medical treatment, including in the context of minors' consent for treatment and the confidentiality thereof. *See*, *e.g.*, 42 C.F.R. § 59.10(b) (2022) ("Title X projects may not require consent of parents or guardians for the provision of services to minors."); 45 C.F.R. § 164.502(g)(5) (2022) (establishing certain circumstances in which HIPAA precludes parents from accessing medical records of their unemancipated children). And N.C.G.S. § 90-21.5 is not located in our family law or juvenile welfare statutes, *see*, *e.g.*, N.C.G.S. §§ 7B-100 through -4002 & 50-2 through -11 (2023), but in Chapter 90, which regulates "Medicine and Allied Occupations," N.C.G.S. §§ 90-1 through -747 (2023).

C. The Majority's Backwards Understanding of "Including"

No more convincing is the majority's claim that treating a list of *expressly illustrative examples* as such somehow serves to render those examples meaningless. Again, Congress may use explanatory, illustrative lists without presumptively constraining the broader category it intends to illustrate. *See Fed. Land Bank*, 314 U.S. at 100 ("[T]he term 'including' is not one of all-embracing definition, but connotes simply an illustrative application of the general principle."). Indeed, "the word 'including' does not lend itself to such destructive significance." *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 189 (1941). And when Congress does intend the word "including" to have some limiting effect, it generally does so by constraining the *illustrated* items, not the broader category that precedes them. *See Massachusetts v. EPA*, 549 U.S. 497, 556–57 (2007) (Scalia, J., dissenting) ("The word 'including' can indeed indicate that what follows will be an 'illustrative' sampling of the general category that precedes the word. Often, however, the examples standing alone are broader than the general category, and must be viewed as limited in light of that category." (citation omitted)).

Even treating the inclusive list as surplusage does not lead the majority to the result it wants. "Sometimes the better overall reading of the statute contains some redundancy." *Rimini Street, Inc. v. Oracle USA, Inc.*, 586 U.S. 334, 346 (2019). This is particularly true when, as here, the proponent of a particular interpretation uses the canon against surplusage to *insert* ambiguity into otherwise plain text rather than to resolve any inherent lack of clarity. For example, in a case interpreting the statutory term "attorney," the Supreme Court observed:

> Where there are two ways to read the text—either attorney is surplusage, in which case the text is plain; or attorney is nonsurplusage[,] . . . in which case the text is ambiguous—applying the rule against surplusage is, absent other indications, inappropriate. We should prefer the plain meaning since that approach respects the words of Congress. In this manner we avoid the pitfalls that plague too quick a turn to the more controversial realm of legislative history.

Lamie v. U.S. Trustee, 540 U.S. 526, 536 (2004).

D. The Majority's Other Various Illogical Arguments

Ignoring the command that "our constitutional structure does not permit [courts] to rewrite the statute that Congress has enacted," *Franklin*, 579 U.S. at 130, the majority decides to employ canons of construction to conjure up an ambiguity where none otherwise exists,[8] partly out of a recognition that "[l]oss under tort law, though serious in its own right, is not equivalent to loss in the constitutional sense." A fair enough observation, but one that raises more questions in this context than it answers. It is ostensibly true that tort losses are more immediately quantifiable in the monetary sense than constitutional ones, but it is certainly not apparent that, in enacting the PREP Act, Congress was exclusively concerned with shielding covered persons from paying monetary damages. The grant of immunity is two-fold, conferring both immunity "from suit *and* liability." 42 U.S.C. § 247d-6d(a)(1) (emphasis added). The duality of the immunities afforded matters: "immunity from liability" is understood to "confer[ ] only a right not to pay damages,

8. Yet again, the majority gets things exactly backwards. "Canons of statutory interpretation are only employed if the language of the statute is ambiguous." *JVC Enters., LLC v. City of Concord*, 376 N.C. 782, 786 (2021) (cleaned up). Otherwise, "[i]f the statutory language is clear and unambiguous, the court eschews statutory construction in favor of giving the words their plain and definite meaning." *State v. Beck*, 359 N.C. 611, 614 (2005).

[whereas] an immunity from suit confers a right not to bear the burdens of litigation." *Nero v. Mosby*, 890 F.3d 106, 121 (4th Cir. 2018). If, as the majority says, Congress were so myopically focused on insulating providers only from "the measurable and compensable" damages afforded in tort, why would it have gone to the trouble of granting the greater protection—divorced from damages concerns—of immunity from suit?

As for the majority's assertion that any other reading of the PREP Act defies common sense, that argument fails because the PREP Act neither promotes wrongdoing nor does it completely insulate bad actors from punishment. Immunizing covered persons from civil suits does not positively reward—and thus incentivize—any particular misconduct. Moreover, PREP Act immunity is one from *civil* suits and liability. A person who violates a penal statute may still be charged and punished criminally because a prosecution is not in any sense a "claim for loss," and our statutes already criminalize the unlawful administration and dispensation of medication, including to children. *See*, *e.g.*, N.C.G.S. § 110-102.1A (2023) (criminalizing administration of medication without parental consent to children attending childcare facilities); N.C.G.S. § 90-85.40 (2023) (criminalizing violations of the North Carolina Pharmacy Practice Act). Licensing discipline is likewise not preempted by the PREP Act. *See Leonard*, 61 F.4th 914–15 (noting that the argument the PREP Act precludes licensing discipline "stretches the text too far. The more natural reading of the statute is that covered persons are immunized from suits by plaintiffs trying to recover for the *plaintiffs*' losses caused by covered persons, not suits by those seeking to impose a loss *on* the covered person."). Congress clearly weighed its need to encourage a fulsome response to nationwide medical emergencies against the possibility of wrongdoing, and it thus did *not* immunize covered persons from the comparatively *greater* punishments of deprivations of liberty and livelihood.

At least one other question goes unanswered by the majority's approach. Tort law and the state constitution undoubtedly serve different, if occasionally related, aims, at least insofar as tort law protects people from each other and the state constitution protects the people from the excesses of government. But there is an alignment—rather than a division—between the state and federal constitutions in this regard. *See*, *e.g.*, *McDonald v. City of Chicago*, 561 U.S. 742, 818 (2010) (Thomas, J., concurring in part and concurring in the judgment) (recognizing the Bill of Rights is incorporated into the Constitution "to expressly protect . . . fundamental rights against interference by the Federal Government"). And yet, "Congress intended to expressly immunize covered persons

from § 1983 actions for claims covered by the [PREP] Act, *even if those claims are federal constitutional claims*." *Maney v. Brown*, 91 F.4th 1296, 1303 (9th Cir. 2024) (emphasis added).[9] If Congress was truly looking only to immunize parties in cases involving interpersonal tort harms, why would it also extend that immunity to federal constitutional claims that seek to vindicate private rights against government overreach? *See, e.g.*, *Albright v. Oliver*, 510 U.S. 266, 271 (1994) ("The first step in any [§ 1983] claim is to identify the specific constitutional right allegedly infringed."). Likewise, and even more pressingly, why would it extend that immunity to federal constitutional claims and *not* state ones involving exactly the same concerns? And how is a tort claim against government actors—persons explicitly immunized under the PREP Act, 42 U.S.C. § 247d-6d(i)(2)—any less of a "protect[ion] [of] the people from their government?" *See* majority *supra* Section II.B.2.b; *see also Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982) ("In situations of abuse of office, an action for damages may offer the only realistic avenue for vindication of constitutional guarantees."); *Lombardo v. City of St. Louis*, 143 S. Ct. 2419, 2421 (2023) (Sotomayor, J., dissenting) (recognizing that "constitutional torts . . . deter and remedy official misconduct"). The majority's logic offers no answers and fails because of that silence.

The majority's ultimate answer is also not internally consistent on its own terms for another reason. The majority would selectively read the PREP Act to demonstrate a congressional intent to protect covered persons from the "measurable and compensable" monetary damages available in tort.[10] But *Corum* claims *also afford monetary relief*—as

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9. This clear and unequivocal statement in *Maney* followed those that the majority reads as rendering "its reasoning and conclusion in-less-than definite terms," due to "its language . . . bec[oming] progressively less forceful." Perhaps the majority is reading *Maney* backwards, too.

In any event, the majority's attempt to distinguish *Maney* on the basis of § 1983 is just as unpersuasive as its effort to assert that *Leonard* is analogous to this case. Section 1983 is nothing more than "a mechanism for vindicating federal statutory or constitutional rights." *Maney*, 91 F.4th at 1302 (cleaned up). While this Court has noted that *Corum* "is not a state law equivalent" of § 1983 because of its more limited availability, remedial character, and state law origins, *Washington v. Cline*, 385 N.C. 824, 831 (2024), that does not change the fact that it, like § 1983, supplies the vehicle for the vindication of some underlying constitutional right.

10. The majority relies in part on *Dressen v. AstraZeneca* AB, No. 2:24-CV-00337-RJS-CMR, 2024 WL 4666577 (D. Utah Nov. 4, 2024), describing its holding as "denying vaccine manufacturer's motion to dismiss [a] breach of contract case because the PREP Act's text was limited to 'tort-like claims.' " That description, however, is not quite accurate, and a proper understanding of the case materially undermines the majority's position. The core holding in that case was that "PREP Act immunity requires a causal link between the

this Court has recently explained, "*Corum* claims are constitutional claims *for damages* directly against the State. These claims are extraordinary and defy many principles of this Court's jurisprudence, *not least the principle that money damages against the State are barred unless the State has authorized them*." *Washington*, 385 N.C. at 825 (emphases added). Given the other logical defects identified herein, there is no apparent reason why Congress would use the all-encompassing word "any" in the limited way the majority supposes. Thus, the majority's reading leaves us with the following entirely tortured and illogical result: immunity from "*any* claim for loss" really means immunity from (a) tort claims for damages caused by government actors who overstep their lawful authority, but not (b) state constitutional claims for damages against government actors who overstep their lawful authority. One wonders how "any" could both mean so much and so little, and why Congress would have intended such a result in light of the manifest purposes of the PREP Act.

In sum, whatever the majority is doing, it cannot in any sense be said to be textualist, let alone vindicative of Congress's will. It employs interpretative canons to create an ambiguity rather than to clarify one. It reads the statutory language right-to-left, not left-to-right. It adopts a reading that frustrates, instead of fosters, the patent aims of the PREP

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claim and a tangible medical countermeasure, and breach of contract claims arise from one party's failure to perform a legal obligation without regard to any countermeasure." *Dressen*, 2024 WL 4666577, at *3. In other words, that court appropriately read the causality requirement as the principal restriction on the applicability of the PREP Act's wide grant of immunity, which is a fundamentally different approach from the category-based limitation adopted by the majority here. And while the *Dressen* court did opine that the illustrative examples of loss in the PREP Act "*suggests*" that only tort-based claims were immunized, *id.* at *10 (emphasis added), that is a far less robust statement than that described by the majority. Finally, *Dressen* adopted an interpretation that actually *furthered* the purposes of the PREP Act:

> requiring covered entities to adhere to their contracts will ensure maximal cooperation between covered entities and consumers during the most critical stages of pandemic response. The speed and agility with which covered entities can operate during public health emergencies due to their widespread tort immunity would be undermined if the *express* promises they make along the way were not enforceable.

Id. at *11. The majority's holding today does the opposite—it actively frustrates the express purposes of the PREP Act, and it directly undermines the immunity from liability and suit by allowing parties to recast immunized tort claims as unimmunized constitutional ones.

Act. It eschews an obvious and plain meaning in favor of an entirely presumed and internally inconsistent one. And, though it is too timorous to include the appropriate quotation marks, the majority flagrantly rewrites " 'all claims for loss' as "all claims for *tort* loss."

I see no need to engage in any of these many "somersaults," *Riegel*, 552 U.S. at 325, and would do what the plain text of an unambiguous statute—in furtherance of the clear intentions of the entire PREP Act—commands: hold that "all claims for loss" actually means "*all* claims for loss," 42 U.S.C. § 247d-6d(a)(1), and " 'loss' " actually "means *any* type of loss," *id.* § 247d-6d(a)(2)(A). Adherence to that plain text, consistent with and not in opposition to the congressional intent and the overarching structure of the PREP Act, is what respect for the legislative branch and constitutional preemptive powers of Congress demands. *See Wyeth v. Levine*, 555 U.S. 555, 565 (2009) ("First, the purpose of Congress is the ultimate touchstone in every pre-emption case." (cleaned up)); *Sprietsma v. Mercury Marine, a Div. of Brunswick Corp.*, 537 U.S. 51, 62–63 (2002) ("[O]ur task of statutory construction must in the first instance focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' pre-emptive intent." (cleaned up)); *Dep't of Agric. Rural Dev. Rural Hous. Serv. v. Kirtz*, 144 S. Ct. 457, 472 (2024) ("When Congress takes the trouble to define the terms it uses, a court must respect its definitions as virtually conclusive." (cleaned up)). The majority's mere lip service to these principles does not suffice, either to effectuate our constitutional duties to faithfully interpret the law or to show appropriate respect to the powers of the other branches and the federal government.

II. The *Corum* Claims

As explained above, I would hold any constitutional claims raised by plaintiffs to be preempted by the PREP Act, rendering the defendants immune from suit. Thus, I would not reach the question of the scope and degree of any state constitutional rights at issue in this case. Nonetheless, because the majority does so—and in a way with which I disagree in form—I likewise dissent from this portion of the majority.

I take no umbrage with the concept of implied constitutional rights. *See, e.g.*, *Wilkinson v. Austin*, 545 U.S. 209, 221 (2005) ("A liberty interest may arise from the Constitution itself, by reason of guarantees implicit in the word 'liberty . . . .' "); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (recounting a number of rights impliedly secured by the Constitution, including rights to contract, marry, learn, pursue gainful employment, freely worship, start a family, "and generally to enjoy those privileges

long recognized at common law as essential to the orderly pursuit of happiness"); *Standley v. Town of Woodfin*, 362 N.C. 328, 331 (2008) (observing that rights to interstate and intrastate travel are fundamental rights impliedly protected by the state and federal constitutions). The majority is undoubtedly correct that persons have a constitutional right to be free from forced medical procedures, and that parents have constitutional rights to the care, custody, and control of their children. I write separately, however, to offer a different articulation of our rights under the North Carolina Constitution.

I cannot agree with the majority that the right to bodily integrity does not impliedly or necessarily recognize a right to bodily autonomy, and there is no principled reason to carve the latter out, at least under the rubric adopted by the majority. *See Meyer*, 262 U.S. at 399 (siting the right to "freedom from bodily restraint" alongside several of the implied rights identified by the majority). The right to bodily autonomy—like the right to bodily integrity described by the majority—has roots in tort law, constitutional law, and foundational principles dating back to and predating the Founding. The writ of habeas corpus, "the great Writ of Right," *In re Bryan*, 60 N.C. (Win.) 1, 45 (1863), has long permitted persons the right to "allege[ ] to be wrongfully imprisoned or restrained of his liberty," *id.*, pursuant to a procedure with an "origin long prior to Magna Charta," *In re Holley*, 154 N.C. 163, 168 (1910). And, as with bodily integrity and battery, persons wrongfully deprived of their physical liberty and bodily autonomy by private persons could sue in tort. *See*, *e.g.*, *Evans v. Kennedy*, 2 N.C. (1 Hayw.) 422 (1796) (recognizing an enslaved person may sue for freedom by way of trespass and false imprisonment claims). Principles of bodily autonomy likewise have a ready analogue in the constitutional criminal law context: "The right of the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated." U.S. Const. Amend. IV. In short, the historical primacy of the right to control one's body cannot be in doubt. *See Union Pac. R. Co. v. Botsford*, 141 U.S. 250 (1891) ("No right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others."). I am troubled by the majority's recognition of a right to bodily integrity but not bodily autonomy under these same circumstances, both because it lacks any articulable principle and because I worry that it will lead to a highly arbitrary and politicized recognition of our individual liberties.

But these examples also draw into stark contrast the complications of tying each and every substantive due process right to a direct historical

analogue. None of these principles were so "objectively, deeply rooted in this Nation's [or State's] history and tradition and implicit in the concept of ordered liberty," *Standley*, 362 N.C. at 331 (quoting *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997)), as to apply equally to persons of color, fully to women, or uniformly to the poor. *See State v. Tirado*, No. 267PA21, slip op. at 78–80 (N.C. Jan. 31, 2025) (Earls, J., concurring) (discussing in detail "the dangers of using history as the yardstick for modern constitutional rights," including that many rights did not historically extend with equal force to women, unlanded and poor persons, and non-white individuals). A Black person held in bondage could sue in tort for freedom, but slave status was a valid defense. *Evans*, 2 N.C. (1 Hayw.) at 422–23. Various evidentiary assumptions attached if such a case went to trial; for example, if the plaintiff's mother was "of a black African complexion," and not "a yellow complexion," then the jury was required to presume she was a slave and that her offspring were as well, as "a presumption of slavery *must* arise from a black [skin tone]." *Scott v. Williams*, 12 N.C. (1 Dev.) 376, 377 (1828).[11] And slaves certainly were denied any sense of bodily autonomy, let alone integrity. *See*, *e.g.*, *State v. Mann*, 13 N.C. (2 Dev.) 263, 266 (1829) ("Such obedience is the consequence only of uncontrolled authority over the body. There is nothing else which can operate to produce the effect. The power of the master must be absolute, to render the submission of the slave perfect.").

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11. The history of parental rights is no less fraught; slaves also lacked any constitutional right to the care, custody, or control of their children. *See Jones v. Jones*, 1 N.C. (Cam. & Nor.) 482, 483 (1801) (holding a will devising a female slave to one of the deceased's heirs did not result in the devise of the slave's children to that preferred heir; instead, the children passed by remainder to a different heir). If the majority is to truly recognize the robust constitutional rights of parents, its practice in other areas of family law should show a departure from, rather than reinforcement of, any historically disparate treatment of disadvantaged populations when it comes to exercising a constitutional right to parent. *See In re L.L.*, 386 N.C. 706, 725 (2024) (Riggs, J., concurring in part and dissenting in part) ("[T]he majority opens the door for classist biases and assumptions to pour into trial courts' considerations of [child] placement and best interest."); *In re G.B.*, 377 N.C. 106, 128 (2021) (Earls, J., dissenting) ("Respondent-father should not, in North Carolina, have his parental rights terminated merely because of his incarceration."); *N.C. Farm Bureau Mut. Ins. Co. v. Martin*, 376 N.C. 280, 298–99 (2020) (Earls, J., dissenting) (critiquing an interpretation of an insurance contract that "fail[ed] to account for and give legal recognition to the residential patterns that so many families experience in rural areas"); *see generally* Janet L. Wallace & Lisa R. Pruitt, Judging Parents, *Judging Place: Poverty, Rurality, and Termination of Parental Rights*, 77 Mo. L. Rev. 95 (2012) (discussing the disparate impact of termination of parental right considerations on rural and impoverished families); Robyn M. Powell, *Legal Ableism: A Systematic Review of State Termination of Parental Rights Law*s, 101 Wash. U. L. Rev. 423 (2023) (discussing the same regarding parents with disabilities).

Bodily integrity was likewise not fully extended to women. If a married woman was the victim of a battery, she could only sue in conjunction with her husband. *Crump v. McKay*, 53 N.C. (8 Jones) 32, 33 (1860). If she was beaten by her husband, she could not testify against him to demonstrate a battery unless he "inflicted or threatened a lasting injury or great bodily harm," *State v. Hussey*, 44 N.C. (Busb.) 123, 127 (1852); indeed, a husband could not be convicted of battery unless he acted with malice or caused permanent injury, because he was perceived as "responsible for the acts of his wife, and he is required to govern his household, and for that purpose the law permits him to use towards his wife such a degree of force as is necessary to control an unruly temper and make her behave herself." *State v. Black*, 60 N.C. (Win.) 262, 263 (1864). In such cases, the abused spouse was not to seek redress at law, but to return to the home, "make the matter up and live together as man and wife should," *id.*, "necessary" beatings and all.

In short, requiring that implied state constitutional rights be exclusively limited to direct historical analogues simply writes certain persons and rights out of constitutional protection—not because of any "objective[ ]" principle relating to "concept[s] of ordered liberty," *Standley*, 362 N.C. at 332 (cleaned up), but because of direct, purposeful, and invidious discrimination in our history that stands contrary to any sense of "ordered liberty" recognized today. These analogues were exclusionary not only in their formulation and articulation, but also in their application, revealing a history—even a recent history—that is inherently contrary to our present sense of liberty and implied constitutionally protected rights, including those recognized by the majority here. Though the majority acknowledges an implied constitutional right to bodily integrity that includes a right to be free from forced medical procedures, less than fifty years ago, this Court upheld as constitutional the forcible sterilization of the intellectually disabled, *In re Moore*, 289 N.C. 95 (1976), relying in part on an early 20th century Supreme Court decision stating, "[i]t is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. . . . Three generations of imbeciles are enough." *Buck v. Bell*, 274 U.S. 200, 207 (1927). History may certainly be helpful in defining and understanding the rights protected by our foundational documents, but we must acknowledge the full history of these rights, and in doing so understand why it cannot be the sole and exclusive source for our "objective[ ]" understanding of "concept[s] of ordered liberty." *Standley*, 362 N.C. at 332 (cleaned up).

Finally, as to the majority's decision to recognize a discrete constitutional right of parents to make medical decisions for their children, I believe such a holding entirely unnecessary. As even the majority acknowledges, our caselaw establishing and detailing the constitutional rights of parents already encompasses the fundamental concerns undergirding the majority's articulation. But going so far as to describe it as a discrete right, with only a scant few sentences acknowledging its limits in only the most general of senses, needlessly presents a host of complicating constitutional concerns, both direct and indirect. Consider, for example, N.C.G.S. § 90-21.1 (2023). First enacted in 1965, that statute authorizes lifesaving medical treatment for minors without parental consent when the time necessary to obtain parental consent—or to litigate a refusal of parental consent in court—would place the minor's life in jeopardy.[12] *Id.* Or, more indirectly, consider our precedent that "the state has a compelling interest in seeing that children are educated and may, constitutionally, establish minimum educational requirements and standards for this education." *Delconte v. State*, 313 N.C. 384, 401–02 (1985). Given the ill-defined contours of the discrete constitutional right identified today, the majority's strictly historical (and, as described herein, also ahistorical) approach to articulating parental rights, its broader statements tightly curtailing any state interest in the rearing of children, and the presumptions it asserts regarding the same, it seems only too certain that the survival of these longstanding directives of state law will be questioned. Maybe that is the intention, but this Court ought not be in the business of installing backdoors into loadbearing constitutional walls.

III. Conclusion

The facts alleged in the plaintiffs' complaint are undoubtedly troubling; as even the defendants' policies provided, the administration of a vaccine to a minor child without parental consent in these circumstances was wrong. The minor child and his parents had every right and reason to be outraged at their losses of their physical and parental rights. And, absent any congressional countermand, they should have

12. One could foresee this situation arising under the PREP Act where a vaccine authorized by an emergency use declaration is the only lifesaving treatment available. *But see* N.C.G.S. § 90-21.5(a1) ("Notwithstanding any other provision of law to the contrary, a health care provider shall obtain written consent from a parent or legal guardian prior to administering any vaccine that has been granted emergency use authorization . . . to an individual under 18 years of age."); *see* majority *supra* Section II.B.3. (asserting, in entirely conclusory fashion, that N.C.G.S. § 90-21.5(a1) does not meaningfully impede Congress's interests in passing the PREP Act).

the opportunity to pursue any lawful claims for those losses against those responsible.

But "tragic facts make bad law," *Wyeth*, 555 U.S. at 604 (Alito, J., dissenting), and "the Legislature's superior capacity for weighing competing interests means that we must be particularly careful not to substitute our judgment of what is desirable for that of Congress," *Holder v. Hum. Law Project*, 561 U.S. 1, 34 (2010). And in the case of the PREP Act, Congress balanced the need for maximum public and private participation in rapid nationwide responses to public health crises against the right to recovery via civil suits like the one before this Court.

I am unable to concur in the majority for the reasons outlined *supra* Part II. In an attempt to obscure the clear and obvious congressional purposes in enacting the PREP Act, the majority first articulates two implied constitutional rights through flawed—and unnecessary—historical analyses. From there, it uses the heft of the principles articulated under that shaded history like a weighted blanket to cover up what it's really doing: reasoning backwards so that it can rewrite a statute to avoid a legislative policy preference it finds distasteful. The ultimate effect is to smother Congress's plain and obvious intent. But the PREP Act is clear: " 'loss' means *any* type of loss," 42 U.S.C. § 247d-6d(a)(2)(A) (emphasis added), and immunity from suit and liability "applies to *any* claim for loss that has a causal relationship" to the provision of a covered countermeasure, *id.* § 247d-6d(a)(2)(B) (emphasis added); *see also id.* § 247d-6d(a)(1) (providing immunity for "*all* claims for loss caused by, arising out of, relating to, or resulting from" the provision of a covered countermeasure (emphasis added)). That this plain and unambiguous language leads to what a judge might view as undesirable policy outcomes—or even unforeseen ones—is no reason to disregard congressional intent; to the contrary, it reinforces our duty to apply it consistent with its broad reach. *See, e.g.*, *Haroco, Inc. v. Am. Nat. Bank and Tr. Co. of Chicago*, 747 F.2d 384, 398 (7th Cir. 1984) ("[T]he fact that RICO has been applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth."). After all, as the majority sees no irony in preaching, we are "a government of the people, not of the judges." *Harper v. Hall*, 384 N.C. 292, 299 (2023). I respectfully dissent.

Justice EARLS joins in this dissenting opinion.

LANNAN v. BD. OF GOVERNORS OF THE UNIV. OF N.C.

[387 N.C. 239 (2025)]

JOSEPH LANNAN AND LANDRY KUEHN, ON BEHALF OF THEMSELVES AND OTHERS SIMILARLY SITUATED

v.

BOARD OF GOVERNORS OF THE UNIVERSITY OF NORTH CAROLINA, KNOWN AND DISTINGUISHED BY THE NAME OF THE UNIVERSITY OF NORTH CAROLINA, A BODY POLITIC AND CORPORATE

No. 316PA22

Filed 21 March 2025

1. Appeal and Error—abandonment of issues—"swapping horses" on appeal—issue not raised at trial or in prior appeal

In a breach of contract action brought against the Board of Governors of the University of North Carolina (defendant) by students (plaintiffs) seeking refunds for mandatory fees and parking permits they paid for during the COVID-19 pandemic, defendant's argument—that, in light of the statutory mandate in N.C.G.S. § 116-143(a), the fees at issue in the case could not be the subject of a contract—was not preserved for appeal. Defendant neither raised the issue before the trial court nor included it in their appellate brief in their prior appeal to the Court of Appeals, and defendant could not "swap horses" between courts to "get a better mount" before the Supreme Court.

2. Immunity—sovereign—waiver—breach of contract—express contracts—pleading

In a breach of contract action brought against the Board of Governors of the University of North Carolina (defendant) by students (plaintiffs) seeking refunds for mandatory fees and parking permits they paid for during the COVID-19 pandemic, where the Court of Appeals affirmed the trial court's denial of defendant's motion to dismiss on the ground that—taking the complaint's allegations as true—defendant waived sovereign immunity by entering into implied-in-fact contracts with plaintiffs, the Supreme Court affirmed and modified the Court of Appeals' decision, clarifying that plaintiffs' complaint sufficiently alleged that defendant waived immunity by entering into express contracts, wherein they offered plaintiffs specific on-campus services, access to campus facilities, and access to on-campus parking in exchange for payment of the fees and the purchase of parking permits.

3. Contracts—breach—express contracts—sufficiency of allegations—motion to dismiss—evidence needed for trial

In a breach of contract action brought against the Board of Governors of the University of North Carolina (defendant) by students (plaintiffs) seeking refunds for mandatory fees and parking permits they paid for during the COVID-19 pandemic, plaintiffs' complaint alleged sufficient facts to overcome defendant's Civil Procedure Rule 12(b)(6) motion to dismiss for failure to state a claim; specifically, plaintiffs sufficiently alleged the existence of express contracts between the parties for specific on-campus benefits in exchange for payment. Although defendant's argument—that there was never a meeting of the minds between the parties to form a contract—was properly rejected at the motion-to-dismiss phase, plaintiffs would need to prove their allegations with evidence in order to defeat defendant's argument at trial.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 285 N.C. App. 574 (2022), affirming an order entered on 30 June 2021 by Judge Edwin G. Wilson Jr. in Superior Court, Wake County. Heard in the Supreme Court on 22 October 2024.

White & Stradley, PLLC, by J. David Stradley; and Brian D. Westrom for plaintiff-appellees.

Jeff Jackson, Attorney General, by Laura McHenry, Special Deputy Attorney General, and Lindsay Vance Smith, Deputy Solicitor General; and Brooks, Pierce, McLendon, Humphrey & Leonard, LLP, by Jim W. Phillips Jr., Jennifer K. Van Zant, and Katarina Wong; and Dowling PLLC, by Craig D. Schauer and Troy D. Shelton, for defendant-appellant.

Cranfill Sumner LLP, by Steven A. Bader, for North Carolina Association of Defense Attorneys, amicus curiae.

ALLEN, Justice.

Early in the Fall 2020 semester, during the COVID-19 pandemic, North Carolina State University (NCSU) and the University of North Carolina at Chapel Hill (UNC-CH) moved their in-person classes online and effectively closed their campuses to students. Plaintiffs filed suit as students at the universities against the Board of Governors of the

University of North Carolina, seeking refunds of the mandatory fees they paid as a condition of registration. Plaintiffs also sued to recover fees paid for on-campus parking permits.

The Board moved to dismiss the lawsuit, asserting the defense of sovereign immunity, a legal doctrine that bars most legal claims against the State and its agencies. The trial court denied the motion as to plaintiffs' breach of contract claims. The Court of Appeals affirmed, in part because sovereign immunity is not a defense to a claim that the State breached a valid contract. According to the Court of Appeals, plaintiffs successfully alleged that (1) the Board—through NCSU and UNC-CH—entered into implied contracts with plaintiffs to provide fee-funded services and on-campus parking and (2) NCSU and UNC-CH breached those implied contracts by denying students access to services and facilities.

We agree with the Court of Appeals that sovereign immunity does not foreclose plaintiffs' breach of contract claims against the Board at this stage of litigation; however, we read the lawsuit to allege the existence of express—not implied—contracts between plaintiffs and the Board. We therefore modify and affirm the judgment of the Court of Appeals.

I. Background

On 10 September 2020, plaintiff Joseph Lannan filed suit in the Superior Court, Wake County, against defendant Board of Governors of the University of North Carolina.[1] The Board is "responsible for the general determination, control, supervision, management and governance of all affairs" of the sixteen constituent universities that make up the University of North Carolina, including NCSU and UNC-CH. N.C.G.S. §§ 116-4, -11(2) (2023). On 18 November 2020, the Chief Justice of the Supreme Court of North Carolina designated this case as exceptional pursuant to Rule 2.1 of the General Rules of Practice for the Superior and District Courts, assigning it to Senior Resident Superior Court Judge Edwin G. Wilson Jr.

On 3 February 2021, plaintiff Lannan and plaintiff Landry Kuehn filed an amended complaint. The amended complaint alleges the following facts regarding certain fee-related actions taken by NCSU and UNC-CH during the Fall 2020 semester. Both universities fund various student services and benefits through the imposition of mandatory fees. Students could not register for the Fall 2020 semester without paying those fees.

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1. Both the original complaint and the amended complaint are framed as class action lawsuits. The class action component is not at issue here.

NCSU and UNC-CH provided information about the mandatory fees on their respective websites and in written communications to students. For example, NCSU described some of its fees as follows:

> a. **Education and Technology Fee** – This academic fee of $439.28 is used by colleges and schools to equip and operate computing and scientific laboratories which supplement classroom instruction.
>
> . . . .
>
> d. **Union Activities Board (UAB) Fee** – This fee of $19.63 supports the UAB which is the main programming body for the campus which is responsible for acquiring, scheduling, publicizing, and presenting films, speakers, and special events.
>
> . . . .
>
> h. **Student Center Operations Fee** – This fee of $132.39 supports the maintenance and operations of the Student Center facilities.
>
> i. **Student Center Programming Fee** – This fee of $242.70 supports programming for the Student Centers and the Office of Institutional Equity and Diversity.
>
> . . . .
>
> l. **Recreational Sports Fee** – This fee of $168.85 is used to defray the cost of operating and maintaining the intramural recreational sports program and other physical education programs.
>
> . . . .
>
> o. **Student Health Services Fee** – This fee of $407.00 is used by the University Health Center to offer medical and counseling services to students.
>
> p. **Transit Operations Fee** – This fee of $205.00 partially funds the campus transit system.

The universities' written communications to students included "an itemized bill which labeled . . . the services, benefits, and opportunities which NCSU and UNC-CH promised to provide in exchange for each student's . . . payment of Fall 2020 Term Student Fees." The bill "also

specified the amount that each . . . NCSU and UNC-CH student was required to pay for those services, benefits, and opportunities."

Additionally, the universities offered optional parking permits that "some, but not all, Fall 2020 Term students at NCSU and UNC-CH . . . purchased." The parking permits authorized purchasers "to park their motor vehicle[s] on NCSU's and UNC-CH's convenient on-campus parking lots for the Fall 2020 Terms."

Plaintiff Lannan paid NCSU's mandatory fees when registering as a graduate student for the Fall 2020 semester. He also paid for a Fall 2020 parking permit. Plaintiff Kuehn paid UNC-CH's mandatory fees when registering as an undergraduate for the Fall 2020 semester and purchased a parking permit, though her permit was valid for the entire 2020–2021 academic year.

In August 2020, NCSU and UNC-CH "voluntarily" and "unnecessarily" took a series of drastic actions effective for the duration of the Fall 2020 semester, to include: cancelling all in-person, on-campus instruction; evicting all students from on-campus housing; severely limiting campus transportation; prohibiting students from accessing on-campus student athletic and recreation facilities; and closing libraries, student unions, dining halls, and other on-campus facilities.[2] Those actions rendered many of the facilities and services funded by the mandatory fees "of no value whatsoever" to plaintiffs and other NCSU and UNC-CH students enrolled during the Fall 2020 semester. Nonetheless, the fees "were not adjusted, pro-rated, or rebated in any way."

The amended complaint alleges two claims against the Board for breach of contract arising from the foregoing alleged facts. The first claim concerns the mandatory fees and asserts that plaintiffs "entered into express contracts . . . in which: (1) NCSU and UNC-CH offered [p]laintiffs . . . services, benefits, and opportunities . . . ; and (2) [p]laintiffs . . . accepted [the] offer and agreed to pay, and did, in fact, pay, the Student Fees for such Earmarked Services." NCSU and UNC-CH allegedly breached the contracts by stopping or curtailing the services and benefits for which plaintiffs paid. This purported breach left plaintiff Lannan with $1,288.80 in damages and plaintiff Kuehn with damages totaling $976.25.

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2. The original complaint filed in this case alleges that NCSU and UNC-CH took these actions "in response to the COVID-19 pandemic." The amended complaint omits any explanation for the actions.

The second breach of contract claim focuses on parking permits. Plaintiffs assert that "NCSU and UNC-CH offered to sell optional parking permits" for on-campus lot access during Fall 2020. When students purchased those permits, the amended complaint continues, they formed contracts. By closing campuses and suspending activities, the universities allegedly "rendered the . . . permits worthless." Although NCSU refunded $80 to plaintiff Lannan and UNC-CH refunded approximately $150 to plaintiff Kuehn, plaintiff Lannan has unpaid damages of $130, while plaintiff Kuehn's unpaid damages come to $150.

As an alternative to plaintiffs' contract claims, the amended complaint also alleges that the universities violated plaintiffs' property rights and constitutional rights "guaranteed by the 'law of the land' clause found in Article I, Section 19 of the North Carolina Constitution." Citing this Court's decision in *Corum v. University of North Carolina*, 330 N.C. 761 (1992), the amended complaint refers to the alleged constitutional violation as a "*Corum* claim" and asserts that it entitles plaintiffs to just compensation for the unrefunded fees they paid for the Fall 2020 semester.

On 2 March 2021, the Board filed a motion to dismiss the amended complaint pursuant to Rules 12(b)(1) (lack of subject matter jurisdiction), 12(b)(2) (lack of personal jurisdiction), and 12(b)(6) (failure to state a claim for relief) of the North Carolina Rules of Civil Procedure. In its motion, the Board asserted that plaintiffs' claims are barred by the doctrine of sovereign immunity, which generally prohibits lawsuits against the State except when the State has waived its immunity. The Board further contended that the amended complaint fails to allege either a claim for breach of contract or a *Corum* claim.

The trial court entered an order on 18 June 2021, granting the Board's motion in part and denying it in part. The order allowed the contract claims to proceed but dismissed plaintiffs' *Corum* claim. At plaintiffs' request, the court entered an amended order on 30 June 2021 restating its earlier ruling and certifying the dismissed *Corum* claim for immediate appeal. Both sides then sought appellate review, with plaintiffs appealing the dismissal of their *Corum* claim and the Board challenging the trial court's denial of its motion to dismiss the contract claims.

In an opinion filed on 4 October 2022, the Court of Appeals unanimously affirmed the trial court's amended order. *Lannan v. Bd. of Governors of the Univ. of N.C.*, 285 N.C. App. 574, 606 (2022). As summarized by the Court of Appeals, the appeal presented three issues: (1) whether sovereign immunity bars plaintiffs' claims; (2) whether the trial court should have dismissed the contract claims under Rule 12(b)(6)

"for failure to plead a claim for breach of contract on which relief may be granted"; and (3) whether, if plaintiffs' contract claims fail, their *Corum* claim states a valid claim for relief. *Id.* at 581. After establishing that it had jurisdiction over the appeal, *id.* at 581–86, the Court of Appeals took up the first issue.

Although the parties agreed that the State waives sovereign immunity by entering into valid contracts, the Board insisted that such contracts must be express and that plaintiffs failed to allege the existence of any express contract. In response, plaintiffs argued that they successfully alleged a contract implied in fact and that such contracts can also overcome sovereign immunity.

The Court of Appeals acknowledged this Court's holding in *Smith v. State*, 289 N.C. 303 (1976), that the State implicitly consents to be sued for breach of contract whenever it enters into a valid contract. *Lannan*, 285 N.C. App. at 585. It noted, though, that later cases such as *Whitfield v. Gilchrist*, 348 N.C. 39 (1998), "include broad language that when read literally, and taken out of context, could [appear to] exclude contracts implied in fact from the waiver of sovereign immunity." *Lannan*, 285 N.C. App. at 590. Declining to rely on this broad language, the Court of Appeals turned for guidance to several of its prior decisions that "extend[ed] *Smith* to implied in fact contracts [in] the employment context." *Id.* at 593. According to the Court of Appeals, "[t]he reasoning of those [employment] cases extends beyond the employment context" because it "turn[s] on the similarities of express and implied in fact contracts." *Id.* In light of this precedent, the court concluded that "a contract implied in fact can waive sovereign immunity under the contractual waiver holding in *Smith*." *Id.* at 595.

Having determined that implied-in-fact contracts can waive sovereign immunity, the Court of Appeals considered whether the amended complaint alleges such a contract. "[T]o plead a valid implied-in-fact contract," the court explained, "[p]laintiffs needed to plead offer, acceptance, and consideration." *Id.* at 597. The court reviewed the amended complaint's factual allegations and held that "[p]laintiffs properly pled each of those three elements." *Id.* Consequently, "the trial court did not err in denying [the Board's] motion to dismiss on the grounds of sovereign immunity." *Id.* at 600.

The Court of Appeals next examined the Board's argument that the trial court should have dismissed plaintiffs' contract claims under Rule 12(b)(6) for failure to state a claim for relief. Because, in its view, plaintiffs alleged a valid contract, the Court of Appeals "only need[ed] to

address whether [p]laintiffs adequately pled breach to address the trial court's Rule 12(b)(6) ruling." *Id.* at 601. "Focusing only on [plaintiffs'] non-conclusory factual allegations," the court held that "[p]laintiffs adequately allege[d] a breach even though they [did] not specifically say they explicitly asked for and then were denied services; according to the allegations, they paid for services and then [NCSU and UNC-CH] barred them from accessing such services." *Id.* at 603. It followed that "the trial court did not err in denying [the Board's] motion to dismiss [p]laintiffs' contract claims for failure to state a claim under Rule 12(b)(6)." *Id.*

Finally, the Court of Appeals disagreed with plaintiffs' contention that the trial court erred by dismissing the amended complaint's *Corum* claim. Observing that a party may not pursue a claim directly under the North Carolina Constitution when the law provides an adequate alternative remedy, the Court of Appeals pointed out that "the remedy for [plaintiffs'] contract claims, namely money damages, is identical to [their] requested remedy for the alleged constitutional violation." *Id.* at 605. Having disposed of all issues raised by the parties, the Court of Appeals affirmed the trial court's amended order granting in part and denying in part the Board's motion to dismiss.

The Board filed a petition for discretionary review pursuant to N.C.G.S. § 7A-31 asking this Court to review the Court of Appeals' rulings on plaintiffs' contract claims. We allowed the petition.[3]

II. Standard of Review

"Questions of law regarding the applicability of sovereign or governmental immunity are reviewed de novo." *Irving v. Charlotte-Mecklenburg Bd. of Educ.*, 368 N.C. 609, 611 (2016). In other words, we "consider[ ] the matter anew and freely substitute[ ] our own judgment for that of the lower courts." *Town of Midland v. Harrell*, 385 N.C. 365, 370 (2023) (cleaned up).

We also review de novo a lower court's ruling on a motion to dismiss under Rule 12(b)(6). *Arnesen v. Rivers Edge Golf Club & Plantation, Inc.*, 368 N.C. 440, 448 (2015). Such a motion tests whether the complaint

3. Plaintiffs did not file a petition for discretionary review of the Court of Appeals' ruling upholding the dismissal of their *Corum* claim. After oral argument, plaintiffs filed a conditional petition for writ of certiorari requesting review of the *Corum* ruling if this Court determines that the amended complaint fails to allege valid breach of contract claims. Inasmuch as we hold that the amended complaint states valid claims for breach of contract, we dismiss as moot the petition for writ of certiorari. Accordingly, plaintiffs' *Corum* claim is not before this Court.

states a valid legal claim if its factual allegations are accepted as true. *Sutton v. Duke*, 277 N.C. 94, 98 (1970). "When the complaint on its face reveals that no law supports the claim, reveals an absence of facts sufficient to make a valid claim, or discloses facts that necessarily defeat the claim, dismissal is proper." *Arnesen*, 368 N.C. at 448. On the other hand, our "system of notice pleading affords a sufficiently liberal construction of complaints so that few fail to survive a motion to dismiss." *Ladd v. Est. of Kellenberger*, 314 N.C. 477, 481 (1985). *See generally* N.C.G.S. § 1A-1, Rule 8(a) (requiring any pleading that sets forth a claim for relief to contain "[a] short and plain statement of the claim sufficiently particular to give the court and the parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved showing that the pleader is entitled to relief").

III. Analysis

The Board raises three main issues in its briefing to this Court. First, it argues that the fees for which plaintiffs seek refunds cannot be the subject of a contract because state law required NCSU and UNC-CH to impose and collect them. Second, the Board contends that sovereign immunity bars plaintiffs' contract claims. Third, the Board insists that plaintiffs' contract claims cannot survive its Rule 12(b)(6) motion to dismiss "because [p]laintiffs pled facts that defeat them." Each of these arguments misses the mark.

A. Statutory Mandate

[1] The Board highlights several statutory provisions that govern the imposition of student fees. In particular, N.C.G.S. § 116-143(a) directs the Board to "fix the tuition and fees . . . at the [constituent] institutions of higher education . . . in such amount or amounts as it may deem best, taking into consideration the nature of each institution and program of study and the cost of equipment and maintenance." N.C.G.S. § 116-143(a) (2023). According to the Board, "[t]he University's imposition and collection of fees, pursuant to the General Assembly's mandate, constitutes the exercise of the University's governmental power and, therefore, cannot be the subject of a contract."

Furthermore, in the Board's view, the imposition and collection of mandatory student fees is analogous to the levying of taxes. The Board insists that "the government's levying of an assessment is the exercise of its sovereign power to raise revenue and fund government operations and advance public welfare, not the creation of a contract enforceable by a citizen." In support of its position, the Board cites *Tilghman v. West of New Bern Volunteer Fire Dep't*, 32 N.C. App. 767

(1977), wherein the Court of Appeals held that "[t]he collection of taxes by Craven County . . . under authority granted by the legislature constituted the exercise of a public and governmental power and as such [was] not and [could not] be the subject of a contract." *Id.* at 769.

It appears that the Board did not make its statutory mandate argument to the trial court. Likewise, the Board did not include the argument in its briefs to the Court of Appeals. Inasmuch as "the law does not permit parties to swap horses between courts in order to get a better mount in the Supreme Court," we decline to consider this argument. *Weil v. Herring*, 207 N.C. 6, 10 (1934); *see also* N.C. R. App. P. 28(a) ("Issues not presented and discussed in a party's brief are deemed abandoned.").

B. Sovereign Immunity

[2] The Board maintains that sovereign immunity bars plaintiffs' breach of contract claims because "there can be no serious argument the General Assembly's requirement that [the Board] charge fees is a waiver of liability." The Board further argues that plaintiffs failed to allege a waiver of sovereign immunity because the amended complaint does not allege either an express contract or a contract implied in fact. Lastly, the Board asserts that, even if the amended complaint alleges an implied-in-fact contract, "North Carolina's appellate courts have previously only allowed an implied-in-fact contract to waive sovereign immunity in one limited context: where the State acts as an employer."

Subject to important limitations, the doctrine of sovereign immunity bars lawsuits against the State except when the State has waived its immunity to suit.[4] *Smith v. Hefner*, 235 N.C. 1, 6 (1952). The State's sovereign immunity extends to the University of North Carolina. *See Orange County v. Heath*, 282 N.C. 292, 296 (1972) ("The State and its governmental units cannot be deprived of the sovereign attributes of immunity except by a clear waiver by the lawmaking body.").

Though rooted in the outdated notion that "the king could do no wrong," *Corum*, 330 N.C. at 785, today sovereign immunity reflects the judiciary's respect for the separation of powers between the legislative

4. In general, sovereign immunity will not bar claims against the State or its agencies for violations of an individual's rights under the North Carolina Constitution. *See Corum*, 330 N.C. at 785–86 ("The doctrine of sovereign immunity cannot stand as a barrier to North Carolina citizens who seek to remedy violations of their rights guaranteed by the [North Carolina Constitution's] Declaration of Rights."). "In addition, under the federal cases interpreting [42 U.S.C. § 1983], sovereign immunity alleged under state law is not a permissible defense to section 1983 actions." *Id.* at 772 (citing *Martinez v. California*, 444 U.S. 277, 283 (1980)).

and the judicial branches. *See id.* ("It has been said that the present day doctrine [of sovereign immunity] seems to rest on a respect for the positions of two coequal branches of government—the legislature and the judiciary.").

The appropriations clause in the North Carolina Constitution provides that "[n]o money shall be drawn from the State treasury but in consequence of appropriations made by law." N.C. Const. art. V, § 7(1). "In drafting the appropriations clause, the framers sought to ensure that the people, through their elected representatives in the General Assembly, had full and exclusive control over the allocation of the [S]tate's expenditures." *Cooper v. Berger*, 376 N.C. 22, 37 (2020). By narrowing the State's exposure to lawsuits, sovereign immunity reduces the chances that judgments entered against the State will significantly impair the General Assembly's authority to set spending priorities. *See Smith*, 289 N.C. at 322 ("With no limits on liability jury verdicts could conceivably impose an unanticipated strain upon the State's budget.").

Consistent with our respect for the separation of powers, we will not lightly infer waivers of sovereign immunity. *Guthrie v. N.C. State Ports Auth.*, 307 N.C. 522, 537–38 (1983). In *Smith*, however, we reasoned "that whenever the State of North Carolina, through its authorized officers and agencies, enters into a valid contract, the State implicitly consents to be sued for damages . . . in the event it breaches the contract." *Smith*, 289 N.C. at 320. In such circumstances, "the doctrine of sovereign immunity will not be a defense to the State." *Id.*

We predicted that our decision in *Smith* would not "result in any unseemly conflict between the legislative and judicial branches of the government." *Id.* at 321. For one thing, we did not "anticipate that [*Smith* would] have a significant impact upon the State treasury." *Id.* Inasmuch as the immunity waiver recognized in *Smith* was confined to contracts "authorized by law," the State could, "with a fair degree of accuracy, estimate the extent of liability for a breach of contract." *Id.* at 322; *see also Wray v. City of Greensboro*, 370 N.C. 41, 47 (2017) (noting that a valid contract waives the State's sovereign immunity only "to the extent of th[e] contract"). We further clarified that, even if the *Smith* plaintiff proved his claim against the State, he could not "obtain execution to enforce the judgment." *Smith*, 289 N.C. at 321. "Satisfaction [of the judgment] w[ould] depend upon the manner in which the General Assembly discharge[d] its constitutional duties." *Id.*

"Because in contract actions the doctrine of sovereign immunity will not be a defense, a waiver of governmental immunity is implied, and

effectively alleged, when the plaintiff pleads a contract claim." *Wray*, 370 N.C. at 48 (cleaned up). Ordinarily, this means that the complaint must allege offer, acceptance, and consideration. *See, e.g.*, *Dodds v. St. Louis Union Tr. Co.*, 205 N.C. 153, 156 (1933) ("In the formation of a contract[,] an offer and an acceptance are essential elements; they constitute the agreement of the parties."). To serve as the foundation for a valid contract, the offer must be intended to create legal obligations if accepted. *Yeager v. Dobbins*, 252 N.C. 824, 828 (1960). "It must not be . . . intended merely to open negotiations which will ultimately result in a contract . . . ." *Id.* Acceptance occurs only if the parties "assent to the same thing in the same sense, . . . and their minds must meet as to all the terms." *Dodds*, 205 N.C. at 156. Consideration is present if there is a benefit to the promisor or a detriment to the promisee. *Carolina Helicopter Corp. v. Realty Co.*, 263 N.C. 139, 147 (1964).

As noted above, the Court of Appeals held that plaintiffs successfully alleged the existence of an implied-in-fact contract. In a case not involving sovereign immunity, we declared that "an implied contract is as valid and enforceable as an express contract." *Creech v. Melnik*, 347 N.C. 520, 526 (1998).

"[A] contract implied in fact arises where the intent of the parties is not expressed, but an agreement in fact, creating an obligation, is implied or presumed from their acts." *Id.* To determine whether an implied-in-fact contract exists, courts look to whether the parties' conduct would be understood to create legal obligations in "the ordinary course of dealing." *Snyder v. Freeman*, 300 N.C. 204, 217 (1980) (cleaned up). The existence of an implied-in-fact contract is usually obvious from the circumstances. In *Warren v. Dixon & Christopher Co.*, for example, an implied employment contract came about when the employer's foreman immediately put a pipefitter to work. 252 N.C. 534, 538 (1960).

The Court of Appeals erred in holding that the amended complaint alleges a contract implied in fact. Because this appeal stems from a Rule 12(b)(6) motion to dismiss, we must base our decision on the amended complaint's factual allegations. *Morris v. Rodeberg*, 385 N.C. 405, 406 (2023). As explained below, the amended complaint alleges the existence of express contracts between plaintiffs and the Board. Once parties enter an express agreement, there can be no implied contract between them covering the same subject matter. *Morganton Mfg. & Trading Co. v. Andrews*, 165 N.C. 285, 290 (1914). Thus, plaintiffs' allegations of express contracts necessarily defeat their effort on appeal to recast their lawsuit as one arising from the Board's breach of implied contracts.

After providing detailed descriptions of the mandatory fees charged by NCSU and UNC-CH, the amended complaint alleges the following facts with respect to those fees:

> 47. . . . [B]efore the beginning of their respective Fall 2020 Terms, NCSU and UNC-CH provided each student enrolled for their Fall 2020 Terms, including [p]laintiffs, an itemized bill which labeled, in writing, the services, benefits, and opportunities which NCSU and UNC-CH promised to provide in exchange for each student's, including each [p]laintiff's, payment of Fall 2020 Term Student Fees; those bills also specified the amount that each [p]laintiff and each other NCSU and UNC-CH student was required to pay for those services, benefits, and opportunities.
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> 48. Following their receipt of the itemized bill for Fall Term 2020 Student Fees from NCSU and UNC-CH, each [p]laintiff made full payment to each of their respective Subject Constituent Institutions—NCSU and UNC-CH—for all Student Fees charged by NCSU and UNC-CH for the Fall 2020 Terms.
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> 49. Before August 10, 2020, NCSU and UNC-CH, on behalf of [the Board], offered to [p]laintiffs and other prospective . . . students that if the prospective students registered for the Fall 2020 Terms and promised to pay the Student Fees for the Fall 2020 Terms, that they . . . would, in turn, receive the services, benefits, and opportunities of the Earmarked Components from NCSU and UNC-CH for the duration of the Fall 2020 Term; NCSU and UNC-CH, on behalf of [the Board], made this offer through their websites and through their billing communications with [p]laintiffs and other prospective . . . students . . . .
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> . . . .
>
> 98. As set forth above, [p]laintiffs . . . entered into *express contracts* with [the Board] in which: (1) NCSU and UNC-CH offered [p]laintiffs . . . the Earmarked Components composed of services, benefits, and opportunities and billed [p]laintiffs . . . for those Earmarked Components; and (2) [p]laintiffs . . . accepted [the Board's] offer and agreed to

> pay, and did, in fact, pay, the Student Fees for such Earmarked Services.

(Emphasis added.)

Similarly, the amended complaint alleges these facts regarding plaintiffs' parking permits:

> 108. Before the beginning of the Fall 2020 Terms, NCSU and UNC-CH offered to sell optional parking permits to [p]laintiffs and other Fall 2020 Term students which would permit the purchaser to park a motor vehicle in an on-campus parking lot during the Fall 2020 Terms.
>
> 109. Plaintiffs . . . accepted the offers of NCSU and UNC-CH and purchased such permits: Lannan paid NCSU $210 for his parking permit and Kuehn paid UNC-CH over $300 for her parking permit . . . .
>
> 110. As set forth above, [p]laintiffs . . . entered into *express contracts* with [the Board] through its Subject Constituent Institutions—NCSU and UNC-CH—in which: (1) NCSU and UNC-CH offered [p]laintiffs . . . on-campus motor vehicle parking permits; and (2) [p]laintiffs . . . accepted such offers and agreed to pay, and did, in fact, pay, to [the Board] through the respective Subject Constituent Institutions—NCSU and UNC-CH—fees for on-campus motor vehicle parking permits for the Fall 2020 Terms at NCSU and UNC-CH.

(Emphasis added.)

For both contract claims, the amended complaint alleges offer, acceptance, and consideration. It asserts that the universities offered prospective students benefits in the form of specified services and access to designated facilities in exchange for the payment of certain fees. It further alleges that plaintiffs accepted the offer and paid those fees. Likewise, the amended complaint alleges that the universities expressly offered the benefit of on-campus parking to students such as plaintiffs in exchange for the purchase of parking permits and that plaintiffs accepted the offer and purchased the permits. Under the lenient standards of notice pleading, the amended complaint sufficiently alleges that the Board—through two of its constituent institutions—entered into express contracts with plaintiffs. Accordingly, it also alleges waivers of

the Board's sovereign immunity as to plaintiffs' claims for breach of contract. *See Smith*, 289 N.C. at 320 ("[I]n causes of action on contract . . . , the doctrine of sovereign immunity will not be a defense to the State.").

Having concluded that the amended complaint alleges a waiver of sovereign immunity based on express contracts, we need not consider whether or when a contract implied in fact can waive sovereign immunity. We therefore decline to resolve that issue.

C. Adequacy of Contract Allegations

[3] According to the Board, "[e]ven if [this] Court were to endorse the Court of Appeals' derogation of [the Board's] sovereign immunity and allow [p]laintiffs to proceed with their claims against [the Board] . . . , then [p]laintiffs' breach of contract claims would still fail under Rule 12(b)(6)." Specifically, in the Board's opinion, plaintiffs' "own allegations reveal that there was never any meeting of the minds to form a contract and are fatal to their claims." The Board contends that "[t]he very websites on which [p]laintiffs rely as a basis for their contract informed students that the fees would not be refunded if [NCSU or UNC-CH] switched to remote instruction."[5] The Board also argues that the fee descriptions contained in the amended complaint "affirmatively show[ ] that many of the fees were paid not in exchange for personal services, but rather to fund debt services and the expansion and renovation of campus buildings."

Not surprisingly, having just held that the amended complaint successfully alleges express contracts, we reject these arguments. As we have repeatedly emphasized, the procedural posture of this case requires us to accept the amended complaint's factual allegations as true. *Morris*, 385 N.C. at 406. Plaintiffs could lose at a later stage, however, if the evidence produced in discovery confirms the Board's contention that they were not entitled to refunds.

Moreover, the Board correctly observes that many of the fee descriptions in the amended complaint lack any explicit promise to provide services to students who paid those fees. The description of the "Transit Operations Fee," for instance, merely says that "[t]his fee of $205.00 partially funds the campus transit system." Plaintiffs have overcome the Board's Rule 12(b)(6) motion because the amended complaint alleges

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5. The Board cites copies of website pages that it submitted to the trial court as exhibits to a memorandum of law. Although the amended complaint mentions websites, we cannot tell from its factual allegations whether the pages cited by the Board are the ones referred to in the amended complaint.

other facts sufficient to establish the existence of express contracts between the parties. To win at trial, plaintiffs will have to prove their allegations with evidence.[6]

IV. Conclusion

The amended complaint adequately alleges the existence of express contracts between plaintiffs and the Board. For this reason, sovereign immunity does not bar plaintiffs' alleged claims against the Board for breach of contract. Although the Court of Appeals rightly affirmed the trial court's denial of the Board's motion to dismiss those claims, it did so under the erroneous impression that the amended complaint alleges implied but not express contracts. We thus modify and affirm the judgment of the Court of Appeals.

MODIFIED AND AFFIRMED.

Justice BARRINGER did not participate in the consideration or decision of this case.

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6. We have not addressed whether the amended complaint sufficiently alleges that the Board breached its contracts with plaintiffs. The Court of Appeals considered the issue and held that, "[t]aking the alleged facts as true, . . . [p]laintiffs have properly alleged breach." *Lannan*, 285 N.C. App. at 602. Aside from a conclusory footnote, the Board ignored the breach issue in the briefs it filed with this Court. *See* N.C. R. App. P. 28(a) ("Issues not presented and discussed in a party's brief are deemed abandoned.").

SMITH v. SMITH

[387 N.C. 255 (2025)]

CAROL SPERRY SMITH
v.
DALE PRESTON SMITH

No. 79A24

Filed 21 March 2025

Divorce—equitable distribution—classification of land—pretrial stipulation—no ruling on motion to set aside—invited error

The decision of the Court of Appeals upholding a trial court's equitable distribution (ED) order, in which the trial court classified a tract of land as defendant's separate property even though the parties had filed a pretrial stipulation classifying the tract as marital property, was modified and affirmed. Although plaintiff argued that the stipulations remained binding on the parties because the trial court never ruled on defendant's motion to set them aside, any error by the trial court in failing to rule on the motion constituted invited error and could not serve as the basis for a new ED hearing because plaintiff's attorney expressly invited the trial court to proceed with the ED hearing even though no direct proceeding had been held on defendant's motion to set aside the stipulations.

Appeal pursuant to N.C.G.S. § 7A-30(2) (2023) from the decision of a divided panel of the Court of Appeals, 292 N.C. App. 443 (2023), affirming an equitable distribution judgment and order entered on 31 August 2022 by Judge Lee F. Teague in District Court, Pitt County. Heard in the Supreme Court on 29 October 2024.

W. Gregory Duke for plaintiff-appellant.

Jon G. Nuckolls for defendant-appellee.

ALLEN, Justice.

This case arises from the dissolution of the parties' marriage. A divided panel of the Court of Appeals affirmed the trial court's equitable distribution order classifying a tract of land as the separate property of defendant Dale Preston Smith. In asking this Court to reverse the decision of the Court of Appeals, plaintiff Carol Sperry Smith points to pretrial stipulations that designated the disputed parcel as marital property. According to plaintiff, because the trial court never ruled on defendant's

motion to set aside the stipulations, they remained binding on the parties and the court. As explained below, any departure from the procedures for resolving such motions came at plaintiff's invitation. Consequently, plaintiff cannot cite the trial court's purported error as the basis for a new equitable distribution hearing. We therefore affirm the decision of the Court of Appeals, though we do not adopt its reasoning.

The parties wed on 1 June 2002 and remained together until their separation on 28 January 2018. Nearly one month after their separation, plaintiff filed a complaint against defendant in the District Court, Pitt County, seeking a divorce from bed and board, post-separation support, alimony, equitable distribution, and attorneys' fees.[1] Defendant filed an answer and counterclaim, also asking for a divorce from bed and board and equitable distribution.

As in many divorce cases, the parties disagreed over the classification or value of various properties. The specific property at issue in this appeal is a parcel located at 4080 Racetrack Road in Grifton, North Carolina (Racetrack Road). Defendant purchased Racetrack Road before the parties' marriage.

On 14 January 2019, the parties signed and filed stipulations with the trial court concerning two pieces of real property: Racetrack Road and the parties' marital residence. The stipulations described both properties as "marital property" and valued Racetrack Road at $46,563.00 and the marital residence at $247,011.00.

On 2 August 2022, defendant filed a motion to strike and set aside the parties' stipulations "due to mistake." In his motion, defendant asserted that: (1) he was the sole owner of Racetrack Road; (2) he owned Racetrack Road before the parties' marriage; (3) the parties mortgaged Racetrack Road to purchase the marital residence; (4) he never conveyed any part of Racetrack Road to plaintiff; (5) Racetrack Road remained his separate property throughout the parties' marriage; and (6) classifying Racetrack Road as marital property would be inequitable.

During a pretrial conference on 29 August 2022, the trial court considered the parties' proposed pretrial order. The draft order "stipulated to certain facts relative to the issues to be tried." Schedule E of the draft order listed Racetrack Road as property over which the parties disagreed as to classification. According to Schedule E, plaintiff

1. This Court need only address the parties' equitable distribution motions. Plaintiff's other motions are not at issue in this appeal.

contended that Racetrack Road was a mixed asset, whereas defendant maintained that it was his separate property. The parties agreed on the value of Racetrack Road, which they continued to assess at $46,563.00. The trial court approved the pretrial order.

The equitable distribution hearing commenced immediately thereafter. During his opening statement, plaintiff's attorney made the following comments:

> [O]n January the 14th, 2019, there were stipulations entered into in relationship to . . . the former marital residence, and the 4080 Racetrack Road property . . . stipulating to the value of those two parcels of property.
>
> Now, [defendant's trial counsel] has recently, as he indicated, recently filed a motion to strike and set aside the stipulations. That was filed on August the 2nd, 2022. *I'm fine with the [c]ourt just hearing the evidence and considering those motions or that motion in relation to those stipulations during this trial.*

(Emphasis added.)

On 31 August 2022, the trial court entered its equitable distribution order. The trial court "accept[ed]" the parties' Schedule E, classified Racetrack Road as defendant's separate property, and distributed the property to defendant. The order contained no findings of fact or conclusions of law expressly addressing defendant's motion to set aside the 14 January 2019 stipulations. Plaintiff appealed the trial court's equitable distribution order on 28 September 2022.

A divided panel of the Court of Appeals affirmed the trial court's order on 20 February 2024. *Smith v. Smith*, 292 N.C. App. 443, 456 (2024). The majority rejected plaintiff's argument that "the trial court erred in disregarding the parties' stipulation on 14 January 2019 classifying . . . Racetrack Road as marital property . . . because the stipulation was never set aside by the trial court." *Id.* at 448. In the majority's view, the parties' later stipulation in Schedule E of the pretrial order showed that plaintiff and defendant did not, in fact, agree that Racetrack Road was marital property. *Id.* at 449.

The dissenting judge concluded that "the trial court's calculation of the division of marital property [was] incorrect due to the failure to account for the Racetrack Road property as marital property." *Id.* at 458

(Arrowood, J., dissenting). He agreed with plaintiff that the trial court remained bound by the 14 January 2019 stipulations because "the trial court never entered an order ruling on the motion, nor did [it] make any findings or conclusions regarding the motion in its 31 August 2022 judgment and order." *Id.* at 457. The dissenting judge expressed concern that the majority's decision would "undercut[ ] our case law with respect to setting aside stipulations through a 'direct proceeding' and permit[ ] lower courts to relieve parties of binding stipulations without following proper procedures." *Id.* at 458 (quoting *Moore v. Richard W. Farms, Inc.*, 113 N.C. App. 137, 141 (1993)).

On 25 March 2024, plaintiff filed a notice of appeal based on the dissent in the Court of Appeals. Since this case was pending at the Court of Appeals before the repeal of N.C.G.S. § 7A-30(2), the dissent triggered a right of appeal to this Court under that statute. *See* Current Operations Appropriations Act of 2023, S.L. 2023-134, § 16.21(d)–(e), https://www.ncleg.gov/Sessions/2023/Bills/House/PDF/H259v7.pdf.

"Equitable distribution is governed by [N.C.G.S.] § 50-20 . . . , which requires the trial court to conduct a three-step process: (1) classify property as being marital, divisible, or separate property; (2) calculate the net value of the marital and divisible property; and (3) distribute equitably the marital and divisible property." *Brackney v. Brackney*, 199 N.C. App. 375, 381 (2009). "A trial court's determination that specific property is to be characterized as marital, divisible, or separate property will not be disturbed on appeal if there is competent evidence to support the determination." *Id.* (cleaned up). Competent evidence is "evidence that a reasonable mind might accept as adequate to support the finding." *In re J.M.*, 384 N.C. 584, 591 (2023) (cleaned up). "Ultimately, the court's equitable distribution award is reviewed for an abuse of discretion and will be reversed 'only upon a showing that it [is] so arbitrary that it could not have been the result of a reasoned decision.' " *Brackney*, 199 N.C. App. at 381 (quoting *White v. White*, 312 N.C. 770, 777 (1985)); *see also Wiencek-Adams v. Adams*, 331 N.C. 688, 691 (1992) ("Equitable distribution is vested in the discretion of the trial court and will not be disturbed absent a clear abuse of that discretion.").

In her brief to this Court, plaintiff argues primarily that the trial court's classification of Racetrack Road as defendant's separate property in its distribution order "was not based on competent evidence and was erroneous as a matter of law because the [14 January 2019 stipulations] had not been set aside by the trial court and [were] therefore binding on the parties and the trial court." In support of her position, plaintiff asserts:

> [T]here was no evidence presented at the trial to set [the 14 January 2019 stipulations] aside, there was no argument made at the trial to set [them] aside, there were no findings made by the trial court relating to setting aside the 14 January 2019 [s]tipulation[s], and there was no order entered by the trial court setting [them] aside.

"A stipulation is an agreement between the parties establishing a particular fact in controversy." *Smith v. Beasley*, 298 N.C. 798, 800 (1979); *see also Rural Plumbing & Heating, Inc. v. H.C. Jones Constr. Co.*, 268 N.C. 23, 31 (1966) (noting that parties to a case "may, by stipulation or judicial admission, establish any material fact which has been in controversy between them"). "While a stipulation need not follow any particular form, its terms must be definite and certain in order to afford a basis for judicial decision, and it is essential that they be assented to by the parties or those representing them." *State v. Powell*, 254 N.C. 231, 234 (1961) (superseded on other grounds by statute) (cleaned up).

"The effect of a stipulation is to eliminate the necessity of submitting that issue of fact to the jury." *Beasley*, 298 N.C. at 800. In other words, stipulations can promote judicial economy by narrowing the factual issues that must be resolved by the jury in a jury trial or by the trial court in a bench trial.

While a stipulation remains in place, the parties are "bound by it and . . . may not thereafter take an inconsistent position," *Rural Plumbing*, 268 N.C. at 31, though "[s]tipulations may be set aside in certain circumstances." *Plomaritis v. Plomaritis*, 222 N.C. App. 94, 106 (2012). The Court of Appeals has aptly summarized the procedural and substantive principles that govern the setting aside of stipulations:

> A party to a stipulation who desires to have it set aside should seek to do so by some direct proceeding, and, ordinarily, such relief may or should be sought by a motion to set aside the stipulation in the court in which the action is pending, on notice to the opposite party. Application to set aside a stipulation must be seasonably made; delay in asking for relief may defeat the right thereto. Whether a motion is seasonably made . . . cannot be determined with mathematical precision.
>
> It is generally recognized that it is within the discretion of the court to set aside a stipulation of the

> parties relating to the conduct of a pending cause, where enforcement would result in injury to one of the parties and the other party would not be materially prejudiced by its being set aside. A stipulation entered into under a mistake as to a material fact concerning the ascertainment of which there has been reasonable diligence exercised is the proper subject for relief. Other proper justifications for setting aside a stipulation include: misrepresentations as to material facts, undue influence, collusion, duress, fraud, and inadvertence.

Lowery v. Locklear Constr., 132 N.C. App. 510, 513–14 (1999) (cleaned up).

Although defendant moved to set aside the 14 January 2019 stipulations, the record nowhere indicates that the trial court ruled on the motion in any direct proceeding. Nor did the court dispose of the motion either during or after the equitable distribution hearing.

The Court of Appeals majority apparently concluded that the trial court implicitly invalidated the 14 January 2019 stipulations when it accepted Schedule E of the pretrial order. We are unpersuaded. Schedule E noted the parties' disagreement over the classification of Racetrack Road, as well as their agreement on the property's value. With respect to the classification issue, it seems to us that by accepting Schedule E the trial court may have intended merely to acknowledge the existence of a dispute between the parties. If so, the acknowledgment did not amount to a ruling on the validity of the 14 January 2019 stipulations.

We need not decide, however, whether the Court of Appeals majority correctly understood the significance of Schedule E. To the extent the trial court erred by not ruling on defendant's motion to set aside, plaintiff invited the error.

"Invited error is not ground for a new trial." *State v. Payne*, 280 N.C. 170, 171 (1971). We invoked the invited error doctrine in *Frugard v. Pritchard*, 338 N.C. 508 (1994), a personal injury case. There, the plaintiff attempted to introduce evidence of worker's compensation payments made to her in Virginia, her home state. *Frugard*, 338 N.C. at 512. The defendants objected, and the trial court sustained the objection. *Id.* The jury subsequently awarded the plaintiff $700,000.00 in damages. *Id.* at 510. On appeal, and contrary to their position at trial, the defendants argued that the trial court should have admitted the worker's compensation evidence. *Id.* at 512. Despite agreeing with the defendants, this Court ruled against them, explaining that "[t]he defendants [could

not] complain of the exclusion of the evidence when they objected to its admission [at trial]." *Id.*

Similarly, in this case, plaintiff "may not complain of [the] action which [she] induced." *Id.* As recounted above, plaintiff's attorney expressly invited the trial court to proceed with the equitable distribution hearing even though no direct proceeding had been held to consider defendant's motion to set aside: "*I'm fine with the* [*c*]*ourt just hearing the evidence and considering those motions or that motion in relation to those stipulations during this trial.*" (Emphasis added.) Under the invited error doctrine, plaintiff may not turn the trial court's acceptance of her attorney's invitation into the basis for a new equitable distribution hearing.[2]

Plaintiff also argues in her brief to this Court that no competent evidence supports the trial court's finding that she "contributed none of her own monies toward the marital home." According to plaintiff, the finding is erroneous because (1) the parties stipulated on 14 January 2019 that Racetrack Road was marital property and (2) some of the funds used to construct the marital home came from a home equity line of credit secured by Racetrack Road. Having declined to upset the trial court's classification of Racetrack Road as defendant's separate property, we must also reject this argument.

We affirm the decision but not the reasoning of the Court of Appeals. The invited error doctrine bars plaintiff from obtaining a new equitable distribution hearing based on the failure of the trial court to rule on defendant's motion to set aside the 14 January 2019 stipulations.

MODIFIED AND AFFIRMED.

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2. To be sure, defendant also bears responsibility for the trial court's failure to rule on his motion to set aside the 14 January 2019 stipulations. After filing the motion, he seems not to have pressed the court to consider it. The invited error doctrine does not work to his disadvantage, however, because he is not the party challenging the trial court's classification of Racetrack Road.

STATE OF NORTH CAROLINA
v.
BRYAN CHRISTOPHER BELL

No. 86A02-2

Filed 21 March 2025

Appeal and Error—preservation of issues—jury selection—gender-based discrimination—failure to object or raise in prior appeal

The Supreme Court affirmed the trial court's denial of defendant's amended motion for appropriate relief—in which he claimed that, in a trial that resulted in defendant being sentenced to death for first-degree murder, the prosecution engaged in gender-based discrimination during jury selection in violation of his constitutional rights to equal protection under the law as articulated in *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994)—where defendant's *J.E.B.* argument was not preserved because, despite multiple explicit statements made in open court by the prosecutor about wanting more men on the jury, defendant failed to raise this constitutional issue at trial, during jury selection or otherwise. Moreover, even had defendant preserved his *J.E.B.* claim, it was procedurally barred pursuant to N.C.G.S. § 15A-1419 because he did not raise this issue in his previous appeal despite having access to direct evidence (the explicit statements by the prosecutor), statistical evidence (apparent in the record regarding the State's use of peremptory strikes), and side-by-side comparison evidence (regarding the female potential juror whose strike was at the heart of the claim and other venire members who were not struck).

Justice EARLS concurring in result only.

Justice RIGGS joins in this concurring in result only opinion.

On writ of certiorari pursuant to N.C.G.S. §§ 7A-32(b) (2023) and 15A-1422(c)(3) (2023) to review an order denying defendant's post-conviction motion for appropriate relief filed on 12 May 2006 and amendment to motion for appropriate relief filed on 13 April 2012, entered on 13 December 2012 by Judge Charles H. Henry in Superior Court, Onslow County. Heard in the Supreme Court on 9 April 2024.

Jeff Jackson, Attorney General, by Teresa M. Postell, Special Deputy Attorney General, for the State-appellee.

Dionne R. Gonder and Michael R. Ramos, for defendant-appellant.

BARRINGER, Justice.

Defendant Bryan Christopher Bell was convicted of first-degree murder based on both the felony murder rule and premeditation, deliberation, and malice; first-degree kidnapping; and burning of personal property. Defendant was sentenced to death for the first-degree murder conviction. Defendant was sentenced to consecutive prison terms of 133 months to 169 months for the kidnapping conviction and eleven to fourteen months for the burning of personal property conviction. *State v. Bell*, 359 N.C. 1, 8–9 (2004), *cert. denied*, 544 U.S. 1052 (2005). Defendant filed a post-conviction motion for appropriate relief and an amendment thereto. Defendant contends that, because the prosecution engaged in gender-based discrimination during his trial, in violation of *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994), his conviction should be vacated and a new trial granted.

This Court recognizes the reprehensible and insidious nature of discrimination in the jury selection process. Given the great importance of this issue, this Court has considered, in depth, the discriminatory practices of the State in this case. However, in the faithful application of the laws of this State, this Court cannot ignore the blackletter, statutory, and procedural requirements of the law.

For the reasons set forth herein, we conclude that defendant's *J.E.B.* claim was not preserved for appellate review. Moreover, defendant's claim is also procedurally barred pursuant to N.C.G.S. § 15A-1419. We therefore affirm the judgment of the superior court as stated in the 13 December 2012 order denying defendant's motion for appropriate relief.

I. Factual Background

A. The Offenses

At trial, the evidence tended to show that on 3 January 2000, defendant, Antwaun Sims, and Chad Williams brutally murdered eighty-nine-year-old Elleze Kennedy by beating her and locking her in the trunk of her car, which defendant then set on fire. *Bell*, 359 N.C. at 9–11. Williams ultimately pleaded guilty to the crimes and testified against defendant and Sims, who were tried together. *Id.* at 11.

Defendant, Sims, and Williams were together in Newton Grove, North Carolina on 3 January 2000. They visited a game room and then "hung out" at a traffic circle where they smoked marijuana and drank brandy. *Id.* at 9. Defendant told Sims and Williams that he wanted to steal a car so that he could leave town. Sims agreed to participate in defendant's plan. Defendant then saw Ms. Kennedy leaving a Hardee's restaurant and stated, "I want to rob the lady for her Cadillac." *Id.*

Defendant, Sims, and Williams followed Ms. Kennedy to her home. As Ms. Kennedy was getting out of her car and preparing to lock it, defendant rushed upon her, pointed a BB gun at her, and demanded the car keys. Ms. Kennedy threw the keys and began screaming. Defendant hit her with the gun, causing her to fall to the ground. After finding the keys, Sims and Williams forced Ms. Kennedy into her vehicle. Ms. Kennedy fought. She bit Williams, who responded by punching her in the face.

Defendant sat next to Ms. Kennedy in the back seat of her car. With Williams in the front passenger seat, Sims drove towards Bentonville Battleground. Ms. Kennedy asked defendant where they were taking her and why he was so mean. Defendant responded by pistol whipping Ms. Kennedy. By the time they arrived at Bentonville Battleground, Ms. Kennedy was unconscious. The three men pulled her from the back seat of her vehicle and shoved her into the trunk. The three men then continued driving towards Benson with Ms. Kennedy in the trunk of the vehicle. *Id.* at 9–10.

Ms. Kennedy eventually awoke and began moving and making noise from the trunk. Defendant told Sims to turn up the radio so they could not hear her. Defendant, Sims, and Williams then drove to a trailer park community where Williams' cousin, Mark Snead, lived. The three men went inside Snead's trailer. After smoking marijuana, the three left Snead's residence and went to another trailer in the community. Before leaving the second trailer, Williams declared that he did not want to go anywhere in the car while Ms. Kennedy was in the trunk. Williams stayed at the trailer park when defendant and Sims drove off. A short while later, defendant and Sims returned. Ms. Kennedy was still in the trunk, but defendant and Sims told Williams that Ms. Kennedy had been released. Thinking Ms. Kennedy was out of the vehicle, Williams left in the car again with defendant and Sims. *Id.* at 10.

Sims drove the stolen vehicle towards Fayetteville. Along the way, the trio made two stops. During the first stop, they cleaned Ms. Kennedy's blood from the back seat. Then, they stopped a second time for fuel. Defendant rifled through Ms. Kennedy's purse, where he found four dollars to steal and use for gasoline. At this point, Williams heard

movement in the trunk and realized Ms. Kennedy was still trapped inside. When Williams confronted defendant about his suspicions, defendant told Williams he was "tripping." Sims then drove the group the rest of the way to Fayetteville where he eventually stopped the car. Defendant and Sims got out of the vehicle and opened the trunk. Sims repeatedly slammed the trunk lid on Ms. Kennedy as she tried to climb out of the trunk and escape. *Id.*

Next, Sims drove defendant and Williams back to Ms. Kennedy's home so defendant could look for the scope to his BB gun. The three did not find the scope, but did find Ms. Kennedy's shoe, which defendant put into the car. Williams again asked defendant and Sims to release Ms. Kennedy. They told Williams that they would release her in a different location. *Id.*

Sims drove Ms. Kennedy's car down a path before parking in a clearing where Sims opened the trunk. At trial, Williams testified that he could hear Ms. Kennedy moaning. When Williams asked defendant what he was going to do, defendant responded, "Man, I ain't trying to leave no witness. This lady done seen my face. I ain't trying to leave no witness." Defendant shut the trunk with Ms. Kennedy still inside, took a lighter from Sims, and set his coat on fire. Defendant tossed his burning coat into the car with Ms. Kennedy, still alive, locked in the trunk. *Id.* at 10–11.

The next morning, at defendant's behest, Sims went to check on Ms. Kennedy's car. Sims reported to defendant that the car was covered in smoke and Ms. Kennedy was dead in the trunk. Defendant called a friend, Ryan Simmons, to pick up defendant, Sims, and Williams. Simmons later drove the three men back to the vehicle, where defendant and Sims wiped fingerprints off the car. Simmons eventually transported the three men to the home of Sims' brother, where they stayed for the next several days. *Id.* at 11.

Ms. Kennedy's vehicle was discovered and reported to the sheriff's department. Upon investigation, law enforcement found Ms. Kenndy's body in the trunk. An autopsy revealed that the cause of death was not the multiple blunt force trauma injuries Ms. Kennedy had sustained. Rather, the cause of Ms. Kennedy's death was carbon monoxide poisoning directly resulting from the fire set by defendant. *Id.* at 11.

B. Procedural History and Post-Conviction Proceedings

On 24 August 2001, upon being convicted by a jury for the first-degree murder of Ms. Kennedy, defendant was sentenced to death. *Id.*

at 8. In 2001, defendant appealed his conviction to this Court for the first time. *Id.*

In his initial appeal, defendant alleged numerous *Batson* violations related to the striking of jurors during voir dire. One of the alleged *Batson* violations was directed at the removal of prospective juror Viola Morrow. Defendant asserted twenty-three other assignments of error, none of which alleged gender discrimination in violation of *J.E.B. See Bell*, 359 N.C. at 16–47. This Court upheld defendant's conviction and death sentence, concluding that defendant received a fair trial and capital sentencing hearing. The Supreme Court of the United States denied defendant's subsequent petition for writ of certiorari. *Bell v. North Carolina*, 544 U.S. 1052 (2005).

Defendant filed a motion for appropriate relief on 12 May 2006. This motion did not raise a *J.E.B.* claim. Defendant filed an amendment to the motion for appropriate relief (AMAR) on 13 April 2012 pursuant to N.C.G.S. § 15A-1415(g).

In his AMAR, defendant alleged—for the first time—that the State engaged in unconstitutional gender-based discrimination at his trial, requiring vacatur of his conviction and a new trial. Defendant centers his *J.E.B.* claim on the peremptory strike of Viola Morrow, a female prospective juror. The State filed an answer and request for summary denial.

Defendant's *J.E.B.* claim is based on an affidavit, filed on 9 January 2012 by Assistant District Attorney Gregory Butler, one of the State's prosecutors at defendant's murder trial. The affidavit was prepared by Butler in response to a Racial Justice Act claim by a defendant in an unrelated death penalty case. The affidavit provided race neutral reasons for the State's use of peremptory strikes in various death penalty trials, including defendant's.[1]

Pertinent to defendant's trial, the Butler affidavit contains the following information regarding prospective juror Morrow:

> Has 2 children age of [d]efendants. Has an illness rheumatoid arthritis. Can flare up at any time and incapacitate her. State had only used 12 of its 28 preempts and 10 jurors were seated, all female. State

1. Notably, defendant also filed a motion for appropriate relief pursuant to the Racial Justice Act on 5 August 2010, which he amended on 30 August 2012. Defendant's Racial Justice Act motion for appropriate relief is not at issue before this Court now and remains before the superior court.

> was looking for male jurors and potential foreperson. Was making a concerted effort to send male jurors to the [d]efense as they were taking off every male juror. Batson motion denied, no [prima facie] case but allowed state to give reason on the record.

On 13 December 2012, the superior court entered an order summarily denying defendant's AMAR. Regarding defendant's *J.E.B.* claim, the superior court made a finding of fact that

> [a]lthough [defendant] objected to the prosecutor's peremptory challenge of Ms. Morrow based on her race pursuant to [*Batson*], there was never an objection alleging gender discrimination. The only objection during voir dire based on gender discrimination was raised by the prosecutor and was based on defendant's numerous peremptory challenges of men. The defense peremptorily challenged every man presented to them for questioning, except three.

The superior court concluded: "Since defendant was in a position to adequately raise this claim on direct appeal but failed to do so, this claim is procedurally barred from review pursuant to N.C.G.S. § 15A-1419(a)(3)."

On 18 January 2013, defendant moved that this Court hold in abeyance the time to file a petition for writ of certiorari. This Court allowed that motion on 24 January 2013. Defendant filed a Petition for Writ of Certiorari on 20 September 2019. This Court allowed that petition to consider the following issues:

> I. Whether defendant preserved his claim that the prosecutor impermissibly struck a juror on the basis of gender.
>
> II. If the claim is preserved, whether the trial court properly decided that there was no intentional gender discrimination, including whether the "dual motivation" standard applies.
>
> III. If the claim is preserved and the trial court erred, is the record sufficient to rule on the merits, or should the matter be remanded to the trial court for an evidentiary hearing.

On 8 February 2022, the State moved this Court to hold defendant's appeal in abeyance and remand defendant's case to the trial court for an evidentiary hearing regarding defendant's *J.E.B.* claim. The State's

motion was allowed. In December 2022, the superior court in Onslow County conducted a joint evidentiary hearing for defendant and his co-defendant, Sims.

The remand court found that it was "more likely than not that the State's peremptory challenge of juror Viola Morrow was motivated in substantial part by a gender discriminatory intent." In making this determination, the remand court considered, *inter alia*, the following: statements made by the State's counsel during jury selection; the Butler affidavit; relevant history of the State's peremptory strikes in an unrelated capital case; a side-by-side comparison of juror Morrow who was struck and male prospective jurors who were passed by the State; and statistical evidence addressing the prosecutor's use of peremptory strikes, including a report by Dr. Frank Baumgartner which analyzed those statistics. *See State v. Tucker*, 385 N.C. 471, 510 (2023), *cert. denied*, 145 S. Ct. 196 (2024) (discussing evidence that may support a claim that a prosecutor's peremptory strikes were made on the basis of race); *see also J.E.B.*, 511 U.S. at 130, 144–45 (applying the *Batson* framework to evaluate claims of gender-based discrimination).

The remand court limited its review to the issue of defendant's and Sims' *J.E.B.* claims and did not re-address the procedural bar. However, the remand court did make additional findings of fact "establish[ing] the chronology and details of the jury selection process." In doing so, the remand court noted, "from a review of the jury selection transcript, it is clear that the defendants never raised a gender-based Batson objection that the trial court could address."

After review of the voir dire transcript, the trial court made the following finding:

> In these ten rounds [of jury selection panels], twelve jurors were selected by the parties, ten females and two males. During this entire process, [sixty-nine] jurors were questioned with [sixteen] being excused for cause, three of whom were excused for cause after being passed by the State. During this process the State peremptorily removed [nineteen] jurors. At the end of this process the State had remaining [nine] peremptory challenges. Of the nineteen jurors removed peremptorily by the State, sixteen were females and three were males. The State had passed seventeen female jurors, ten of whom were selected to sit on the jury. The State passed twenty male jurors, three were removed for cause after they were

> passed by the State, and two of whom were eventually selected to sit on the jury. Fifteen of the twenty males were removed peremptorily by the defendants, ten by defendant Sims and five by defendant Bell.

In his briefing to this Court following its grant of certiorari, defendant argued that the trial court erred in concluding that his *J.E.B.* claim is procedurally barred under N.C.G.S. § 15A-1419(a)(3), because the Butler affidavit amounts to an admission by the State of violating the Equal Protection Clause and *J.E.B.* Without the affidavit, defendant argues, he would have "had no hope of making a viable showing [of his *J.E.B.* claim] . . . based upon the evidentiary record developed at trial." *State v. Hyman*, 371 N.C. 363, 384 (2018).

Defendant's argument hinges on the fact that, at the time of his initial appeal, Butler had not yet produced the affidavit. Without the Butler affidavit, defendant contends, the real reasoning behind the State's use of a peremptory strike on juror Morrow was unknown to defendant. Thus, defendant claims that he was not positioned to "adequately" raise the *J.E.B.* issue on his direct appeal and the procedural bar does not apply. N.C.G.S. § 15A-1419(a)(3) (2023).

C. Voir Dire Proceedings

On remand, the superior court made findings of fact, as detailed below, "establish[ing] the chronology and details of the jury selection process." The remand court concluded that "[t]he jury selection transcript reveals the State's concern about the defendants' peremptory challenges of male jurors."

Jury selection consisted of ten rounds of voir dire and an additional three rounds to select alternate jurors. Each round consisted of various panels of prospective jurors. During the first round of voir dire, a prospective male juror informed the trial court that he had plans to travel out of state. The court proposed that this prospective juror be placed in a later panel of prospective jurors, meaning he would not be called for voir dire until later in the process, after he had returned from his travel. Neither defendant objected to this plan. The State, however, urged the court instead to accommodate the prospective juror's travel plans by conducting his voir dire earlier as opposed to later. The State advised the court: "I'd like to have [a] few men. I would like to have a representative jury. There ain't no men." This prospective juror was never called for voir dire.

In the third round of jury selection, the defendant and Sims raised two *Batson* objections after the State peremptorily struck two black

female prospective jurors. The court denied both motions after finding that defendants had not established a prima facie case of racial discrimination. The State passed to the defendants two female and three male prospective jurors. Before any questioning by either defendant or Sims took place, Sims announced that he would like to peremptorily excuse two of the three male prospective jurors on the current panel. Accordingly, the State raised a *J.E.B.* objection, arguing that it was improper for either side to strike prospective jurors simply on the basis of their gender.

The State, perceiving that defendants were purposefully striking male jurors, argued that "all the men that have been passed to [the defense] have been challenged. Currently, we have passed three to them and one of them has been challenged before questioning has even begun." The State argued further: "[O]f the jurors currently seated, we've got seven, all of them are women . . . they have taken off all the . . . men." The remand court found that "it appear[ed] that the State wanted to put the defendants on notice of this observation and its complaint of gender discrimination."

In the fifth round of jury selection, the State exercised its peremptory strike to remove black female prospective juror Viola Morrow. Defendant centers his *J.E.B.* claim around this strike. Defendant and Sims raised a *Batson* objection to the State's peremptory strike of Morrow, which the court denied. No gender-based *J.E.B.* objection was raised by defendant or Sims at trial.

The juror questionnaire completed by Morrow and contained in the record asked: "If you are selected to serve as a juror in this trial, is there any reason, physical . . . or otherwise which would or could distract or prevent you from giving your total and undivided attention to the trial of this matter . . . ?" Morrow responded: "I have rheumatoid arthritis . . . and it causes me to have a lot of pain. I feel it might distract me at times."

During her voir dire, Morrow explained that her rheumatoid arthritis had progressively worsened since her 1993 diagnosis. Butler asked: "[I]s it to the point that it incapacitates you to the point you have to stay home and everything?" Morrow replied affirmatively. Morrow explained that "flare ups . . . could be twice a week" or "twice in one day," and that she had spent the last two weeks in bed. At the conclusion of Morrow's voir dire, Butler stated to the court: "[I]n light of Ms. Morrow's medical situation and her concerns about that . . . the State would like to thank and excuse her for the purposes of this trial . . . we would excuse her and use a peremptory on her." When the State was later asked to put its reason for striking Morrow on the record, the prosecution replied,

in part: "We have taken off . . . females because we felt like we needed more men on the jury."

The juror questionnaire completed by Morrow contains handwritten notes made by the prosecution. Those notes, produced during post-conviction discovery, state:

> --2 children age of Δ's
>
> --illness [rheumatoid arthritis can flare up at any time + incapacitate her]
>
> --no man yet on panel, + we've already seated 10 jurors!

In contrast is the voir dire of male prospective juror Gary Northern, also conducted in the fifth round. Northern's questionnaire indicated that he had suffered a heart attack, resulting in his retirement. The following exchange took place during voir dire:

Butler:	The heart condition, would you feel that would cause you any difficulty in listening to the evidence and pay attention to all the evidence?
Northern:	There is no way I could tell. It depends on how intense -- if it gets to[o] intense, it might cause me to have stress.
Butler:	But, basically, for the most part you are able -- you can sit here and listen to the evidence and take the breaks that we take and do things?
Northern:	Yes, sir.
Butler:	If you have a problem, you understand that you just let the judge know and the bailiffs know and we would adjust and deal with that?
Northern:	Yes, sir.

The court interceded, asking follow-up questions which revealed that Northern takes daily medication, must see a doctor every three months, and that his heart only functions at about 20% capacity. Despite these health challenges, Northern was accepted by the State and passed to the defense. After questioning, defendant excused Northern.

The sixth round of voir dire included that of male prospective juror Johnnie Burris. On Burris' questionnaire, he indicated that he also had heart disease—a serious illness. Burris indicated that he was medically

retired and taking heart and blood pressure medication that could interfere with his mental competency. Burris further indicated that increased blood pressure caused by the trial could cause him physical harm. The following exchange took place:

> Butler: . . . you mention on your questionnaire that you have some stress heart problems and are on medication. Anything in particular about that that's beyond normal where you felt like you couldn't sit for an hour and a half at a time and would prevent you from being able to listen to the evidence?
>
> Burris: I really don't think so. Like I said, I am dealing with stress. I've had five heart surgeries and three heart attacks; so, you know, I'm a little concerned about my own health as well.
>
> Butler: I understand. Obviously, it's physically stressful in here. It is taxing. You've got to listen to the things that will be presented in court.
>
> Burris: Exactly.
>
> Butler: Do you feel like that you could -- if you have any medical problems, that you would let the [c]ourt know and things could be -- you could be accommodated and such if you were to sit as a juror?
>
> Burris: Yes.
>
> Butler: So I'm taking it then that even though you are on medication and things like that that you don't feel that would prevent you from being a fair and impartial juror or fairly considering the evidence and listen attentively to everything?
>
> Burris: Just like I told the judge the other day, I do not think it would interfere.
>
> Butler: I appreciate your concerns. If the situation got to where medically it's difficult, you would make the [c]ourt aware of that; is that right?
>
> Burris: Yes.

A bench conference was held after some further questioning. During the bench conference, the following exchange took place:

Defense Counsel:	Could we ask the judge to inquire more about his health?
Butler:	That's fine with me. I don't mind if you want to do that or make a cause for challenge. If he doesn't allow the cause for challenge, I can either go on or you can tell me if you're going to do a peremptory on him. I don't have any problems if the judge wants to do that.

The court removed Burris for cause, due to his health conditions.

II. Standard of Review

"When considering rulings on motions for appropriate relief, [this Court] review[s] the trial court's order to determine whether the findings of fact are supported by evidence, whether the findings of fact support the conclusions of law, and whether the conclusions of law support the order entered by the trial court." *State v. Frogge*, 359 N.C. 228, 240 (2005) (extraneity omitted). We review issues of law de novo. *E.g.*, *State v. Biber*, 365 N.C. 162, 168 (2011).

III. Analysis

This Court allowed defendant's Petition for Writ of Certiorari on the following issues:

I. Whether defendant preserved his claim that the prosecutor impermissibly struck a juror on the basis of gender.

II. If the claim is preserved, whether the trial court properly decided that there was no intentional gender discrimination, including whether the "dual motivation" standard applies.

III. If the claim is preserved and the trial court erred, is the record sufficient to rule on the merits, or should the matter be remanded to the trial court for an evidentiary hearing.

Accordingly, this Court first considers whether defendant has preserved his claim that the State deprived defendant of his Equal Protection

rights by impermissibly striking a prospective juror due to her gender, in violation of *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994). We hold that defendant failed to preserve his *J.E.B.* claim.

Constitutional matters—including claims of gender discrimination during jury selection—"not raised and passed upon at trial will not be reviewed for the first time on appeal." *State v. Garcia*, 358 N.C. 382, 410 (2004) (extraneity omitted), *cert. denied*, 543 U.S. 1156 (2005); *accord State v. Best*, 342 N.C. 502, 513, *cert. denied*, 519 U.S. 878 (1996). Despite multiple statements by the State—in open court—that indicated the State's gender-based motives for striking potential jurors, neither defendant nor Sims made a gender-based discrimination objection at the time of jury selection. When the State was asked to put the reason for striking Morrow on the record, the State said: "We have taken off . . . females because we felt like we needed more men on the jury." Neither defendant nor Sims made a gender-based objection then, either.

The State also made the following statements during voir dire: "I'd like to have [a] few men. I would like to have a representative jury. There ain't no men"; "we have nothing but seven white women—seven women on the jury now, and we are entitled to have a jury that's representative of the community"; and "of the jurors seated currently, we've got seven, all of them are women . . . . they have taken off all the . . . men." Neither defendant nor Sims raised a gender-based objection when any of these statements were made by the State or at any point during voir dire. Furthermore, neither defendant nor Sims raised the issue in their initial appeal. Therefore, defendant's claim is not preserved.

Moreover, assuming arguendo that defendant's *J.E.B.* claim is preserved, this Court is prohibited from allowing defendant's AMAR, because defendant's and Sims' gender-based claim of discrimination is procedurally barred and defendant has not demonstrated an exception to that bar. *See* N.C.G.S. § 15A-1419(b) (2023).

Under North Carolina law, this Court "shall deny," *id.*, review of a motion for appropriate relief when "[u]pon a previous appeal the defendant was in a position to adequately raise the ground or issue underlying the present motion but did not do so," N.C.G.S. § 15A-1419(a)(3). *See also Tucker*, 385 N.C. at 514 (affirming the denial of a defendant's MAR for review of a *Batson* claim, because it was procedurally barred and the defendant had not demonstrated an exception to that bar). This statute "requires the reviewing court . . . 'to determine whether the particular claim at issue *could* have been brought on direct review.' " *Tucker*, 385 N.C. at 492 (quoting *Hyman*, 371 N.C. at 383 (emphasis added)). For this Court to determine that a claim could have been brought on direct

review, "the direct appeal record must have contained sufficient information to permit the reviewing court to make all the factual and legal determinations necessary to allow a proper resolution of the claim in question." *Hyman*, 371 N.C. at 383. The procedural bar may be waived when a defendant shows, "by a preponderance of the evidence," that there is "[g]ood cause for excusing the" procedural bar *and* "actual prejudice," N.C.G.S. § 15A-1419(b)(1), or that "failure to consider the defendant's claim will result in a fundamental miscarriage of justice," N.C.G.S. § 15A-1419(b)(2). *See also Tucker*, 385 N.C. at 485.

Defendant argues that the MAR court erred in concluding that his *J.E.B.* claim was procedurally barred, because without the Butler affidavit, filed in 2012, defendant was not in a position to "adequately" raise the *J.E.B.* claim in his 2001 appeal. N.C.G.S. § 15A-1419(a)(3). Phrased another way, defendant contends that, without the Butler affidavit, the record did not "contain[ ] sufficient information to permit the reviewing court to make all the factual and legal determinations necessary to allow a proper resolution of the claim in question." *Hyman*, 371 N.C. at 383. We disagree.

To show gender discrimination in jury selection, a defendant may rely on a variety of evidence. *See Tucker*, 385 N.C. at 510 (referencing evidence that may support a claim that a prosecutor's peremptory strikes were made on the basis of race); *see also J.E.B.*, 511 U.S. at 130, 144–45 (applying the *Batson* framework to evaluate claims of gender-based discrimination). Here, as previously discussed, the prosecutor made numerous statements about the State's desire to have men on the jury. This is direct evidence of the prosecutor's intent. Beyond the direct evidence, defendant may have relied on additional evidence that includes statistical evidence about the prosecutor's use of peremptory strikes based on gender, side-by-side comparisons of female prospective jurors who were struck and male prospective jurors who were not struck in the case, and other relevant circumstances that bear upon the issue of gender discrimination. *See Tucker*, 385 N.C. at 510; *J.E.B.*, 511 U.S. at 144–45.

A. Direct Evidence

The jury selection transcript reveals pointed statements baldly communicated by the State—in open court—that it wanted to place more men on the jury at the expense of seating women. When asked to put its reason for striking Morrow on the record, the prosecution replied, in part: "We have taken off . . . females because we felt like we needed more men on the jury." This statement confirms, as expressed in the Butler affidavit, that the State was "making a concerted effort to send

male jurors to the [d]efense." Additionally, when the court suggested moving a prospective male juror to a later voir dire panel, the prosecution stated, "I mean, I'd like to have [a] few men. I would like to have a representative jury. There ain't no men. . . . I know I want a representative jury." With this statement, the State revealed its objective to "[look] for male jurors"—the same objective expressed in the Butler affidavit.

The transcript also reflects that the State raised a *J.E.B.* objection to both defendants' striking of prospective male jurors, stating, "all the men that have been passed to [defendant and Sims] have been challenged. Currently, we have passed three to them and one of them has been challenged before questioning has even been done." The State's decision to raise a *J.E.B.* objection at trial presumably put defendant on notice that the gender of the jurors was a matter of interest to the State. Indeed, the remand court found that "[i]t appear[ed] that the State wanted to put the defendants on notice of this observation and its complaint of gender discrimination."

While arguing its *J.E.B.* objection, the State vocalized its dissatisfaction with the number of women that had been seated, stating that all "of the jurors seated . . . seven, all of them [were] women." The State reemphasized its dissatisfaction with an all-female jury, stating, "we have nothing but seven white women—seven women on the jury now, and we are entitled to have a jury that's representative of the community." Again, these statements—made in open court and captured in the record—reflect the State's dissatisfaction with an all-female jury, precipitating its "concerted effort to send male jurors to the [d]efense" as stated in the Butler affidavit.

The portion of the Butler affidavit pertaining to the State's peremptory strike of Morrow contains the following:

> Has 2 children age of [d]efendants. Has an illness rheumatoid arthritis. Can flare up at any time and incapacitate her. State has only used 12 of its 28 preempts and 10 jurors were seated, all female. State was looking for male jurors and potential foreperson. Was making a concerted effort to send male jurors to the [d]efense as they were taking off every male juror. Batson motion denied, no [prima facie] case but allowed state to give reason on the record.

The additional statements contained in the Butler affidavit, beyond those facts that could be gleaned from the transcripts available on appeal are: "State was looking for male jurors and potential foreperson. Was

making a concerted effort to send male jurors to the [d]efense." This language in the Butler affidavit is a summary of the statements made by the prosecution throughout voir dire. The additional statements in the Butler affidavit are not new facts absent from the record. Rather, they are the conclusion one would draw from the record as a whole and then argue in support of a *J.E.B.* claim on appeal.[2]

B. Statistical Evidence

In combination, the transcripts and questionnaires provide the basis for a statistical analysis of the State's use of peremptory strikes based on gender. This determination is exemplified by defendant's own expert, Dr. Frank Baumgartner, who was tendered by defendant at the evidentiary hearing on remand.

Dr. Baumgartner reviewed data derived from the jury questionnaires and the transcript. Based on this portion of the record, Dr. Baumgartner determined that, of the ninety-three jury venire members, fifty-two were female and forty-one were male. Of the entirety, eleven females and eleven males were struck for cause, leaving forty-one females and thirty males. The State used twenty-four peremptory strikes: twenty for females and four for males. The analysis of the record, performed by defendant's expert, shows that the State used 83% of its peremptory strikes to remove females—a statistically significant percentage. Dr. Baumgartner analyzed numbers and information extracted *from the record* to conclude that the State made a statistically significant effort to remove female jurors. Dr. Baumgartner did not rely on, analyze, or utilize the Butler affidavit in his analysis. Therefore, it is apparent that the Butler affidavit is not required to perform a statistical analysis of the State's use of peremptory strikes.

C. Side-by-Side Comparison

Comparison of female jurors who were struck to male jurors who were not struck is an important consideration in determining whether gender-based discrimination has occurred. *See Miller-El v. Dretke*, 545 U.S. 231, 241 (2005). The jury questionnaires and voir dire transcript

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2. Likewise, the handwritten note on Morrow's jury questionnaire, produced during post-conviction discovery, while not available for the direct appeal, is not now new evidence. The words "no man on panel, + we've already seated 10 jurors!" is simply reflective of statements made by the prosecution throughout voir dire. Indeed, on remand, the trial court found that "[t]he thinking and rationale expressed in Butler's affidavit regarding the peremptory charge of Morrow is also reflected in, and consistent with, the handwritten comments that appear on Viola Morrow's questionnaire obtained by the defendants in discovery."

allow comparison of Morrow with the male jurors who were permitted to serve. In particular, the transcripts allow for comparison of Morrow with prospective jurors Northern and Burris.

Voir dire questioning revealed that both Morrow and Northern could experience days when, due to their respective medical conditions, they would be unable to give their undivided attention to the trial. Morrow was asked directly if her health would interfere with her physical ability to sit on the jury. Burris, however, despite his serious health concerns, was not directly asked the same question. Morrow was offered no assurances of accommodation for any medical issues; however, both Northern and Burris were. The State accepted and passed Northern to the defense despite his serious health issues. Similarly, the State indicated at the bench conference that it would accept Burris, despite his serious health issues. The disparate treatment and questioning between female Morrow and males Northern and Burris are reflected in the transcripts contained in the record, which were available to defendant in preparing his appeal.

On remand, the reviewing court made "factual and legal determinations," *see Hyman*, 371 N.C. at 383, based on the transcript, that "[t]his disparity is evidence tending to prove purposeful discrimination." The Butler affidavit was not used to assess disparate treatment between prospective jurors.

In summary, the record contains the facts required to perform a statistical analysis of the State's use of peremptory strikes by gender. The record also contains the facts required to compare juror Morrow to males for whom the State did not use a peremptory strike. Most striking, the jury selection transcript captures statements—made in open court—conveying the State's desire to have more men on the jury at the expense of seating additional women jurors.

Clearly, the record contained "sufficient information to permit the reviewing court to make all the factual and legal determinations necessary to allow a proper resolution of the claim in question" without the Butler affidavit. *Hyman*, 371 N.C. at 383. Therefore, the trial court was correct to conclude that, even without the Butler affidavit, defendant was in a position to adequately raise this claim on direct appeal but failed to do so. Thus, defendant's *J.E.B.* claim is procedurally barred from review pursuant to N.C.G.S. § 15A-1419(a)(3). *See Tucker*, 385 N.C. at 492.

IV. Exceptions to the Mandatory Procedural Bar

This mandatory procedural bar may be overcome in two scenarios. First, the bar may be overcome where a defendant shows "[g]ood cause for excusing" the defendant's failure to raise the claim on direct appeal and "demonstrate[s] actual prejudice." N.C.G.S. § 15A-1419(b)(1); *see also Tucker*, 385 N.C. at 485. Second, the bar may be overcome when a defendant shows "[t]hat failure to consider the defendant's claim will result in a fundamental miscarriage of justice." N.C.G.S. § 15A-1419(b)(2); *see also Tucker*, 385 N.C. at 485.

Defendant makes no argument that failure to consider his *J.E.B.* claim will result in a fundamental miscarriage of justice. Therefore, we limit our analysis to "good cause." Under subsection 15A-1419(c):

> [G]ood cause may only be shown if the defendant establishes by a preponderance of the evidence that his failure to raise the claim or file a timely motion was:
>
> (1) The result of State action in violation of the United States Constitution or the North Carolina Constitution including ineffective assistance of trial or appellate counsel;
>
> (2) The result of the recognition of a new federal or State right which is retroactively applicable; or
>
> (3) Based on a factual predicate that could not have been discovered through the exercise of reasonable diligence in time to present the claim on a previous State or federal postconviction review.

N.C.G.S. § 15A-1419(c); *see also Tucker*, 385 N.C. at 485.

Defendant has failed to show good cause. Defendant first argues that, under subsection (c)(1), the State acted by withholding its true reasoning for striking Morrow from the jury, thereby preventing defendant's trial counsel and the trial court from ensuring the jury was selected without discrimination. Defendant also argues that, under subsection (c)(3), the Butler affidavit is new evidence of the State's motivation for the strike "that could not have been discovered through the exercise of reasonable diligence." Both of these arguments fail.

First, the record does not comport with defendant's view that the State's failure to confess discrimination at trial prevented defendant from raising his *J.E.B.* claim on his initial appeal. To the contrary, the

prosecutors made statements in open court conveying the very information contained in the Butler affidavit. Specifically, the prosecutor stated on the record: "We have taken off . . . females because we felt like we needed more men on the jury"; "I'd like to have [a] few men. I would like to have a representative jury. There ain't no men"; "[w]e have nothing but seven white women—seven women on the jury now, and we are entitled to have a jury that's representative of the community"; and finally, "[o]f the jurors currently seated, we've got seven, all of them are women . . . they have taken off all the . . . men." It was no secret or surprise that the State was striking female jurors in an attempt to secure more male jurors.

Second, the Butler affidavit is not "a factual predicate that could not have been discovered through the exercise of reasonable diligence." N.C.G.S. § 15A-1419(c)(3); *see also Tucker*, 385 N.C. at 485. A predicate fact is "[a] fact from which a presumption or inference arises." *Predicate fact*, *Black's Law Dictionary* (11th ed. 2019). The affidavit states: "State was looking for male jurors and potential foreperson. Was making a concerted effort to send male jurors to the [d]efense as they were taking off every male juror." The applicable inference in play here is that the State was surreptitiously striking female jurors in order to seat more male jurors. However, when asked to put its reasons on the record for striking Morrow, the State admitted, "We have taken off . . . females because we felt like we needed more men on the jury."[3]

It is evident from the cold record that the remarks made by the State during voir dire put defendant on notice that he needed to raise a *J.E.B.* objection. Thus, the Butler affidavit did not provide a factual predicate that could not have been discovered by analyzing the cold record. This Court need not reach the issue of whether defendant can demonstrate actual prejudice as required under N.C.G.S. § 15A-1419(b)(1), because defendant has failed to show good cause.[4]

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3. The State also made the following statements during voir dire: "I'd like to have [a] few men. I would like to have a representative jury. There ain't no men"; "we have nothing but seven white women—seven women on the jury now, and we are entitled to have a jury that's representative of the community"; and "of the jurors currently seated, we've got seven, all of them are women . . . . they have taken off all the . . . men."

4. The concurrence argues that the apparently incompetent lawyering should qualify defendant for the good cause exception. To pursue such a claim, defendant may file a motion for appropriate relief alleging ineffective assistance of counsel. *See* N.C.G.S. § 15A-1415(b)(3). This procedure would allow the reviewing court the opportunity to make the factual and legal determinations necessary to appropriately evaluate his claim. This would produce a record reviewable by this Court on appeal. *See* N.C.G.S. § 15A-1415(e); *but cf. Hyman*, 371 N.C. 383.

This Court holds that defendant failed to preserve his *J.E.B.* claim, because defendant failed to make a *J.E.B.* objection at trial. Moreover, assuming arguendo that defendant's claim is preserved, the claim is nevertheless not reviewable because defendant failed to raise the issue on direct appeal. Defendant's *J.E.B.* claim—raised for the first time in his Amendment to Motion for Appropriate Relief—is procedurally barred pursuant to N.C.G.S. § 15A-1419(a)(3). This Court further holds that defendant has failed to meet his burden to show good cause in order to overcome the mandatory procedural bar. Accordingly, the remaining two issues for which certiorari was allowed are moot.

V. Conclusion

Nothing in this opinion commends the defense's practice of systematically eliminating men from the jury. Discrimination in jury selection by either the State or the defendant is equally reprehensible. Without discrimination, the jury selection process should result in a "jury of one's peers," reflective of the community. "Discrimination in jury selection, whether based on race or on gender, causes harm to the litigants, the community, and the individual jurors who are wrongfully excluded from participation in the judicial process. The litigants are harmed by the risk that the prejudice that motivated the discriminatory selection of the jury will infect the entire proceedings." *J.E.B.*, 511 U.S. at 140. "Discriminatory use of peremptory challenges may create the impression that the judicial system has acquiesced in suppressing full participation by one gender or that the deck has been stacked in favor of one side." *Id.* (extraneity omitted).

This Court recognizes the reprehensible and insidious nature of discrimination in the jury selection process. Given the great importance of this issue, this Court has considered, in depth, the discriminatory practices of the State in this case. The concurrence contends that this Court constructs barriers to deny defendant any remedy. Yet, the concurrence acknowledges that denial of defendant's claim is required by law. Accordingly, in the faithful application of the laws of this State, this Court cannot ignore the blackletter, statutory, and procedural requirements of the law.

"The post-conviction procedure set forth [in N.C.G.S. § 15A-1419] serves a critical role in our criminal justice system. Not only does it provide for review and potential relief to defendants convicted of a crime, but the process also promotes finality. It is imperative, not only for the parties, but also for federal habeas review, that we strictly and regularly follow our post-conviction procedural requirements." *Tucker*, 385 N.C.

at 486 (citations omitted). "[P]reservation . . . serves crucial functions in our justice system. . . . When a party alerts the trial court of a potential error, the court can correct it." *State v. Reber*, 386 N.C. 153, 157 (2024). An objection at trial is critical. The outcome of this case emphasizes the importance of preservation—not only for the defendant, but for the sake of the Constitution.

Defendant failed to raise a *J.E.B.* objection during jury selection and "was in a position to adequately raise" a *J.E.B.* claim on direct appeal. N.C.G.S. § 15A-1419(a)(3). Accordingly, defendant's *J.E.B.* claim is not preserved and is procedurally barred under N.C.G.S. § 15A-1419(a)(3). Accordingly, we affirm the superior court's 13 December 2012 order denying defendant's amended motion for appropriate relief.

AFFIRMED.

Justice EARLS concurring in the result only.

The majority invokes the rampant evidence of unconstitutional gender discrimination by the State during jury selection to justify rejecting a defendant's challenge to unconstitutional gender discrimination by the State. That is just one clear indication of the failure of the *Batson* and *J.E.B.* frameworks to address the constitutional violation first acknowledged by the Supreme Court of the United States in *Strauder v. West Virginia*, 100 U.S. 303, 310 (1880).

I concur in the result only, because I cannot discern what Bell or his counsel could have done differently to achieve relief under our precedent, even in this extraordinary instance where a prosecutor has admitted under oath that he struck a juror based on her gender. In my view the jurisprudence of this state has effectively overruled *Batson* and *J.E.B.* for post-conviction relief even before today's decision. Until that precedent is overturned or superseded by statute, I am constrained to follow it. Our jurisprudence is wrong on this front, and it is our Court's responsibility to champion new pathways forward that will enforce the constitutional rights and safeguards of equal, impartial justice.

I. North Carolina's History of Jury Discrimination Claims

Striking a prospective juror on the basis of their race or gender violates the Equal Protection guarantee of the Fourteenth Amendment. *See generally Batson v. Kentucky*, 476 U.S. 79 (1986); *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994). This prohibition is rooted in the criminal defendant's constitutional right to be tried by a jury of their peers

and to be sure that no group of peers is "systematically and arbitrarily excluded from the jury pool which is to decide [a defendant's] guilt or innocence." *State v. Blakeney*, 352 N.C. 287, 296 (2000) (cleaned up). It also safeguards a defendant's constitutional right to an impartial jury. *See Miller-El v. Dretke* (*Miller-El II*), 545 U.S. 231, 237 (2005). A right to be judged by one's peers secures the People's voice in our justice system and operates as a "necessary check on governmental power." *Pena-Rodriguez v. Colorado*, 580 U.S. 206, 210 (2017); *accord Duncan v. Louisiana*, 391 U.S. 145, 156 (1968) ("[T]he jury trial provisions in the Federal and State Constitutions reflect a fundamental decision about the exercise of official power—a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges.").

Batson and *J.E.B.* safeguards are also rooted in the individual citizen's right not to be excluded from a sacred civic duty because of their race or gender. Barbara D. Underwood, *Ending Race Discrimination in Jury Selection: Whose Right Is It Anyway?*, 92 Colum. L. Rev. 725, 726 (1992) (citing *Batson*, 476 U.S. at 85–87). Aside from voting, jury service is the "most substantial opportunity that most citizens have to participate in the democratic process." *Flowers v. Mississippi*, 139 S. Ct. 2228, 2238 (2019). It embodies the essential principle of democracy and self-government that "the law comes from the people." *Pena-Rodriguez*, 580 U.S. at 210.

Thus discrimination in jury selection "undermine[s] public confidence in the fairness of our system of justice" and harms the entire community. *Batson*, 476 U.S. at 87. It inflicts a "profound personal humiliation" on the excluded jurors. *Powers v. Ohio*, 499 U.S. 400, 425 (1991). The State effectively labels those excluded jurors as "inferior" and unworthy to mete out justice. *See Strauder*, 100 U.S. at 308 (explaining that discriminatory exclusion is a "brand upon [the excluded jurors], affixed by the law, an assertion of their inferiority"). So great is the collective harm that "[t]he Constitution forbids striking even a single prospective juror for a discriminatory purpose." *Snyder v. Louisiana*, 552 U.S. 472, 478 (2008) (cleaned up) (quoting *United States v. Vasquez-Lopez*, 22 F.3d 900, 902 (9th Cir. 1994)).

Since 1986, courts have employed a three-step process to determine whether a peremptory strike of a juror was "motivated in substantial part by discriminatory intent." *Flowers*, 139 S. Ct. at 2238; *J.E.B.*, 511 U.S. at 145 (applying *Batson*'s three steps to gender discrimination claims). At step one, the defendant must make a prima facie showing that the prosecution struck a juror based on gender based on a range of evidence—patterns in the prosecution's strikes, comparisons between

how male and female jurors were treated, statements by the prosecutor, or anything else that might support an inference of discrimination. *State v. Clegg*, 380 N.C. 127, 130 (2022); *State v. Hobbs*, 374 N.C. 345, 350 (2020); *Miller-El II*, 545 U.S. at 240.

If the defendant clears that low bar, he "transfer[s] the burden of production to the State." *Hobbs*, 374 N.C. at 350. This is step two. At this stage, the prosecution must explain its peremptory challenges in non-discriminatory terms. *Clegg*, 380 N.C. at 130. The explanation need not be the full one. *State v. Fair*, 354 N.C. 131, 140 (2001).

At step three, the trial court must determine whether the defendant has carried his "burden of showing purposeful discrimination." *Hobbs*, 374 N.C. at 353. The judge considers the prosecutor's non-discriminatory explanations "in light of all of the relevant facts and circumstances," including "the arguments of the parties." *Id.* (quoting *Flowers*, 139 S. Ct. at 2243). The trial court must weigh all the evidence and decide whether the challenged strike was "motivated in substantial part by discriminatory intent." *Id.* (quoting *Flowers*, 139 S. Ct. at 2244). If the court decides the challenged strike was so motivated, the trial court has discretion to either dismiss the venire and start again, or to seat the improperly struck juror. *State v. McCollum*, 334 N.C. 208, 235–36 (1993).

Yet on appeal, these three steps have virtually never identified any instance of a discriminatory motive in the decision to use a peremptory challenge to strike a juror in North Carolina. Between 1986 and 2016, North Carolina's appellate courts collectively decided 114 *Batson* challenges on the merits. Daniel R. Pollitt & Brittany P. Warren, *Thirty Years of Disappointment: North Carolina's Remarkable Appellate* Batson *Record*, 94 N.C. L. Rev. 1957, 1957 (2016). But they did not find a single violation where a prosecutor articulated a race-neutral reason for striking the juror. *Id.* These cases include seventy-four decided by our Court during that period. *Id.* at 1961–62.

North Carolina is an outlier even among southeastern states. During the same period, the highest state courts of bordering states found multiple *Batson* violations: three in Virginia, and eleven in South Carolina. *Id.* at 1984.[1]

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1. Canvasing the South, North Carolina is an extreme outlier. From 2010 to 2017, "Alabama had over eighty appellate reversals because of racially-tainted jury selection." *See* James E. Coleman, Jr. & David C. Weiss, *The Role of Race in Jury Selection: A Review of North Carolina Appellate Decisions*, The North Carolina State Bar Journal, Fall 2017, at 13, 14. Florida had thirty-three. *Id.* Louisiana had twelve. *Id.* Mississippi and Arkansas saw ten each. *Id.* And in Georgia, the number was eight. *Id.*

Batson challenges have fared little better at our Court since 2016. This Court rejected recent *Batson* challenges in *State v. Campbell*, 384 N.C. 126 (2023), *State v. Richardson*, 385 N.C. 101 (2023), and *State v. Tucker*, 385 N.C. 471 (2023). We found one, and only one, substantive *Batson* violation in *State v. Clegg*, 380 N.C. 127 (2022). We remanded for reconsideration of the matter in *State v. Hobbs*, 374 N.C. 345 (2020), and for further consideration in *State v. Bennett*, 374 N.C. 579 (2020).

The lack of successful *Batson* claims is not because discrimination is magically absent from North Carolina's legal system. Just the opposite. Studies examining state-wide jury data show that prosecutors struck Black jurors twice as frequently as their white counterparts. *See* Ronald F. Wright et al., *The Jury Sunshine Project: Jury Selection Data as a Political Issue*, 2018 Ill. L. Rev. 1407 (2018) (analyzing data on more than 29,000 potential North Carolina jurors in noncapital felony trials between 2011–2012 and finding that prosecutors struck Black jurors twice as often as white ones).

J.E.B. claims alleging gender discrimination in jury selection have been similarly unsuccessful. The Court rejected such claims against the State in cases like *Richardson*, 385 N.C. at 193–94, *State v. Maness*, 363 N.C. 261, 276 (2009), *State v. Call*, 349 N.C. 382, 393 (1998), *State v. Gaines*, 345 N.C. 647, 669 (1997), *State v. Bates*, 343 N.C. 564, 595 (1996), and *State v. Best*, 342 N.C. 502, 513 (1996) (siding with the State on procedural grounds).

II. Bell's *J.E.B.* Claim

One possible exception to the drumbeat of rejection of *J.E.B.* claims was the predecessor to the case before us, *State v. Bell*, 380 N.C. 672 (2022), and its companion, *State v. Sims*, 373 N.C. 176 (2019), *rescinded* 384 N.C. 669 (2023). In these cases we remanded a *J.E.B.* challenge for an evidentiary hearing in superior court. On 23 January 2023, after receiving evidence, that court found that the State's peremptory strike of a juror, Viola Morrow, "was motivated in substantial part by her gender" in violation of *J.E.B.* It detailed its findings in a sixty-four-page order.

Significantly, the trial court relied on sworn testimony from a prosecutor in the case that he removed Ms. Morrow because he "[w]as making a concerted effort to send male jurors to the Defense." The same prosecutor admitted that, in another case, he struck prospective alternate juror Elizabeth Rich because he "was looking for strong male jurors" and wanted to "to get someone stronger" than Ms. Rich. He further admitted that he struck Brenda Corbett as a prospective juror because he wanted

"strong unequivocal jurors and a potential foreman."[2] That sworn testimony as to the prosecutor's thoughts was, obviously, not available to the defendants at the time of their trial or their direct appeal.

Moreover, at Sims's and Bell's joint evidentiary hearing, Bell's attorneys submitted a copy of the jury questionnaire for Morrow, which the State had provided during post-conviction discovery in Bell's case. That is, the discovery that occurs *after* the trial and *after* direct appeal through post-conviction proceedings under N.C.G.S. § 15A-1415(f) (2023). This document contained handwritten notes in the margin, which stated:

> – 2 children age of Δ's
>
> – illness [rheumatoid arthri . . . can flare up at any time + incapacitate her]
>
> – no man on panel, + we've already seated 10 jurors!

Whatever other evidence of gender discrimination in the State's use of peremptory strikes that existed during jury selection at Sims's and Bell's initial trial, the jury questionnaire notes and affidavit were new, conclusive admissions by the State that it employed a peremptory strike to remove a juror based on gender. That is a constitutional violation. *E.g.*, *United States v. Omoruyi*, 7 F.3d 880, 882 (9th Cir. 1993) (finding a constitutional violation because "[t]here was an admission of purposeful gender discrimination" (cleaned up)); *McGee v. State*, 953 So. 2d 211, 214–15 (Miss. 2007) (finding a violation of the Equal Protection Clause in a case where the State admitted it struck a juror because he was male).

"Once discrimination in jury selection has occurred, the harm is done. The system, the litigant, and the juror have already sustained injury." *Woodson v. Porter Brown Limestone Co.*, 916 S.W.2d. 896, 906 (Tenn. 1996). But in the face of that constitutional injury, the majority constructs a fortress of procedural barriers to deny Bell any remedy.

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2. The prosecutor, assistant district attorney Greg Butler, had prepared two affidavits—including one for the Bell/Sims case—for a large data analysis effort by Dr. Joseph Katz. Dr. Katz asked prosecutors for their reasons for striking African American jurors in the 173 cases examined in a Michigan State University study on the Racial Justice Act. *See* Catherine M. Grosso & Barbara O'Brien, *A Stubborn Legacy: The Overhwleming Importance of Race in Jury Selection in 173 Post-*Batson *North Carolina Capital Trials*, 97 Iowa L. Rev. 1531 (2012). It is noteworthy that the prosecutors invoked gender discrimination in an effort to assert that they were not engaged in racial discrimination, in a case where defense counsel repeatedly objected to perceived racial discrimination in the prosecutor's peremptory strikes.

It concludes first that Bell's constitutional claim is not preserved because Bell's counsel objected to racial discrimination, not gender discrimination, during voir dire. Then it determines that Bell's challenge—brought in a motion for appropriate relief based on the new evidence not available to Bell or his counsel during trial—is procedurally barred. It reasons that evidence other than the State's direct admission of gender discrimination would have enabled Bell's counsel to adequately raise the issue. (It cites, for example, the prosecutor's personal notes—which again were not available to defendants until after their convictions. It does not mention North Carolina's virtually impossible track record on such claims.) Even then, the majority suggests that the State may have had cause to strike Ms. Morrow regardless. The majority faults the defendants' initial trial counsel for failing to object on gender discrimination grounds in the face of the State's many discriminatory statements—but it does not explain why such apparently incompetent lawyering fails to qualify the defendants for the "good cause" exception to the procedural bar. N.C.G.S. § 15A-1419(a)(3), (b)(1) (2023). It even shames defense counsel for what it perceives to be that side's practices of gender discrimination, ignoring the Supreme Court's admonition that "[d]iscrimination against one defendant or juror on account of [gender] is not remedied or cured by discrimination against other defendants or jurors on account of [gender]." *Flowers*, 139 S. Ct. at 2242.

The majority's opinion thus makes explicit what the thrust of this Court's jurisprudence has conveyed for some years: *Batson* and *J.E.B.* relief is effectively unavailable on appeal and violations of the constitutional right first recognized in *Strauder* cannot be vindicated if not remedied by the trial court during jury selection.

The majority implies that the evidence at trial, including remarks by a different prosecutor than Mr. Butler made days before and after Ms. Morrow was struck, was sufficient to make out a *J.E.B.* claim had Bell's counsel only objected when Ms. Morrow was struck or argued it on direct appeal. But this Court in *Campbell*, 384 N.C. 126, effectively heightened what is required for a prima facie showing. Had the trial court rejected that hypothetical *J.E.B.* objection, as it did for the *Batson* objections, Bell would unlikely have been able to reverse that decision on appeal, because this Court has narrowed its review to the circumstances known to the trial court at the time of the objection based on the cold record "giving appropriate deference to the trial court's determination." *Id.* at 136. Moreover, on direct appeal Bell's counsel *did* raise and litigate a *Batson* challenge, mistakenly guessing that Ms. Morrow was struck because she was Black, not because she was a woman, since

prosecutors had exercised peremptory challenges to exclude nine out of the eleven African American prospective jurors who expressed a willingness to impose the death penalty. But our Court rejected that *Batson* challenge in the face of similar evidence the majority cites here, again deferring to the trial court's decision that the State had offered nondiscriminatory justifications for the strikes. *State v. Bell*, 359 N.C. 1, 12–16 (2004). The majority offers scant reason to think a *J.E.B.* objection at trial or raised on appeal would have fared better.

Not having objected at trial, Bell could have tried to raise the gender discrimination issue on appeal anyway, without the admission from the affidavit or the jury questionnaire notes. But an appellate court would have applied plain error review under this Court's precedent in *Maness*, 363 N.C. at 273. And this Court seemingly toughened the plain error standard in *State v. Reber*, 386 N.C. 153 (2024), by requiring a defendant to prove both that "the jury probably would have returned a different verdict" and that "the error is an exceptional case." *Id.* at 158 (cleaned up). Moreover, *Maness* made clear that Rule 2 of the North Carolina Rules of Appellate Procedure is not available to criminal defendants claiming gender discrimination, because a "defendant's claim of gender bias in the State's peremptory challenge of prospective juror [Morrow] is not an exceptional circumstance calling for invocation of Rule 2." 363 N.C. at 274.

That leaves the defendants with only the possibility of post-conviction relief. Mr. Butler's affidavit admitting his improper motives is "new evidence" that could not have been obtained by reasonable diligence. After all, evidence from a prosecutor's personal notes during voir dire is commonly unavailable until the prosecution's trial file is turned over during post-conviction proceedings yet can still give rise to a successful *Batson* or *J.E.B.* challenge. *See Foster v. Chatman*, 578 U.S. 488, 493, 504 (2016). And we held in *State v. Jackson*, 322 N.C. 251 (1988), that a defendant who brings a *Batson* challenge has no right to examine the prosecuting attorney as to their true motives in a separate hearing. *Id.* at 258. But in *Tucker*, this Court ascribed near superhuman quality to an indigent, incarcerated criminal defendant's capacity to discover such information with "reasonable diligence in time to present the claim" under N.C.G.S. § 15A-1419(c). *Tucker*, 385 N.C. at 502, 506 (suggesting that the defendant's appointed counsel could have petitioned the court for funds to self-produce an academic study, originally authored by two full-time academics including one who holds a doctorate and later dismissed by this Court as "unreliable and fatally flawed").

Even if this evidence were not "new," a defendant is still eligible for post-conviction relief by showing good cause and actual prejudice.

N.C.G.S. § 15A-1419(b)(1). Yet *Tucker* also suggested that the "actual prejudice" standard simply boils down to an inquiry as to whether the trial court would have made a different decision at step one of a *Batson* determination in light of the new information. *Id.* at 510. It is unclear that this Court would even consider this new evidence of the prosecutor's motive at step one, because it declined to do exactly that in *Tucker* by ignoring the prosecutor's *Batson* "cheat sheet." *See id.* (concluding that a document suggesting pretext by the State in striking jurors was *not probative* at step one, because "the prosecutor's reasons justifying the peremptory strikes and whether they show pretext and purposeful discrimination" are step two and three inquiries).

So while the majority makes great efforts to pin the outcome of this case on procedural bars, reading in a general preservation requirement to N.C.G.S. § 15A-1419 and shifting responsibility to defense counsel, that reasoning itself is unnecessary to the outcome. This Court's existing jurisprudence forecloses the relief defendants seek. Thus discriminatory behavior by the State faces no consequence of any kind, even in this most extraordinary of cases with direct evidence of intentional gender discrimination. Instead our jurisprudential shell game transmogrifies constitutional protections into a mirage.[3]

III. *Batson*'s Deficiencies and Remedial Challenges

Understanding our jurisprudence in this way reinforces the underlying truth: *Batson* and *J.E.B.*'s three-step test and its corresponding remedial scheme is fundamentally flawed. Even though *Batson*'s driving principles are integral to our constitutional order, the current doctrine frustrates rather than vindicates them.

Scholars and jurists have long identified the problems of creating a "legal test that will objectively measure the inherently subjective reasons that underlie use of a peremptory challenge." *Miller-El II*, 545 U.S. at 267 (Breyer, J., concurring). Start at step one. The prima facie showing is "not intended to be a high hurdle" or create an onerous burden. *State v. Waring*, 364 N.C. 443, 478 (2010) (cleaned up). It instead serves as a rough winnowing mechanism, quickly separating frivolous

3. While professing to abhor the "reprehensible and insidious nature of discrimination in the jury selection process," the majority goes on to ratify a jurisprudence this Court alone is responsible for and case law which this Court fully has the power to change, case law that makes it nearly impossible to address that discrimination. *See* majority *supra* Part V. That jurisprudence is contrary to Supreme Court precedent, and no amount of hypocritical empty words can hide the fact that the majority abandons its responsibility to enforce constitutional guarantees of equal justice under the law.

claims from meritorious ones. *See Bennett*, 374 N.C. at 598 (noting that a claimant satisfies *Batson*'s first step "so long as the sum of the proffered facts gives rise to an inference of discriminatory purpose" (cleaned up)). But in many cases, *Batson*'s first step is the final one. According to some scholars, that is because courts use it as a "gatekeeping tool." *See* Emily Coward, *Policing Jury Discrimination in North Carolina: What's Happening and What's at Stake?*, Wilson Ctr. for Sci. and Just. at Duke U. Sch. of L. 1, 7 (2023), https://wcsj.law.duke.edu/wp-content/uploads/2023/06/Policing-Juror-Discrimination-in-North-Carolina-June-15-2023.pdf (last visited Mar. 18, 2025). If a court determines that a claimant did not establish a prima facie case of discrimination, the inquiry ends there. There is no need to consider the prosecution's reasons for the strike or whether those justifications are pretextual. For that reason, *Batson*'s first step has become an exit ramp, allowing courts to nip an objection in the bud and "avoid[ ] parsing difficult evidence of racial discrimination." *Id.*

Batson's second step fares little better. To prevail, a prosecutor need only offer a neutral reason for his strike, not a "persuasive, or even plausible" one. *See Purkett v. Elem*, 514 U.S. 765, 768 (1995) (per curiam). Random observations that "the mustaches and the beards look suspicious" suffice. *Id.* at 766. And justifications that a juror participates in a Black Lives Matter event are a race-neutral explanation. *Campbell*, 384 N.C. at 130, 136.

At step three, focus shifts to the trial judge. To resolve a *Batson* objection, judges must weigh evidence of discrimination against the prosecutor's explanation. But that, too, presents difficulties. In sustaining a *Batson* claim, a judge must effectively brand an attorney as both a bigot and a liar: A bigot for discriminating against prospective jurors, and a liar for trying to cover it up. *See* Robin Charlow, *Tolerating Deception and Discrimination After* Batson, 50 Stan. L. Rev. 9, 11 (1997) (noting that one judge "had the uncomfortable feeling that she had just rendered an official ruling that the attorney was lying to the court"). The requirement places judges in an understandably "awkward" position—especially when many attorneys are repeat players in their courtrooms. *See Miller-El II*, 545 U.S. at 267 (Breyer, J., concurring). This Court recognized those tempestuous "interpersonal dynamics" in *Clegg*, noting that "a trial judge may feel understandably or unconsciously hesitant to imply that a prosecutor engaged in racial discrimination while that prosecutor is standing right in front of her." 380 N.C. at 144 n.1.

Notice, too, that these three steps make little space for addressing unconscious bias and discrimination, such as assumptions that a

female juror is insufficiently "strong," or observations "that a prospective black juror is 'sullen,' or 'distant.' " *Batson*, 476 U. S. at 106 (Marshall, J., concurring); *see also* Antony Page, Batson's *Blind-Spot: Unconscious Stereotyping and the Peremptory Challenge*, 85 B.U. L. Rev. 155, 161 (2005) (noting that "subtle forms of bias are automatic, unconscious, and unintentional" and "escape notice, even the notice of those enacting the bias" (cleaned up)).

Batson's remedies pose yet another challenge. *Batson* itself dedicated a single footnote to this all-important question. *See Batson*, 476 U.S. at 99 n.24. And the Court's scant discussion focused solely on in-trial *Batson* remedies. *Id.* That is, what trial judges should do if they identify a *Batson* violation when it happens. If a judge finds that a prosecutor discriminated against jurors, she may "disallow the discriminatory challenges and resume selection with the improperly challenged jurors reinstated on the venire," or she may "discharge the venire and select a new jury from a panel not previously associated with the case." *Id.* This Court has endorsed the latter approach where the sitting jury was aware of the improper strike. *See McCollum*, 334 N.C. at 235–36.

The remedy on appeal presents a more difficult question. When a case reaches us, the jury was already impaneled, the trial already held, and the verdict already delivered. An appellate court has comparatively few vehicles for relief. We can remand a case for reconsideration of the *Batson* claim, *e.g.*, *Hobbs*, 374 N.C. at 360 (remanding *Batson* claim to the trial court), or we can reverse the defendant's conviction and order a new trial, *e.g.*, *Clegg*, 380 N.C. at 162; *Bennett*, 374 N.C. at 602. Sometimes the relief is hollow because the defendant has already completed their sentence. *See Clegg*, 380 N.C. at 164 (Earls, J., concurring). And sometimes, where the crime is horrific and the evidence overwhelming, it may be too difficult for a court to stomach ordering a new trial.[4]

Accordingly, courts have taken a variety of approaches to enforcing *Batson* and *J.E.B.* Some courts reverse and automatically order a new trial for *Batson* violations, *see, e.g.*, *People v. Yarbrough*, 999 N.W.2d 372, 380–81 (Mich. 2023), while others employ a prejudicial error standard,

4. *E.g.*, John C. Jeffries Jr., *The Right-Remedy Gap in Constitutional Law*, 109 Yale L. J. 87, 90 (1999) (theorizing that a remedial pivot from damages to injunctive relief could "facilitate[ ] constitutional change by reducing the costs of innovation" and "shift[ing] constitutional adjudication from reparation toward reform"); Richard Fallon, Jr., *Bidding Farewell to Constitutional Torts*, 107 Cal. L. Rev. 933, 938 (2019) (discussing how remedies impact courts' interpretation of Fourth Amendment "reasonableness" and their willingness to enforce it).

see, *e.g.*, *Winston v. Boatwright*, 649 F.3d 618, 632 (7th Cir. 2011) ("Prejudice, in other words, is automatically present when the selection of a petit jury has been infected with a violation of *Batson* or *J.E.B.*"); *Davis v. Sec'y for the Dep't of Corr.*, 341 F.3d 1310, 1317 (11th Cir. 2003) (holding that an appellant may demonstrate prejudice by showing a "reasonable probability" that a *Batson* challenge would have prevailed on appeal had trial counsel preserved it).

But these appellate remedies are effectively unavailable in this state. Too often we fail to make right the constitutional harm. Yet everything *Batson* said about the evils of jury discrimination remains true. Discriminatory jury strikes deny defendants their right to an impartial jury of their peers, dilute the quality and fairness of jury verdicts, and strip excluded jurors of their dignity and equality as citizens in a democratic society.[5] *See Clegg*, 380 N.C. at 169 (Earls, J., concurring).

IV. Other Paths Forward

The importance of fair jury selection places a duty on this Court. "If we are to give more than lip service to the principle of equal justice under the law," we must "take reasonable steps to address" *Batson*'s obstacles. *Id.* at 173, 170. We "have considerable discretion in structuring [our state's] jury-selection processes" under *Batson* and *J.E.B.* Jason Mazzone, Batson *Remedies*, 97 Iowa L. Rev. 1613, 1614 (2012). We must use the arsenal of tools at our disposal. *Clegg*, 380 N.C. at 173.

Other state courts have recognized *Batson*'s shortcomings and acted to remedy them. Washington's Supreme Court, for instance, has retooled *Batson*'s standard, recognizing that the existing framework "fail[ed] to adequately address the pervasive problem of race discrimination in[ ] jury selection." *State v. Jefferson*, 429 P.3d 467, 481 (Wash. 2018). The court placed particular weight on *Batson*'s inability to reach implicit bias. *See id.* at 480–81. As it explained in past cases, "*Batson* recognizes only 'purposeful discrimination,' whereas racism is often unintentional, institutional, or unconscious." *State v. Saintcalle*, 309 P.3d 326, 329 (Wash. 2013). To bridge that gap, the court swapped *Batson*'s subjective

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5. Studies show that more diverse juries dig deeper into the evidence, deliberate longer, and consider more perspectives and viewpoints in reaching a verdict. *See* Nancy S. Marder, *Juries, Justice, and Multiculturalism*, 75 S. Cal. L. Rev. 659, 687–98 (2001); Samuel R. Sommers, *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations*, 90 J. Person. & Soc. Psych. 597, 603–06 (2006); Erin York Cornwell & Valerie P. Hans, *Representation Through Participation: A Multilevel Analysis of Jury Deliberations*, 45 Law & Soc'y Rev. 667, 668–69 (2011).

standard with an objective one. *See Jefferson*, 429 P.3d at 480. In 2018, it adopted a rule which, among other things, eliminated *Batson*'s first step, instead requiring trial courts to consider baseline criteria. *See* Wash. R. Gen. Application R. 37. The rule identifies a set of facially neutral reasons for striking that are "presumptively invalid" because of their racist and sexist undertones. *Id.* Early evidence suggests that the rule lessened the frequency of discriminatory peremptory strikes and more often afforded a remedy. *See* Annie Sloan, Note, "*What to do about* Batson*?*": *Using a Court Rule to Address Implicit Bias in Jury Selection*, 108 Calif. L. Rev. 233, 257 (2020); Nancy S. Marder, *Race*, *Peremptory Challenges*, *and State Courts: A Blueprint for Change*, 98 Chi.-Kent L. Rev. 67, 86–91 (2024) (observing an impact in nine of twenty-nine relevant cases).

Arizona has gone even further. Just four years ago, the state's Supreme Court eliminated peremptory challenges in both civil and criminal trials. *See* Order Amending Rules 18.4 and 18.5 of the Rules of Criminal Procedure, and Rule 47(e) of the Rules of Civil Procedure, Ariz. Sup. Ct. No. R-21-0020 (Aug. 30, 2021).[6]

Other potential innovations include reimagining the traditional three-step *Batson* framework and the remedy for a *Batson* violation. For example, courts might require the striking party to actually rebut some of the evidence presented in the prima facie case and narrow the voir dire remedy to immediately reseat an improperly stricken juror without their knowledge that they were improperly stricken to begin with. *See* Jeffrey Bellin & Junichi P. Semitsu, *Widening* Batson*'s Net to Ensnare More Than the Unapologetically Bigoted or Painfully Unimaginative Attorney*, 96 Cornell L. Rev. 1075, 1110–11, 1121 (2011). Some scholars have suggested moving the peremptory strike system to one of negotiation—allowing peremptory strikes only on the consent of both parties. Caren Myers Morrison, *Negotiating Peremptory Challenges*, 104 J. Crim. L. & Criminology 1, 42–44 (2014) (proposing a procedure for negotiating peremptory challenges during voir dire). Other scholars and courts have proposed expanding remedies for *Batson* violations to include professional or ethical consequences. *E.g.*, Darby Gibbins, Comment, *Six Trials & Twenty-Three Years Later: Curtis Flowers and the Need for a*

6. Some scholars have advocated for the elimination of peremptory strikes for the State only. *See*, *e.g.*, Anna Roberts, *Asymmetry as Fairness: Reversing a Peremptory Trend*, 92 Wash. U. L. Rev. 1503, 1506, 1514, 1523, 1549–50 (2015). At least one district attorney abandoned the practice of using peremptory strikes in misdemeanor trials. Sheraz Sadiq, *Outgoing Multnomah County DA Changes Jury Selection for Misdemeanor Trials*, OPB (July 24, 2024), https://www.opb.org/article/2024/07/24/think-out-loud-outgoing-multnomah-county-district-attorney-jury-selection-misdemeanor-trials.

More Expansive Batson *Remedy*, 59 Hous. L. Rev. 713, 737 (2022) (cataloging arguments for and against this proposal); *People v. Willis*, 43 P.3d 130, 137 (Cal. 2002). New York's highest court has embraced forfeiture of an improperly-exercised peremptory challenge after reseating the challenged juror as a permissible remedy. *People v. Luciano*, 890 N.E.2d 214, 216–19 (N.Y. 2008).

Whatever the solution, the way forward requires courage. It requires rooting out discrimination that surfaces in whispers as well as when the quiet part is said out loud. And it requires a commitment to the values *Batson* and *J.E.B.* strive to protect but too often fall short of: fairness, dignity, and equal justice under law.

V. Conclusion

Counsel for Bell's co-defendant, Sims, at argument asked of this Court: "Is it really the case that the court system is powerless to respond when the prosecutor withholds material information about the basis of a peremptory strike and then years later belatedly confesses that the strike was motivated by discriminatory intent?"[7] Today this Court says yes.

I reluctantly concur in the result only because I cannot envision a scenario in which Bell would have been able to obtain the relief he seeks under our existing precedent. The majority's opinion validates the long-standing concerns that *Batson* and *J.E.B.* would become effectively "a right without a remedy." *Jackson*, 322 N.C. at 260 (Frye, J., concurring). I do not believe our court system is so powerless, and I look forward to a day when our Court has the courage to enforce such foundational constitutional rights with an even hand.

Justice RIGGS joins in this concurring in the result only opinion.

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7. Oral Argument at 22:00, *State v. Sims* (No. 297PA18) (Apr. 9, 2024), https://www.youtube.com/watch?v=rXqfIETGr1U (last visited Mar. 18, 2025).

STATE OF NORTH CAROLINA
v.
TRISTAN NOAH BORLASE

No. 33A24

Filed 21 March 2025

Constitutional Law—Eighth Amendment—consecutive life sentences imposed—juvenile defendant—Miller factors

The Supreme Court upheld defendant's consecutive sentences of life without the possibility of parole, which were imposed after he was convicted of two counts of first-degree murder for killing his parents just before he turned eighteen years old, where the sentences did not violate the Eighth Amendment of the federal Constitution as interpreted by *Miller v. Alabama*, 567 U.S. 460 (2012) or Art. I, sec. 27 of the North Carolina constitution, which does not provide additional protections for juvenile defendants. The trial court expressly considered evidence in mitigation with regard to each of the factors contained in N.C.G.S. § 15A-1340.19B—a statute that was enacted to address the *Miller* requirements—including defendant's youth and attendant circumstances, and defendant's capacity to consider the consequences of his actions, and did not abuse its discretion in weighing the evidence and the factors before reaching its sentencing decision.

Justice EARLS and Justice RIGGS dissenting.

Appeal pursuant to N.C.G.S. § 7A-30(2) (2023) from the decision of a divided panel of the Court of Appeals, 292 N.C. App. 54 (2024), finding no error after appeal from judgments entered on 3 March 2022 by Judge R. Gregory Horne in Superior Court, Watauga County. Heard in the Supreme Court on 25 September 2024.

Jeff Jackson, Attorney General, by Heidi M. Williams, Special Deputy Attorney General, for the State-appellee.

Lisa Miles for defendant-appellant.

BERGER, Justice.

Defendant killed his mother and father one month prior to his eighteenth birthday. After being convicted of two counts of first-degree murder, defendant was sentenced to two consecutive life sentences without the possibility of parole. Defendant argued to the Court of Appeals that he was sentenced in violation of the Eighth Amendment as interpreted in *Miller v. Alabama*, 567 U.S. 460 (2012), North Carolina's *Miller*-fix statute, and Article I, Section 27 of the North Carolina Constitution because, as a juvenile offender, his crimes did not reflect permanent incorrigibility. The Court of Appeals rejected this argument, holding that there was no error in the sentences imposed by the sentencing court. We affirm the Court of Appeals.

I. Factual and Procedural Background

At the time of the events in this case, defendant was a senior in high school and was just shy of his eighteenth birthday. He was a pole vaulter on the track team, but defendant was struggling in school, and his parents were aware that he may not graduate because of his poor grades. On 10 April 2019, defendant's parents informed him that he would not be allowed to compete with the track team for the remainder of the season, and they took away his car keys and cell phone.[1]

Later that day, defendant was alone with his mother in the kitchen while his father was outside spreading mulch. Evidence presented at trial, including defendant's testimony and footage from home security videos, tended to show that defendant stabbed his mother with a kitchen knife multiple times. Mrs. Borlase sustained twelve sharp force injuries, blunt force injuries, and injuries consistent with strangulation. The medical examiner testified that Mrs. Borlase died from stab wounds to her chest and torso.

After killing his mother, security footage showed defendant running towards his father with a large knife. Defendant raised the knife and struck at his father cutting his upper left arm. Mr. Borlase fell as he attempted to run away. Defendant jumped on his father and stabbed him multiple times. As defendant began to walk away, he saw his father struggling to get up before collapsing back to the ground. Despite seeing that his father was still alive, defendant took no steps to render aid or to summon help. The medical examiner testified that, in addition to sharp force injuries, Mr. Borlase had signs of blunt force injuries to the back of

1. Ironically, earlier that day during his civics class, defendant learned about the differences between the punishments for juveniles and adults in the justice system, including that juveniles could not receive the death penalty for murder.

the head. The medical examiner concluded that the cause of death was multiple stab wounds to the torso.

For the next two hours, defendant attempted to cover up his actions. Defendant tried to clean up or wash away his parents' blood. Defendant also attempted to drag his mother's body from the home by using a rope tied around her feet. When he was unsuccessful, defendant carried her body to the bed of a truck and repeatedly dropped her along the way. Defendant covered his mother's body with bags of mulch and a blanket and then went into the yard to conceal his father's body. Defendant took his father's wallet and then wrapped the body in a hammock and covered it with leaves.[2]

Defendant then drove to his grandmother's house to pick up his twelve-year-old brother. Defendant's grandmother and brother noted that defendant smiled and laughed, was acting "overly happy," and was "in a very good mood." Defendant drove his brother home. Defendant's brother asked about the blood on the floor of the house, and defendant said it was from cutting himself cleaning dishes. Defendant left home around 8:45 p.m., leaving his youngest brother alone, and went to hang out with his friends and smoke marijuana. Despite attempts to find alternative places to stay for the evening, defendant drove back home. When he pulled up near his driveway, defendant noticed his grandmother's car and other vehicles at the residence. Defendant turned around and left. The next morning, defendant made plans to flee, but he was apprehended crossing the border into Tennessee.

Defendant was subsequently indicted for, and convicted of, two counts of first-degree murder. A sentencing hearing was held pursuant to N.C.G.S. § 15A-1340.19B to determine the appropriate sentence. The sentencing court thereafter entered a written order which included findings of fact detailing defendant's actions in murdering his parents, the court made the following additional findings of fact:

> 1. Defendant was the son of the decedents. He was 17 years, eleven months old on April 10, 2019, the date of offense;
>
> 2. As permitted by statute, the Court has considered all evidence received during the guilt–innocence phase of the case. Further, the Court has

2. Later that evening, while searching for her parents, one of defendant's sisters discovered her father's body concealed under the hammock.

afforded both sides an opportunity to present any additional relevant and probative evidence regarding sentencing;

3. In April of 2019, Defendant was unexpectedly picked up from school by his father. The parents had received a call from school personnel expressing concerns over Defendant's grades and participation at school, to the extent that his ability to graduate was in question. The parents decided to pick him up from school early planning to talk with him about their growing concerns and to search for possible answers moving forward. As part of the discussion, the parents took the keys to his car and his cell phone. They also informed him that he would not be participating on the high school track team for the balance of the season;

4. Defendant had been accepted at Coastal Carolina University and had been in discussions with the University track coach regarding his planned participation with their pole vault team;

. . . .

9. After so viciously attacking his mother, Defendant did not render aid or summon medical assistance for his gravely injured mother despite the presence of a home phone;

10. After killing both parents, Defendant spent then spent almost two hours attempting to conceal his actions by the following: 1) Using a garden hose to wash blood from the front porch, house siding, and interior of the home. He then used towels to try to mop up the bloody water on the floor of the residence; 2) Drug his mother's body out of the residence and out onto the stone and mulch front walk. He then tied rope from a hammock around his mother's ankles and attempted to drag her body toward the driveway. Failing in that, he lifted the body up and drug it through mulch to the edge of the drive; 3) Placed his

mother's body into the back of a pickup truck and drove the truck down to the bottom of the property and up into a wooded area thereby concealing his mother's body; 4) Wrapped his father's body up into a hammock and attempted to further conceal the body with leaves; 5) Packed bags with clothing and a sleeping bag that he subsequently took with him; 6) Removed blood-stained items from the home to include a rug and blinds;

11. Defendant then drove to his grandmother's house and picked up his youngest brother (age 12). Both his grandmother and his brother noticed that Defendant was acting "overly happy" and in a very good mood. Defendant took the young brother into the home that still had blood on the floor and throughout areas of the residence. He later admitted that he had gone to pick up his brother out of fear that his grandmother would first drive to residence thereby discovering the scene;

12. Defendant then left the scene at approximately 8:45 PM and went to the high school where he hung out with friends and smoked marijuana. He then sent out messages trying to find a place to stay for the night. He planned to run away from the area and go to another state. Later that evening he drove back to the home, but upon approach he observed his grandmother's car at the property. He turned off his headlights and turned around heading back toward Boone. He passed multiple police officers responding toward the scene as he drove back into Boone and away from the scene;

13. The Court has allowed both sides the opportunity to present further evidence at this sentencing hearing. The State offered a number of victim impact statements both oral and written. The defense offered further testimony of Defendant and Defendant Sentencing Exhibits DS#1 – DS#7 inclusive;

> 14. The Court has not presumed the appropriateness of any particular sentence. Rather, the Court has considered and selected the appropriate sentencing alternative based solely upon a consideration of the circumstances of the offense, the particular circumstances of Defendant, and any mitigating factors under N.C.G.S. § 15A-1340.19B(c)(l)–(9);

Based upon consideration of these findings of fact and additional evidence received at the sentencing hearing, the sentencing court then made findings pursuant to N.C.G.S. § 15A-1340.19C(a) as follows:

> a) Age at the time of offense: The Court finds that Defendant was 17 years and 11 months old on the offense date. He reached the age of adulthood only one month after committing these homicides;
>
> b) Immaturity: Dr. Hilkey's report cites various general studies tending to indicate that the juvenile brain tends to develop slowly and that the brain does not become fully developed until later in adulthood. While undoubtedly true, there is no credible, specific evidence before the Court that Defendant suffered from any specific immaturity that would act to mitigate his decisions and conduct in this case. Accordingly, the Court does not find this factor to be a significant mitigating factor in this case;
>
> c) Ability to appreciate the risks and consequences of the conduct: Based upon the credible evidence received, Defendant was capable of fully appreciating the risks and consequences of his conduct. The evidence shows that Defendant planned out, for at least a short period of time, his actions. This is demonstrated by Defendant going outside the home to check on his father's whereabouts and status prior to reentering the home moments before beginning the assault on his mother. It is further evidenced by his actions following the deadly assaults in that he took numerous actions to clean the scene and hide evidence. Finally, his actions in fleeing the scene and taking steps to avoid apprehension further

point to his understanding and appreciation of the risks and consequences. Accordingly, the Court finds no mitigating value as to this factor;

d) Intellectual capacity: The evidence is undisputed that Defendant was a very bright and capable person. His total IQ score of 128 placing him in the 97 percentile proves this to be true. Clearly, Defendant was under no intellectual limitations. The defense seems to argue in sentencing that this high intellectual capacity and ability should be found as a mitigating factor. The Court believes this is a misinterpretation of this factor. Certainly, if an individual has limited intellectual abilities or functioning, then this limitation should be consider in mitigation. However in this case, Defendant's far superior intellectual functioning acts to only underscore his ability to plan, understand, and appreciate his decisions and subsequent actions. The Court finds no mitigating value as to this factor;

f)[3] Prior record: Defendant has no prior record of criminal convictions. The Court does consider this fact to have substantial mitigating value;

g) Mental health: [The forensic psychologist]'s reports and Defendant's testimony indicate that Defendant continues to suffer from depression and anxiety related issues. Further, Defendant has developed symptoms consistent with PTSD only following this incident. Beyond that, [the forensic psychologist] found that there was no clear evidence of a psychotic disorder or any cognitive impairment. It is further likely that Defendant's depression was exacerbated by his persistent marijuana use in the two months leading up to the murders. Accordingly, the Court finds mitigating value to this factor as it relates to his depression;

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3. The sentencing order did not contain a subparagraph (e); however, the sentencing court addressed the nine factors set forth in the statute. *See* N.C.G.S. § 15A-1340.19B(c) (2023).

h) Familial or peer pressure exerted upon the Defendant: In *Miller v. Alabama*, the majority placed emphasis on the negative family, home, environmental and peer influences a juvenile faced while growing up. The specific situations addressed in that and following cases included growing up exposed to a troubled childhood, lack of parental care and involvement, exposure to drugs and even violence. This would also include a situation in which the juvenile was not the "trigger-man" or his involvement in the killing was only tangential. None of the factors are present in this case. In fact, the very opposite is true. Defendant had the benefit of very loving, caring and nurturing parents. He benefited from being raised by parents who deeply loved him and all his siblings and who sacrificed beyond even reasonable measure to provide for their children's health, welfare, happiness, needs and even wishes. While the Defendant may have genuinely disagreed with the form of discipline (taking of privileges and interactive discussions), even he seemingly admits in his testimony that both his parents had his best interests and his very future at heart throughout. As to any tangential involvement in murders, that is clearly not the case here. Defendant killed both parents separately by his own hand. There is no credible evidence before the Court to support any finding of mitigation as to this factor;

i) Likelihood that the Defendant would benefit from rehabilitation in confinement: The Court acknowledges that rehabilitation services will be made available to Defendant while in custody. However, the Court finds relevant to this issue the Defendant's manipulative behaviors both before and, as evidenced in the jail recordings, after the offenses. These behaviors were noted by his sibling even as he faced corrective discipline at his mother's hand (i.e, shifting blame to siblings, smiling or smirking as he faced punishment). Further, even through this

very hearing, Defendant has not demonstrated sincere remorse for his actions. Certainly, he has shed tears and expressed sorrow or sadness at his resulting situation. But as observed in his words and demeanor, this does not represent true remorse for his criminal conduct. All combined, the Court does not believe that there is a likelihood of rehabilitation in confinement. Accordingly, the Court finds no mitigating value to this factor;

j) Catchall: The Court has received evidence that Defendant is a very bright and gifted person who expresses a desire to use his gifts to benefit others. The Court finds mitigating value to this factor;

k) The Court has further considered the possible applicability of the other statutory mitigating factors as listed in N.C.G.S. § 15A-1340.16(e). The Court finds that none of those additional factors apply.

Based upon the findings of fact and weighing the mitigating circumstances of youth set forth in the *Miller*-fix statute, the sentencing court concluded that defendant's crimes "reflect a condition of irreparable corruption and permanent incorrigibility without the possibility of rehabilitation" and sentenced defendant to two consecutive sentences of life without parole. Defendant appealed, and the Court of Appeals determined that there was no error.

On appeal to this Court based upon a dissent, defendant argues that the Court of Appeals "gave no meaningful appellate review to the trial court's sentencing decision" because there was no showing that defendant was permanently incorrigible, and defendant argues this purported error below allowed him to be sentenced to life in prison without parole in violation of the Eighth Amendment to the federal Constitution, Article I, Section 27 of our state constitution, and N.C.G.S. § 15A-1340.19B. Specifically, defendant contends that the Court of Appeals did not conduct "a full and fair appellate review" and employed the wrong standard of review. In addition, defendant asserts that the sentencing court (1) failed to consider mitigating evidence, (2) improperly considered defendant's criminal conduct, and (3) improperly weighed evidence in mitigation.

We affirm the Court of Appeals.

II. Analysis

The Eighth Amendment to the federal constitution bars "cruel and unusual punishments." U.S. Const. amend. VIII. This Court recently held that Article I, Section 27 of our state constitution does not provide juveniles with the more robust sentencing protections the Supreme Court of the United States has developed in its Eighth Amendment jurisprudence. *State v. Tirado*, No. 267PA21 (N.C. Jan. 31, 2025). Instead, to ensure no citizen is afforded lesser rights, this Court continued its historical practice of lockstepping Article I, Section 27 with the protections of the Eighth Amendment. *Id.*, slip op. at 45. Thus, an analysis of sentencing for a juvenile murderer under the Eighth Amendment satisfies state constitutional scrutiny. *See id.*

In *Miller*, the Supreme Court "h[e]ld that the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders." 567 U.S. at 479. As this Court explains today, "*Miller* permits sentences of life without parole for juvenile murderers provided the sentencing court (1) considers a defendant's youth in mitigation, and (2) has discretion to impose a different punishment other than life without parole." *State v. Sims*, No. 297PA18 slip op. at 11 (N.C. Mar. 21, 2025); *Tirado*, slip op. at 44–45.

In *Montgomery v. Louisiana*, 577 U.S. 190 (2016), the Supreme Court stated that *Miller* does not preclude juvenile murderers from being sentenced to life without parole, but it does prohibit such sentences "for all but the rarest of juvenile offenders . . . whose *crimes* reflect permanent incorrigibility." *Id.* at 209 (emphasis added). This differentiates between "children whose *crimes* reflect transient immaturity" and those "whose *crimes* reflect irreparable corruption." *Id.* (emphasis added). The Court also concluded that "a finding of fact regarding a child's incorrigibility . . . is not required." *Id.* at 211.

To comply with the Eighth Amendment, a sentencing court simply must "follow a certain process—considering an offender's youth and attendant characteristics—before imposing" a particular penalty. *Jones v. Mississippi*, 141 S. Ct. 1307, 1311 (2021) (quoting *Miller*, 567 U.S. at 483). According to *Jones*, it is the adherence to the sentencing procedure enunciated in *Miller* that provides the individualized consideration of a defendant's age and attendant circumstances of youth, combined with the nature of the crime, that "helps ensure that life-without-parole sentences are imposed only in cases where that sentence is appropriate in light of the defendant's age." *Id.* at 1318. Thus, it is the discretionary sentencing protocol itself that "help[s] make life-without-parole sentences

relatively rare for murderers under 18." *Id.* (cleaned up). Important here, the Eighth Amendment does not require "an on-the-record sentencing explanation with an implicit finding of permanent incorrigibility," but instead requires that the sentencing judge be afforded "discretion to consider the mitigating qualities of youth and impose a lesser punishment." *Id.* at 1314, 1319.

Our State legislature adopted N.C.G.S. §§ 15A-1340.19A to -1340.19D to address the requirements enunciated in *Miller*. The *Miller*-fix "gave trial courts the discretion to determine whether juvenile murderers receive life without parole or the lesser sentence of life imprisonment with parole . . . . In making this determination, the trial court must consider certain enumerated mitigating factors along with any other mitigating factor or circumstance . . . ." *Tirado*, slip op. at 4 (cleaned up). This statutory scheme satisfies the Eighth Amendment as interpreted by *Miller* and does not presume in favor of either potential sentence. *Sims*, slip op. at 14; *see also State v. James*, 371 N.C. 77, 90, 813 S.E.2d 195, 205 (2018) (the statutory language "treats the sentencing decision required by N.C.G.S. § 15A-1340.19C(a) as a choice between two equally appropriate sentencing alternatives."). Thus, in following and applying the language of the *Miller*-fix statute, a sentencing court complies with the safeguards of the Eighth Amendment.

When a juvenile has been convicted of first-degree murder on the theory of premeditation and deliberation, the sentencing court must conduct a sentencing hearing pursuant to the *Miller*-fix statute. N.C.G.S. § 15A-1340.19B(a)(2) (2023). At this hearing,

> [t]he defendant or the defendant's counsel may submit mitigating circumstances to the court, including, but not limited to, the following factors:
>
> (1) Age at the time of the offense.
>
> (2) Immaturity.
>
> (3) Ability to appreciate the risks and consequences of the conduct.
>
> (4) Intellectual capacity.
>
> (5) Prior record.
>
> (6) Mental health.
>
> (7) Familial or peer pressure exerted upon the defendant.

(8) Likelihood that the defendant would benefit from rehabilitation in confinement.

(9) Any other mitigating factor or circumstance.

N.C.G.S. § 15A-1340.19B(c) (2023).

A sentencing court is required to "consider any mitigating factors" presented, and its sentencing order "shall include findings on the absence or presence of any mitigating factors and such other findings as the court deems appropriate." N.C.G.S. § 15A-1340.19C(a) (2023). A "sentencing court complie[s] with *Miller* when it weigh[s] factors attendant to defendant's youth and, appreciating the discretion available, sentence[s] defendant." *Sims*, slip op. at 17. While a sentencing court must consider the factors listed in the *Miller*-fix statute, it is not required to weigh them in defendant's favor. Rather, it is the exercise of discretion by a sentencing court that "determine[es] whether, based upon all of the circumstances of the offense and the particular circumstances of the defendant, the defendant should be sentenced to life imprisonment with parole instead of life imprisonment without parole." N.C.G.S. § 15A-1340.19(C). A sentencing court is not required to apply an additional factor or filter to ensure rarity of the sentence. *Sims*, slip op. at 17-18.

Contrary to defendant's argument, the inquiry is not whether a defendant is permanently incorrigible or irreparably corrupt; nor is it potential for redemption. *See Jones*, 141 S. Ct. at 1322 ("*Miller* and *Montgomery* . . . [squarely rejected the argument] that the sentencer must make a finding of permanent incorrigibility . . . ."). The Supreme Court in *Miller* stated that life without parole should be reserved for the "rare juvenile offender whose *crime* reflects irreparable corruption." *Miller*, 567 U.S. at 479–80 (cleaned up) (emphasis added). *Montgomery* thereafter confirmed that *Miller* prohibited life without parole "for all but the rarest of juvenile offenders, those whose *crimes* reflect permanent incorrigibility." *Montgomery*, 577 U.S. at 209 (emphasis added). There is no separate requirement that a sentencing court make a finding the murderer is permanently incorrigible or irreparably corrupt.[4]

Under *Miller*, *Montgomery*, and *Jones*, the Eighth Amendment simply requires a sentencing court to consider youth and its attendant circumstances. *Sims*, slip op. at 19. Thus, the *Miller*-fix adheres to Eighth

4. The Supreme Court in *Jones* explains why "an on-the-record sentencing explanation with an implicit finding of permanent incorrigibility" is not required: it "(i) is not

Amendment protections when sentencing juvenile murderers, as it is the sentencing court's exercise of discretion when considering the nine factors in light of the nature of the crime which makes a sentence of life without parole relatively rare.

The Court of Appeals has properly stated that "[o]rders weighing the *Miller* factors and sentencing juveniles are reviewed for abuse of discretion." *State v. Golphin*, 292 N.C. App. 316, 322 (2024); *see also State v. Antone*, 240 N.C. App. 408, 410 (2015). Moreover, "[i]n non-capital cases we do not, and are not required to, conduct factual comparisons of different cases to determine whether a given sentence is constitutional." *State v. Ysaguire*, 309 N.C. 780, 786 n.3 (1983). Therefore, "[i]t is not the role of an appellate court to substitute its judgment for that of the sentencing judge." *State v. Lovette*, 233 N.C. App. 706, 721 (2014) (quoting *State v. Westall*, 116 N.C. App. 534, 551 (1994)).

Subsection 15A-1340.19C(a) requires the sentencing court to enter an order which "include[s] findings on the absence or presence of any mitigating factors and such other findings as the court deems appropriate." N.C.G.S. § 15A-1340.19C(a). Consistent therewith, however, a "trial court need not make a finding as to every fact which arises from the evidence; rather, the court need only find those facts which are material to the resolution of the dispute." *In re A.E.S.H.*, 380 N.C. 688, 693 (2022) (cleaned up). Moreover, our appellate courts will not reverse a discretionary sentence "merely because the sentencer could have said more about mitigating circumstances." *Jones*, 141 S. Ct. at 1321.

A. Court of Appeals Opinion

Defendant contends that the Court of Appeals failed to conduct meaningful appellate review of the sentencing court's sentencing order, suggesting instead that the dissent provides a more appropriate review. However, defendant essentially argues that the majority erred when it declined to step into the shoes of the sentencing court and reweigh evidence. But it is not the job of appellate courts to reweigh evidence. *See Sims*, slip op. at 35. As we have noted:

> an important aspect of the trial court's role as finder of fact is assessing the demeanor and credibility of

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necessary to ensure that a sentencer considers a defendant's youth, (ii) is not required by or consistent with *Miller*, (iii) is not required by or consistent with this Court's analogous death penalty precedents, and (iv) is not dictated by any consistent historical or contemporary sentencing practice in the states." 141 S. Ct. at 1314, 1319.

> witnesses, often in light of inconsistencies or contradictory evidence. It is in part because the trial court is uniquely situated to make this credibility determination that appellate courts may not reweigh the underlying evidence presented at trial.

Matter of A.A.M., 379 N.C. 167, 174 (citations omitted).

In its decision, the Court of Appeals majority squarely addressed defendant's Eighth Amendment argument, citing to and discussing Supreme Court case law concerning sentences of life without parole for juveniles, including *Miller*, *Montgomery*, and *Jones*. Based upon its analysis of these decisions, the majority below determined that the sentencing court's written order showed that it exercised discretion consistent with the Eighth Amendment in sentencing defendant.

In addition, the Court of Appeals addressed defendant's state constitutional argument under Article I, Section 27. There, the majority discussed the applicability of *State v. Kelliher*, 381 N.C. 558 (2022) and *State v. Conner*, 381 N.C. 643 (2022) related to the constitutional provision, along with the possibility that legal analysis supporting defendant's argument was "arguably *dicta*." *State v. Borlase*, 292 N.C. App. 54, 63 (2024). The majority also noted that even if *Kelliher* and *Conner* controlled, the sentencing court made findings consistent therewith. *Id.* We recently confirmed the Court of Appeals' analysis that *Kelliher* "is nonbinding obiter dictum." *Tirado*, slip op. at 44.[5] Thus, because this Court locksteps Article I, Section 27 of our state constitution with the Eighth Amendment, *id.* at 45, defendant's argument that the courts below allowed him to be sentenced in violation of our state constitution is without merit.

Moreover, the majority below specifically addressed defendant's argument concerning N.C.G.S. § 15A-1340.19B and the *Miller* factors set forth therein. In fact, the discussion below correctly stated that the statute does not require a finding of permanent incorrigibility before specifically addressing the five *Miller* factors challenged by defendant. *Borlase*, 292 N.C. App. at 59–62.

The dissent in the Court of Appeals suggests, and defendant argues, that the sentencing court violated defendant's constitutional rights under the Eighth Amendment pursuant to *Eddings v. Oklahoma*, 455

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5. While the Court of Appeals appropriately confronted *Kelliher*, even if not dicta, *Kelliher*'s precedential value is questionable. *See id.* at 49 (Berger, J., concurring) ("*Kelliher* is an outlier that is entitled to little precedential weight." (cleaned up)).

U.S. 104, 104 (1982) by "refusing to consider, as a matter of law, the relevant mitigating evidence regarding defendant's family life and immaturity." *Id.*, at 80 (Arrowood, J., dissenting) (cleaned up). Specifically, defendant contends he presented uncontradicted evidence concerning his youth, family pressures, and immaturity, and the sentencing court failed to make necessary findings that his age was a mitigating factor, improperly considered familial pressures, and ignored credible expert testimony regarding his psychological state.

But defendant misapprehends the inquiry as *Jones* has clarified that courts must consider mitigating evidence, not make explicit findings or assign weight. *Jones*, 141 S. Ct. at 1316 (there is no requirement that a "sentencer . . . make any particular factual finding regarding those mitigating circumstances."). While a defendant may have an "Eighth Amendment claim if the sentencer expressly refuses *as a matter of law* to consider relevant mitigating circumstances," *id.* at 1320 n.7,[6] "*Eddings* . . . permits a sentencer to find mitigating evidence unpersuasive," *Thornell v. Jones*, 144 S. Ct. 1302, 1305 (2024). In other words, there may be an Eighth Amendment violation only if a sentencing court expressly refuses to consider relevant mitigating circumstances.

But contrary to the argument presented by defendant and the dissent below, the sentencing court here did not refuse to consider relevant mitigating evidence. In fact, the sentencing court expressly considered each of the mitigating factors as set forth above, including familial pressure and immaturity; it simply found the evidence relating to these factors unpersuasive. Regarding immaturity, the court acknowledged studies that show slower brain development in juveniles, but found that "there is no credible, specific evidence before the Court that Defendant suffered from any specific immaturity that would act to mitigate his decisions and conduct in this case." Concerning defendant's familial pressures, the sentencing court found that while "[d]efendant may have disagreed with the form of discipline" by his parents, he benefitted from "very loving, caring and nurturing parents."

Although the sentencing court could have recounted additional evidence from the sentencing hearing in its order, there is no requirement that a sentencing court recount all of the testimony and evidence presented. *See Sims*, slip op. at 20 (quoting *Jones*, 141 S. Ct. at 1321)

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6. *Jones* explains the difference between "expressly refus[ing] as a matter of law to consider" mitigating factors such as "the defendant's youth," as opposed to "deeming the defendant's youth to be outweighed by other factors." *Jones*, 141 S. Ct. at 1320 n.7.

("appellate courts will not reverse a discretionary sentence 'merely because the sentencer could have said more about mitigating circumstances.' ") Moreover, although defendant disagrees with the weighing of these factors by the sentencing court, it is not the role of appellate courts to reweigh the evidence. *Sims*, slip op. at 23 ("[I]t is not the role of an appellate court to substitute its judgment for that of the sentencing judge." (citation omitted)).

Thus, defendant's argument that the Court of Appeals failed to conduct a thorough and proper appellate review is without merit.

B. Proper Standard

Defendant next contends that the Court of Appeals failed to employ an abuse of discretion standard, even though he acknowledges that the majority determined the sentencing court's sentencing decision "was not arbitrary." Defendant goes on to state that "[t]he governing legal standard in *Miller* cases is that [life without parole] is reserved 'for those juvenile defendants whose crimes reflect irreparable corruption rather than transient immaturity.' "

Sentencing courts consider the *Miller* factors "based upon all the circumstances of the offense and the particular circumstances of the defendant." N.C.G.S. § 15A-1340.19C(a). Sentences imposed after conducting a *Miller*-fix hearing "are reviewed for abuse of discretion." *Golphin*, 292 N.C. App. at 322; *see also Antone*, 240 N.C. App. at 410. A sentencing court abuses its discretion when a "ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *Golphin*, 292 N.C. App. at 322 (cleaned up). *See Sims*, slip op. at 23-24 (explaining that the sentencing court acknowledged the defendant's immaturity as a mitigating circumstance, but found that in light of other evidence presented, it was of minimal significance, and the defendant could not demonstrate that the sentencing court abused its discretion).

The sentencing court here provided a thorough analysis, considering each of the relevant mitigating factors, and defendant's argument is without merit.

C. Sentencing Court

Defendant makes three arguments concerning the sentencing court's consideration of and weighing of mitigating evidence: (1) the court failed to consider mitigating evidence; (2) the court improperly considered defendant's criminal conduct; and (3) the court improperly weighed evidence in mitigation.

But the sentencing court considered defendant's mitigating evidence and made explicit findings in its written order. There is no evidence in the record or in the order to suggest that the sentencing court expressly refused to consider relevant mitigating evidence. In the absence of express evidence that demonstrates a sentencing court did not consider mitigating evidence or exercise its discretion, we will not presume error. *See State v. Vann*, 386 N.C. 244, 253–54 (2024) ("[I]it is presumed that a trial court acted correctly until statements of the trial court show that the trial court did not exercise discretion. . . . This presumption dictates that appellate courts should presume that the trial judge did not commit error absent affirmative evidence to the contrary." (cleaned up)); *see also Matter of A.P.W.*, 378 N.C. 405, 411 (2021) ("[W]e presume the findings made by the trial court are supported by competent evidence. . . . [I]t is the responsibility of the [defendant] . . . to show error, otherwise the Court cannot presume error." (cleaned up)); *In re A.R.H.B.*, 186 N.C. App. 211, 219 (2007) ("The longstanding rule is that there is a presumption in favor of regularity and correctness in proceedings in the trial court, with the burden on the [defendant] to show error." (citation and quotation marks omitted)).

As to defendant's specific arguments, first, the sentencing court plainly considered defendant's age in mitigation. The sentencing judge stated, "Defendant was 17 years and 11 months old on the offense date. He reached the age of adulthood only one month after committing these homicides[.]" As explained in *Jones*, the defendant's argument that "an on-the-record sentencing explanation [is] . . . necessary to ensure that a sentencer considers a defendant's youth" is without merit, as the sentencer will necessarily consider the defendant's youth when exercising its discretion under *Miller*. *Jones* at 1319-1320 ("[T]he key point remains that, in a case involving a murderer under 18, a sentencer cannot avoid considering the defendant's youth if the sentencer has discretion to consider that mitigating factor."). Put another way, when a sentencing court conducts a sentencing hearing and exercises discretion consistent with our *Miller*-fix statute, the sentencing court has necessarily considered a defendant's age and the attendant circumstances of youth.

While defendant takes issue with the fact that the sentencing court did not expressly state in its order that defendant's age was a mitigating factor, it is clear the sentencing court considered defendant's age along with other relevant evidence. Although defendant contends the sentencing court's finding concerning this *Miller*-fix factor is deficient, our appellate courts will not reverse a discretionary sentence "merely because the sentencer could have said more about mitigating circumstances." *Id.*

at 1321. Moreover, because there is no affirmative evidence in the record that the sentencing court refused to consider defendant's age in mitigation, defendant has not demonstrated error. Thus, this Court applies the longstanding presumption of regularity, and defendant's argument is without merit.

Next, the sentencing court did not err in its assignment of mitigating value to either the familial pressure or immaturity factors. Here again, defendant has not demonstrated that the sentencing court refused as a matter of law to consider the evidence he put before them. Rather, defendant simply contends that the sentencing court did not weigh the mitigating evidence in his favor. But "the weight assigned to any particular mitigating circumstance is solely the province of the sentencer." *Sims*, slip op. at 21 n.3.

Concerning the familial factor, the sentencing court found that defendant had "benefited from . . . parents who deeply loved him and all his siblings and who sacrificed beyond even reasonable measure to provide for their children's health, welfare, happiness, needs and even wishes." Defendant even reported to Dr. James Hilkey, the forensic psychologist, that he believed his parents had the best intentions for him with their strict parenting. While there was evidence before the sentencing court that defendant lived in an overbearing household in which his mother applied questionable discipline, there was sufficient evidence to support the sentencing court's findings, and we will not substitute our judgment for that of the sentencing court. *See Lovette*, 233 N.C. App. at 721. Thus, defendant's contention is without merit "[b]ecause the weight afforded to a mitigating circumstance is within the sound discretion of the sentencing court." *Sims*, slip op. at 23.

The sentencing court also did not err in its finding on the immaturity factor. Dr. Hilkey's report provided general evidence related to brain development in adolescents that was not specific to defendant. In fact, according to Dr. Hilkey, defendant exhibited reasoning abilities at a level significantly above that of his peers. The sentencing court considered the evidence presented on this *Miller* factor and determined that, in the absence of "any specific immaturity that would act to mitigate [defendant's] decisions and conduct," defendant's purported immaturity was not a significant mitigating factor. Once again, while the sentencing court could certainly have made a different finding on this factor and weighed it differently, the record supports the sentencing court's findings, and the weight to be assigned to the evidence is in the sentencing court's sole discretion. *Sims*, slip op. at 31 ("[T]he weight afforded to a mitigating factor lies within the sound discretion of the sentencing court.").

Finally, the sentencing court determined that defendant exhibited the cognitive capacity to appreciate the risks of his actions. Defendant's role in planning and carrying out the murders, his attempts to conceal or destroy evidence thereafter, and his attempt to flee the state are also indicative of his ability to understand and appreciate the risks associated with his conduct. *See Sims*, slip op. at 24 (concluding that the defendant's efforts to dispose of evidence and conceal his participation in the crime indicates an appreciation of the risks associated with his conduct); *State v. Roberts*, 876 N.W.2d 863, 869 (Minn. 2016) (holding that the defendant "indicated an awareness of the consequences of his behavior when," among other things, he "dispos[ed] of evidence"); *Cook v. State*, 242 So. 3d 865, 875 (Miss. Ct. App. 2017) ("[Defendants'] efforts to cover their tracks suggested an awareness of the consequences.").

The actions taken by defendant were deliberate decisions made by an individual one month shy of his eighteenth birthday who understood the consequences of his decisions, and we will not substitute our judgment for that of the sentencing court. *See Lovette*, 233 N.C. App. at 721; *see also Sims*, slip op. at 34.

III. Conclusion

The Court of Appeals conducted an appropriate review of the sentencing court's order in light of relevant federal and state requirements when it concluded that defendant's sentence was constitutionally sufficient under *Miller*. In adhering to the procedure set forth in our *Miller*-fix statute, balancing the *Miller* factors in light of the crimes committed by defendant, and exercising its discretion in sentencing defendant to consecutive sentences of life without parole, the sentencing court did not abuse its discretion, and we affirm the judgment of the Court of Appeals.

AFFIRMED.

Justice EARLS and Justice RIGGS dissenting.

A jury found that on 10 April 2019, at age seventeen, Tristan Borlase murdered both of his parents, Tanya and Jeff Borlase, just months before he was set to graduate from high school. Tristan's violent murders were reprehensible, and his disorganized attempts to cover up the crimes only caused further trauma by creating a situation where his sibling discovered their father's body at the family's home. After Tristan

was convicted, the sentencing judge was presented with a question of the appropriate sentence: two counts of life without the possibility of parole or two counts of life with the possibility of parole—a minimum term of twenty-five years for each count. The sentencing court heard victim impact statements from the surviving family members and evidence from Tristan's teachers, church group leader, and psychological examiner about his background, maturity, family relationships, and mental health. The court concluded that there was no credible evidence of familial pressure or immaturity that might have mitigating value in its sentencing decision.

The majority takes that conclusion at face value. In doing so, it signals to sentencing courts that they have a blank check when using their discretion to sentence a juvenile to die in prison for an intentional murder they committed as a minor.

We do not endorse that proposition, which is incompatible with federal constitutional precedent and our state laws. The Constitution is not crime specific. It applies to all who stand accused of a criminal offense. The crimes here are heinous, as the majority details. Yet that fact does not dissolve Tristan's constitutional and statutory protections. And it does not excuse this Court from faithfully invoking those safeguards. We dissent and would reverse the judgment of the Court of Appeals and remand this matter for further remand to the trial court for a new sentencing hearing.

I. Analysis

A. Issues Presented

This appeal comes to us based on the narrow scope of the dissent below. *See* N.C.G.S. § 7A-30(2) (2023) (repealed 2023). Accordingly, the issues before us are limited to those that are "specifically set out in the dissenting opinion as the basis for that dissent" and argued by the parties on appeal. *Cryan v. Nat'l Council of YMCAs*, 384 N.C. 569, 574 (2023). The first issue is whether the Court of Appeals applied the appropriate standard of review to the underlying *Miller* sentencing order. *See State v. Borlase*, 292 N.C. App. 54, 73–74 (2024) (Arrowood, J., dissenting). The second issue is whether the Court of Appeals correctly concluded that the trial court properly applied N.C.G.S. §§ 15A-1340.19B and -1340.19C and the Eighth Amendment to the evidence presented during the sentencing hearing. *See id.* at 73–80.

We agree with the Court of Appeals dissent that the majority below erred on both fronts. First, it applied the wrong standard of review, a

mistake which the Court compounds by affording sentencing courts carte blanche authority reviewed only for abuse of discretion. Second, it wrongfully upheld the trial court's sentencing order. The sentencing order failed to credit manifestly credible, uncontradicted evidence probative of the familial pressure statutory factor. Further, the trial court's definition of familial pressure represents an outdated and crabbed view of the factor.

We stress the questions presented because the majority entirely ignores our jurisdictional precedent and overreaches to issues and arguments not before us. Specifically, the dissenting judge below did not invoke any heightened protections for criminal defendants under Article I, Section 27 of our state Constitution as any basis for his dissent. The opposite is true. The dissenting judge expressly indicated that he interpreted the Eighth Amendment analysis as the same as the state constitutional analysis for the purposes of his narrow constitutional point—that a trial court's refusal to consider manifestly credible evidence at sentencing is constitutional error in addition to statutory error. *See id.* at 64, 64 n.1. Thus, the majority's invocation of its dicta in *State v. Tirado*, No. 267PA21 (N.C. Jan. 31, 2025), is, yet again, beside the point and properly disregarded as dicta. *See* majority *supra*, Part II; *accord Tirado*, slip op. at 50 (Earls, J., concurring in the result only) (noting that the majority's "gratuitous and sweeping commentary on Section 27 and its overlap with the Eighth Amendment . . . is pure dicta").[1]

B. Standard of Review of *Miller* Sentencing Orders

The dissent below concluded and Tristan argued before us that the Court of Appeals applied the wrong standard of review to the sentencing court's order based on our precedent and that of the United States Supreme Court. We agree.

In *Miller v. Alabama*, 567 U.S. 460 (2012), the United States Supreme Court announced a substantive rule of the Eighth Amendment: "sentencing juveniles [to life without parole] will be uncommon" because such a sentence requires a determination that a young person—who is characteristically immature, impulsive, and reckless due to their stage

1. This Court's binding precedent in *State v. Kelliher*, 381 N.C. 558 (2022), is likewise not implicated because the sentencing court here expressly determined that it believed Tristan Borlase was one of those rare juveniles who is irredeemable. *See id.* at 560 ("[I]t violates both the Eighth Amendment to the United States Constitution and article I, section 27 of the North Carolina Constitution to sentence a juvenile homicide offender who has been determined to be 'neither incorrigible nor irredeemable' to life without parole.").

of life—is "the rare juvenile offender whose crime reflects irreparable corruption." *Id.* at 479–80 (quoting *Roper v. Simmons*, 543 U.S. 551, 573 (2005)). A sentencing court given the opportunity to consider characteristics of a juvenile defendant and his background, upbringing, and mental and emotional development, as well as the "circumstances of the homicide offense," *id.* at 477, will necessarily have to consider "how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison," *id.* at 480.

Montgomery v. Louisiana, 577 U.S. 190 (2016), confirmed this substantive holding. *Id.* at 201. The Court clarified that "[e]ven if a court considers a child's age before sentencing him or her to a lifetime in prison, that sentence still violates the Eighth Amendment for a child whose crime reflects 'unfortunate yet transient immaturity.' " *Id.* at 208 (quoting *Miller*, 567 U.S. at 479). Plainly, affording a sentencer discretion to consider age is not enough for the Eighth Amendment. Imposing a discretionary sentence that is disproportionate in light of the concerns identified in *Miller* is unconstitutional. *Id. Montgomery* clarified that *Miller* "did bar life without parole . . . for all but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility." *Id.* at 209.

In *Jones v. Mississippi*, 141 S. Ct. 1307 (2021), the Court reaffirmed that *Miller* and *Montgomery* remain good law. *Id.* at 1321. It addressed a narrower procedural question: whether to recognize "an *additional* constitutional requirement" that a sentencer must make a specific finding of permanent incorrigibility before awarding a juvenile a sentence of life without parole. *Id.* at 1322 (emphasis added). It declined to do so, noting the variation in practices among the fifty states as to the procedures for reviewing a sentencing court's determinations. *Id.* Thus, under *Jones v. Mississippi*, the operative standard for the specifically required findings and process of review to implement *Miller*'s mandate is state-specific.

We turn, then, to what North Carolina law compels about specific findings in a *Miller* sentencing order and how they should be reviewed. In an almost-immediate response to *Miller*, our General Assembly enacted N.C.G.S. § 15A-1340.19A providing that "a defendant who is convicted of first degree murder, and who was under the age of 18 at the time of the offense, shall be sentenced in accordance with this Part." N.C.G.S. § 15A-1340.19A (2023). This statutory scheme provides for a "penalty determination" hearing with set procedures. N.C.G.S. § 15A-1340.19B (2023). Counsel for the defense may submit evidence of "mitigating circumstances" for the court's consideration and is entitled to receive the last argument. N.C.G.S. § 15A-1340.19B(c), (d). We observed in *State v. James*, 371 N.C. 77 (2018), that these statutes are designed to bring

state sentencing laws into compliance with *Miller*, and specifically its requirement that a juvenile sentence of life without parole "should be reserved for 'the rare juvenile offender whose crime reflects irreparable corruption.' " *Id.* at 92 (quoting *Miller*, 567 U.S. at 479–80). But parts of the statute even go beyond Eighth Amendment jurisprudence to meet this substantive goal. For example, the statutes forbid the imposition of life without parole for a defendant convicted on a felony murder homicide theory, which is an additional protection on top of the Supreme Court's current constitutional rule limiting juvenile sentences of life without parole to homicide offenses only. *See* N.C.G.S. § 15A-1340.19B(a); *Graham v. Florida*, 560 U.S. 48, 80 (2010) (forbidding juvenile sentences of life without parole for nonhomicide offenses).

To understand what standard of review applies to this statutory sentencing procedure, our precedent on the Fair Sentencing Act controls. In *State v. Spears*, 314 N.C. 319 (1985), we clarified that the standard of appellate review of a sentencing order depends on whether the challenged factors are statutory, meaning they are expressly identified in the statute, or non-statutory, meaning they are not so identified. *Id.* at 322–23. Statutory factors impose a heavier burden on the sentencer. Evidence of such factors *must* be considered, even if they are not disputed by the parties. *Id.* at 322. Thus, a court's consideration of statutory factors is reviewed more rigorously: "[F]ailure to find a *statutory* mitigating factor supported by uncontradicted, substantial and manifestly credible evidence is reversible error." *Id.* at 322. This more rigorous review standard was necessary to give proper effect to the Fair Sentencing Act. That Act sought to make criminal punishment commensurate with the nature of the offense and the offender's culpability. *State v. Jones*, 309 N.C. 214, 219 (1983). After all, if evidence of a given mitigating factor is "uncontradicted, substantial, and there is no reason to doubt its credibility, to permit the sentencing judge simply to ignore it would eviscerate" that Act and violate the legislature's intent. *Id.* at 218–19.

Here, the *Miller* sentencing statute plainly requires courts to consider statutory factors with the substantive goal of making juvenile life without parole sentences "uncommon" and "reserved for 'the rare juvenile offender whose crime reflects irreparable corruption.' " *James*, 371 N.C. at 92 (quoting *Miller*, 567 U.S. at 479–80). The statute specifically names eight such factors: the juvenile defendant's age at the time of the offense, their immaturity, their ability to appreciate the risks and consequences of their conduct, their intellectual capacity, their prior record, their mental health, any familial or peer pressure exerted upon them, and any likelihood that they would benefit from rehabilitation while

incarcerated. N.C.G.S. § 15A-1340.19B(c)(1)–(8). These factors track *Miller*'s description of mitigating evidence in sentencing a juvenile to life without parole. *See Miller*, 567 U.S. at 477–78. And they are statutory factors that trigger more rigorous appellate review. *See Spears*, 314 N.C. at 322. Underscoring that point, the statutes further instruct that the court *must* consider any evidence of such factors and *must* make findings on their presence or absence in light of the "particular circumstances of the defendant." N.C.G.S. § 15A-1340.19C(a) (2023).

The sentencer's mandatory obligation to consider probative mitigating evidence is why we concluded in *James* that the statutory scheme facially complies with the Eighth Amendment. *See* 371 N.C. at 90 ("[A] number of factors, including, but not limited to, the statutorily enumerated mitigating factors, must be considered in making the required sentencing determination . . . ."). *James* made clear that to sentence a juvenile to life imprisonment without the possibility of parole, the court must make findings on the enumerated statutory factors. *Id.* at 89–90. Such findings, we noted, will guide a sentencing court to assess evidence that might mitigate a juvenile's punishment in light of *Miller*'s "substantive standard": that a juvenile is irredeemable in light of all the facts and circumstances. *Id.* at 90. Just like we said in *Jones* about the Fair Sentencing Act, affording abuse of discretion review only to the sentencing court's consideration of those mandatory statutory factors would eviscerate the purpose of the *Miller* constitutional sentencing standard and the legislature's intent in enacting a statutory scheme in compliance with that standard.

Thus, under the statutes designed to implement *Miller*'s mandate as well as our precedent, review for a *Miller* sentencing order has two steps. First, a reviewing court looks to whether the sentencing court properly considered the evidence applicable to each statutory factor based on an accurate understanding of the legal standard. At this step, reversible error occurs where a sentencing judge "fails to find a statutory factor when evidence of its existence is both uncontradicted and manifestly credible." *Jones*, 309 N.C. at 220; *accord Spears*, 314 N.C. 319. Provided that the mitigating factors were accurately tallied, a reviewing court moves to step two: we assess the sentencing court's ultimate decision as to how to weigh the mitigating factors for abuse of discretion. *E.g.*, *State v. Canty*, 321 N.C. 520, 527 (1988). Accordingly, when a defendant who is sentenced at a *Miller* hearing charges that the sentencing court failed to credit manifestly credible and uncontradicted evidence of one or more of the sentencing factors, a reviewing court must reverse if "the evidence so clearly establishes the fact in issue that

no reasonable inferences to the contrary can be drawn." *Jones*, 309 N.C. at 219–20 (quoting *N.C. Nat'l Bank v. Burnette*, 297 N.C. 524, 536–37 (1979)).

The majority's standard of review is hardly a standard at all. Even though the statutes require specific findings on specific mitigating factors, the majority bundles together the entirety of the sentencing order for abuse of discretion review. *See* majority *supra* Section II.B. Notwithstanding *Miller*'s substantive holding, reaffirmed by *Montgomery* and *Jones*, and interpreted by this Court in *James* and *Kelliher*, the majority concludes blithely that "[a] sentence of life without the possibility of parole for juveniles is allowed," *State v. Sims*, No. 297PA18 (N.C. Mar. 21, 2025), slip op. 35, and will not be reversed "merely because the sentencer could have said more about mitigating circumstances,' " *see* majority *supra* Part II (quoting *Jones v. Mississippi*, 141 S. Ct. at 1321). As to a challenge that the sentencer failed to consider a defendant's mitigating evidence, the majority will not find error absent "express evidence that demonstrates a trial court did not consider mitigating evidence or exercise its discretion." Majority *supra* Section II.C. This exceedingly deferential standard has no support in federal constitutional law or North Carolina precedent. It amounts to no real standard of review whatsoever beyond one which provides that "we reverse only if the trial judge explicitly says he is refusing to follow the law." An appellate court has the responsibility to do more.

To start, *Jones v. Mississippi* does not authorize giving carte blanche authority to a *Miller* sentencing court, reviewed only for an abuse of discretion. Again, that case decided only a narrow procedural issue: whether a specific finding of fact is required as a prerequisite to sentencing a juvenile to life without the possibility of parole. *Jones*, 141 S. Ct. at 1312–13. The Court said no, instead deferring to existing state court practices for reviewing sentencing orders. *Id.* at 1321. It recognized that many states have different requirements regarding the on-the-record explanations by sentencers and that appellate courts take different approaches as to what state law requires of reasons supplied by sentencing judges. *Id.* This sensitivity to federalism did not overrule *Miller*'s substantive constitutional rule—as *Jones* expressly and repeatedly confirmed. *Id.* ("Today's decision does not overrule *Miller* or *Montgomery*.").

The majority invokes *Jones*'s observation that reversal is not warranted "merely because the sentencer could have said more." *Id.* But that observation was itself a recitation of California's sentencing practices and those of other states. *See id.* (first citing Arthur W. Campbell,

Law of Sentencing § 10:5, at 477 (3d ed. 2004) (reviewing in footnote 107 requirements of sentencing judges in Indiana, North Dakota, California, and Iowa); and then citing 22A Cal. Jur. 3d, *Crim. Law: Posttrial Proceedings* § 408, at 234 (2017) (California's legal encyclopedia on its posttrial proceedings)). Needless to say, North Carolina is not California. Our Court is bound by our precedent, not that of other states.[2]

This misleading quotation of *Jones* obscures the majority's real maneuver here: to ignore North Carolina precedent while charting a new approach without explaining why. Simply put, North Carolina precedent does not support blanket abuse of discretion review. In *State v. Sims*, also announced today, the majority tries to justify its new standard of review by presenting it as extending from our precedent on the Fair Sentencing Act. Slip op. at 21 n.3. But there and here, the majority ignores our long-standing distinction between statutory and non-statutory factors for the purposes of appellate review.[3] Instead it abandons this precedent and chooses an even more toothless standard than that argued for by the State in this case. It offers no credible explanation for why statutory factors receive more rigorous review in those cases but not here—particularly when the statutes share goals of making certain factors mitigating as a matter of law and are designed to ensure that punishments are commensurate to the nature of the offense and

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2. The majority of our Court is not alone in ignoring binding North Carolina precedent in favor of practices in other states. Curiously, the Court of Appeals majority below pulled its "abuse of discretion" standard of review from Mississippi law—and likewise wholly ignored binding precedent from our Court. *State v. Borlase*, 292 N.C. App. 54, 59 (2024) ("[The Mississippi sentencing judge] recognized the correct legal standard ('the *Miller* factors'), his decision was not arbitrary, and his findings of fact [were] supported by substantial evidence." (second alteration in original) (quoting *Jones v. State*, 285 So. 3d 626, 632–33 (Miss. Ct. App. 2017), *aff'd sub nom. Jones v. Mississippi*, 141 S. Ct. 1307 (2021))). This is yet further grounds to reverse the judgment of the Court of Appeals.

3. Indeed the very cases the majority cites in its *Sims* footnote do not stand for the principle it now asserts. *E.g.*, *State v. Canty*, 321 N.C. 520, 524 (1988) ("To show that the trial court erred in failing to find a mitigating factor, the evidence must show conclusively that this mitigating factor exists, i.e., no other reasonable inferences can be drawn from the evidence."); *State v. Ahearn*, 307 N.C. 584, 597 (1983) (noting that "the court is required to consider all statutory factors to some degree" even as it may properly emphasize some more than others and observing that the presumption of validity applies "[s]hould the Appellate Court find no error in the trial court's findings" of aggravating or mitigating circumstances (quoting *State v. Davis*, 58 N.C. App. 330, 333–34 (1982))); *State v. Jaynes*, 342 N.C. 249, 285 (1995) ("The General Assembly has determined as a matter of law that statutory mitigating circumstances have mitigating value. Therefore, jurors must give them some weight in mitigation. Nevertheless, the amount of weight any particular statutory mitigating circumstance is to be given is a decision entirely for the jury." (citations omitted)).

the offender's culpability.[4] The majority's reasoning, that an appellate court can trust that the sentencing court considered characteristics of the juvenile because they had discretion to so consider those characteristics, is circular.

The effect of the majority's test is to abandon our precedent without explanation and gut meaningful appellate review of substantive constitutional protections in the process. It leaves defendants with less protection than the legislature intended and the Constitution guarantees.

C. Specific Challenges to the Sentencing Order

On appeal, Tristan asks this Court to hold that the trial court failed to find three mitigating factors in light of supportive evidence that was uncontradicted, substantial, and manifestly credible. We find no legal error in the trial court's analysis of the mitigating circumstances of age and immaturity. However, the trial court erred by failing to credit manifestly credible and uncontradicted evidence for the "familial or peer pressure" statutory factor. *See* N.C.G.S. § 15A-1340.19B(c)(7). In particular, the trial court viewed too narrowly what kinds of events or patterns in childhood might create familial pressure, leading a troubled, but not hopelessly irredeemable, adolescent to act out on violent urges or fantasies.

1. Evidence Presented

Any consideration of familial pressure in a case where a then-juvenile was convicted of intentionally killing both of his parents is inevitably fraught. No one would suggest that anything Jeff or Tanya Borlase did as parents or people would justify their intentional murders. Yet a sentencing court must be clear that a mitigating circumstance is not a justifying one. Even in such a heinous crime, *Miller* requires that a sentencer consider "the family and home environment" that surrounded the

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4. Oddly, too, the majority reaches for precedent from an entirely separate area of law: our civil cases reviewing dispositional orders in juvenile cases. But any presumption of regularity in those cases clearly does not apply here, where sentencing courts are required to make express findings on mitigating statutory factors to enforce a criminal law constitutional mandate. Our juvenile cases even recognize a similar distinction between legal error and a discretionary choice. We review more rigorously whether a trial court's findings of fact have adequate support and whether those factual findings adequately support the trial court's legal conclusions. The trial court's ultimate dispositional choice in light of those conclusions receives a more deferential review. *See In re A.P.W.*, 378 N.C. 405, 410 (2021). Again, the majority's invocations of precedent do not support its assertions. Instead the majority collapses well-worn nuances in appellate review to afford even more discretion to trial courts than is tolerated in other areas of law.

offender. *Miller*, 567 U.S. at 477. Such background circumstances are relevant because the home environment is one "from which [a juvenile] cannot usually extricate himself—no matter how brutal or dysfunctional." *Id.* That lack of agency over a juvenile's home environment and the extreme pressure such an environment can create are hallmarks of juvenility. They are therefore essential to the assessment of whether a defendant is the "rare juvenile offender whose crime reflects irreparable corruption." *Id.* at 479–80 (quoting *Roper*, 543 U.S. at 573).

The record shows that Jeff and Tanya Borlase had four biological children (Taylor, Alexis, Kaia, and Tristan) and four adopted children (Meseret, Melaku, Stephen, and Eli). Tristan was the youngest of the biological children. The family experienced instability in the years leading up to Tristan's crimes. Two of the adopted children exhibited anger issues related to their traumatic backgrounds and occasionally acted out physically. Simmering intrafamily conflicts contributed to a slow breakup of the family unit. In 2016, Jeff and Tanya sent Meseret to therapeutic foster care in Missouri.[5] In 2017, partly because the adopted brothers did not get along, Jeff and Tristan continued living with Melaku in Mooresville while the rest of the family moved to Deep Gap. In spring of 2018, Tristan's teacher reported to the school administration that she understood Tristan's mother could not be around his violent younger brother and that this put stress on Tristan. After the end of the spring school term in 2018 and prior to Tristan's senior year of high school, Jeff and Tristan moved to Deep Gap and Melaku was sent to a boarding school for academic and behavioral issues until he was later emancipated by Meseret. Tanya, Jeff, Stephen, Eli, and Tristan were the only Borlase family members living in Deep Gap during spring of 2019.

The home environment in Deep Gap presented other challenges. Tristan's English teacher reported to the school counselor that the home was unfit to live in due to lack of electricity and upgrades. It was apparently a two-story shed the family was converting into a home. Before the move, Tristan and his father and brother were driving every weekend from Mooresville to Deep Gap to work on the cabin, according to a church group leader. Tristan testified that he once helped his mother tear out the inside of the home before an inspection to prevent inspectors from knowing that the family was living there in the condition it was in and out of fear that the family would lose the Deep Gap property.

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5. Meseret described an incident where her parents caught her video calling with a friend, against household rules, and then they proceeded to drive her to a psychiatric hospital in the middle of the night. She explained that she never went home again and was subsequently placed in foster care.

He testified that occasionally he slept in the goat pen or his car because it was warmer than the house.

Uncontradicted evidence demonstrated that Jeff and Tanya parented their children through unusual and harsh forms of discipline. Tristan described being woken up in the middle of the night by his mother sometimes as many as "four out of five school nights" for disciplinary conversations about Tristan's grades, his relationships with girls, and religion. Evidence from his teachers corroborated that Tristan appeared physically fatigued in class, was frequently late to class, and appeared unmotivated. The adoptive children confirmed experiencing these punitive midnight lectures, which they called being summoned "to the nest." A church group leader shared that in 2017, Tristan was sent to a week-long church retreat with only one shirt and one pair of shorts as a form of punishment. The leader had to purchase extra clothes for him. The church group leader shared her concerns about Tristan and the family with the youth leaders, who then allegedly spoke with the family, after which "Tristan cut off his involvement" with the program. A former girlfriend of Tristan's shared that she could occasionally hear Tristan's mom screaming at him while he was on the phone. The church group leader described that she frequently witnessed Tanya "incessantly" calling Tristan for updates on his whereabouts. Tristan's classmate saw bruises on his torso at least once and when she asked him about it, he said the bruises were from his parents hitting him. Tristan's sister Taylor described an "ongoing struggle for years" between Tristan and their parents.

Tristan's mental health appeared to worsen as he approached high school graduation. In 2017, his church group leader had advocated for placing Tristan in a temporary mental health hold to watch his behavior after observing him, concerned that he posed a risk of harm to himself. Tristan testified that in 2018 he contemplated and attempted suicide. That same year, he was participating in outpatient counseling due to impulse control and poor judgment in school and told his mother that he did not share her religious beliefs, causing further family strife.[6] The forensic psychiatrist who examined him found scars from self-mutilation that would have preceded his 2019 arrest. That medical professional found that Tristan had a strong desire to please others and felt internal

6. We mention these details about the differences in religious views not to imply that familial pressure always results in families with strongly held religious views, but rather to convey that in this family, divergent religious views appeared to be a source of family tension and conflict.

conflict because he could not please Tanya or meet her expectations. Tristan's English teacher testified that the semester had started normally in January 2019, but that Tristan's performance declined as he failed to turn in assignments and he struggled to stay awake in class.

On 10 April 2019, the day Tristan killed Tanya and Jeff, Tristan's English teacher called Tanya to share her concerns that he was failing to turn in assignments, falling asleep in class, and risked failing her course. His parents checked Tristan out early from school. Tristan testified that the family discussed his shortcomings, like his tardiness and likelihood of not graduating from high school. Notes in Tanya's handwriting supported that the two had a disciplinary discussion about Tristan's behavior. Surveillance cameras that Tristan had helped to install showed that later, at 6:32 p.m., Tristan went outside toward the driveway where Jeff was working, before going back inside the home. Tristan testified that Tanya told him he needed to e-mail his teachers about his class performance. He testified that while he was typing an e-mail she dictated, the two started arguing about religion, at which point Tristan said, "F--k you, that's not what Christianity is about." He testified that Tanya put her arm around his neck and applied pressure, and that he reacted by elbowing her, after which she approached him with a pair of scissors, and he grabbed a kitchen knife and stabbed her. Her autopsy showed she had been "asphyxiated by some type of pressure to the neck" before her death.

By 6:35 p.m., the surveillance camera showed that Tristan ran toward his father in the driveway with a knife and stabbed him. Jeff then ran away from Tristan, but Tristan caught up and started attacking his father with the knife. Jeff Borlase died from multiple stab wounds to his torso. Tristan testified that he then returned to the house and vomited in the toilet before proceeding to hose down the front porch, move his mother's body to the back of a truck, and drive the truck closer to the barn. At some point he covered his father's body with a hammock and leaves.

Tristan testified that he then showered, packed his clothes, and left to pick his younger brother up from their grandmother's house. He and his brother then returned home, where when his brother asked about the blood around the house, Tristan lied about cutting himself while doing dishes. Tristan then left to go smoke with his friends before trying to pick up his other brother from work. He testified that he then drove back to the house, but upon seeing cars in the driveway, left and went to a friend's house to stay the night after telling her he had gotten into an argument with his parents. The next morning the two headed to the friend's father's house in Tenneessee but were apprehended as soon as

they crossed the state border. Tristan confessed to the police and later claimed self-defense during trial. The jury ultimately found him guilty of two counts of first-degree murder.

2. Consideration of Familial Pressure in the Sentencing Order

At sentencing, the same judge who presided over the trial heard evidence under N.C.G.S. §§ 15A-1340.19A and -1340.19B for *Miller* sentencing. The court heard statements from the surviving Borlase family members, including Taylor and Alexis, who described the excruciating pain of losing their parents and the trauma of having it be at the hand of their sibling. The court also heard testimony from Tristan, who expressed remorse for the pain he had caused and accepted that life without the possibility of parole may be the appropriate sentence. Defense counsel presented documentary evidence during the sentencing hearing of Tristan (1) being summoned "to the nest" for punitive midnight lectures, (2) needing to sleep in his car or a goat pen for warmth, (3) coping with intense conflict in the family, including occasional violence, and (4) being punished in a manner that included having no change of clothes on a week-long trip. The trial court was presented with expert testimony that concluded that Tristan's criminal conduct "was influenced by [his] conflicted relationship with his mother" and was "a culmination of years of conflict" and that towards the end Tristan felt he could "not do anything right"; he "quit trying to please and was just trying to make it through each day."

Importantly, the State did not contradict any of this evidence of family conflict or pressure. The State declined a further opportunity to present evidence after Tristan's counsel finished and did not deny the veracity of the letters and e-mails from Tristan's teachers and church group leader.

After being presented with all this evidence, the trial court's sentencing order addressed the familial pressure factor. It concluded that Jeff and Tanya were "very loving, caring[,] and nurturing parents" who deeply loved their children and who sacrificed to provide for them. The trial court observed that "[w]hile the Defendant may have genuinely disagreed with the form of discipline (taking of privileges and interactive discussions), even he seemingly admits in his testimony that both his parents had his best interests . . . at heart." It contrasted Tristan's circumstances with the specific situations in *Miller*: that the individual had a troubled childhood, had lacked parental care or involvement, and had been exposed to drugs and violence. In light of the evidence presented and because Tristan's background differed substantially from the

Miller facts, it ultimately concluded that "[t]here is no credible evidence before the Court to support any finding of mitigation as to this factor." The court's findings of fact made no mention of the significant family conflict or that the discipline used by at least one of Tristan's parents was objectively harsh and extreme, not simply subjectively disagreeable to the average teenager.

In so concluding, the trial court apparently misapprehended the applicable legal standard. Simply put, neglect or criminal involvement are not the only kinds of familial pressure relevant to juvenile sentencing. Family dysfunction is not limited to lack of parental care or resources. Evidence of extremely harsh discipline, ongoing intrafamilial conflict and instability, and nonphysical abuse is also probative. Those things too are aspects of "the family and home environment that surround[ ]" a juvenile and leave him "susceptible to influence and to psychological damage." *Miller*, 567 U.S. at 476–77 (cleaned up). As *Miller* made clear, there is a constitutionally salient difference between "the child from a stable household and the child from a chaotic and abusive one." *Id.* at 477. A person's lack of agency over their home environment and the extreme pressure such an environment can create is a hallmark of an offender's juvenile status and is essential to the assessment of whether this is the "rare juvenile offender whose crime reflects irreparable corruption." *Id.* at 479–80 (quoting *Roper*, 543 U.S. at 573). Being unable to excise oneself from familial dysfunction that manifests through nonphysical abuse is plainly within *Miller*'s purview and this statutory sentencing factor, contrary to the trial court's apparent understanding of the legal factor.

Perhaps because of its misunderstanding as to the legal standard, the trial court apparently failed to credit manifestly credible, uncontradicted evidence of familial pressure, a statutory factor. *See* N.C.G.S. § 15A-1340.19B(c)(7). The finding that Jeff and Tanya were loving parents does not negate or contradict the evidence of pressure and conflict in the Borlase's Deep Gap home. As the dissent at the Court of Appeals put it, "love and conflict are not mutually exclusive; rather, both can exist in a family simultaneously." *Borlase*, 292 N.C. App. at 76 (Arrowood, J., dissenting). The trial court thus erred by failing to credit a statutory mitigating factor supported by manifestly credible and uncontradicted evidence. *See Jones*, 309 N.C. at 219–20.

D. *Miller* and Juvenile Development

The sentencing court's misapprehension of the scope of familial pressure represents a broader misunderstanding of *Miller*'s direction regarding the application of the "mitigating circumstances of youth"

during sentencing. *Miller*, 567 U.S. at 476. In *Miller*, *Roper*, and *Graham*, the Supreme Court of the United States leveraged established knowledge from the fields of psychology, psychiatry, neurology, and behavioral science to ground its legal conclusions about the appropriateness of certain sentences for juveniles. *Miller*, 567 U.S. at 471–72; *Roper*, 543 U.S. at 569; *Graham*, 560 U.S. at 68. But a careful reading of these decisions shows the Court did not intend to create an immutable picture of how our understanding of child development should influence sentencing. The proper application of *Miller*'s mandate requires embracing the growing body of well-established studies that inform our understanding of youth criminal culpability and the potential for rehabilitation. Simply put, the Court illuminated a path for state courts to inform sentencing decisions with established science that reflects "the progress of a maturing society." *Graham*, 560 U.S. at 58 (quoting *Estelle v. Gamble*, 429 U.S. 97, 102 (1976)).

In this case, inconsistent with the teachings of *Miller*, the sentencing court viewed too narrowly the kinds of events or patterns in childhood that create familial pressure. The sentencing court defined this factor as "growing up exposed to a troubled childhood, lack of parental care and involvement, [or] exposure to drugs and even violence." Using that narrow definition, the sentencing court concluded that "[n]one of the factors are present in this case." In effect, the sentencing court's definition cabined the examination of the familial pressure factor to the facts in *Miller*.

But that represents, we think, a crabbed view of what *Miller* commands us to do: use our growing understanding of childhood development to examine, based on science, what pressures have a traumatic effect on child development and whether a juvenile has the potential for rehabilitation. *See* 567 U.S. at 471–72; *Roper*, 543 U.S. at 569; *Graham*, 560 U.S. at 68. The sentencing court's limited view of familial or peer pressure is disconnected from the scientific community's widespread and modern understanding of familial and peer pressure. The range of psychological pressure that can have a negative impact on adolescent development is broader and includes psychological maltreatment as an element of familial pressure.

Psychological maltreatment can include a pattern of behavior denigrating, belittling, or humiliating the child or a level of domination, disparagement, and control exercised by the parent over the child. *See* Amy M. Smith Slep, et al., *Psychological Maltreatment: An Operationalized Definition and Path Towards Application*, Child Abuse & Neglect, 2 (2022) (defining psychological maltreatment as caregiver behaviors

"which cause or have a strong potential to cause serious harm to a child's emotional, cognitive, social, interpersonal, or physical wellbeing or development"); Märta Wallinius, et al., *Offenders in Emerging Adulthood: Sch. Maladjustment, Childhood Adversities, and Prediction of Aggressive Antisocial Behaviors*, 40 L. & Hum. Behav. 551, 552 (2016) (collecting studies that show the effect of childhood and adolescent maltreatment and the link to an increased risk of aggressive antisocial behaviors).

Psychological maltreatment can also include "thwarting of the child's basic emotional needs" including the need "for psychological safety and security in the environment, for acceptance and positive regard, and for age-appropriate autonomy." *See* Hilary B. Hodgdon, et al., *Maltreatment Type, Exposure Characteristics, and Mental Health Outcomes Among Clinic Referred Trauma-Exposed Youth*, Child Abuse & Neglect, 12 (2018) (finding "that [psychological maltreatment] is likely to occur within an early caretaking environment characterized by chaotic, unpredictable, and/or non-responsive caregiving behaviors"); Joshua A. Weller & Phillip A. Fisher, *Decision-Making Deficits Among Maltreated Children*, Child Maltreat., 3–4 (2013) (finding that "maltreated children showed increased risk-taking to avoid losses").

In this case, the sentencing court ignored the evidence demonstrating that Tristan's home life was chaotic and a place where he did not have a sense of psychological safety. While, as the trial court found, Tristan had two parents who loved him, his home life was chaotic and full of conflict. The family was separated due to familial conflict between the adoptive and biological children, including physical violence. Tristan resided primarily in Mooresville with his father, while his mother lived in a converted utility shed in Deep Gap; the family lived apart because some of the children could not live together in the same home without physical conflict. Additionally, one of the adopted children was suddenly removed from the home and placed in therapeutic foster care.

The forensic psychologist testified to a high-conflict relationship between Tristan and his mother. When Tristan stayed in Deep Gap, his mother would keep him awake for long hours on multiple occasions each week to lecture him. These disciplinary practices led to Tristan experiencing feelings of not being able to "do anything right," self-loathing, inadequacy, and self-despair. In Tristan's home, love and conflict were not mutually exclusive. And it was a home environment from which Tristan could not extricate himself. *See Miller*, 567 U.S. at 477 (requiring sentencing courts to consider the family and home environment surrounding defendants).

According to the forensic psychologist, Tristan reported "a history of psychological abuse that, at times, escalated to physical punishment," and the pattern was cumulative over the years. At the time of the crimes, Tristan was in an "aroused and agitated state," severely impacting his ability to think and consider alternative courses of action. The forensic psychologist noted that "[t]here is ample scientific evidence that adolescent brain development impacts judgment, impulsivity, and emotional arousal." In the psychologist's view, Tristan "was suffering from substantial psychological conditions and environmental and situational stressors."

As the forensic psychologist's testimony confirmed, scientific research suggests some association between nonphysical harm and later violent acts. Psychological maltreatment "leads to a range of adverse mental health and functional outcomes." Hodgdon, at 12. Childhood development studies have identified an association between multiple instances of psychological harm, including parental aggression, and the child's ideations of killing, attacking, or humiliating another person; the association peaks at age seventeen in males and disappears in young adulthood. Manuel Eisner, et al., *The Association of Polyvictimization with Violent Ideation in Late Adolescence and Early Adulthood: A Longitudinal Study*, 47 Aggressive Behavior, 472, 478 (2021); *see also* Margaret O'Dougherty Wright, et al., *Childhood Emotional Maltreatment and Later Psychological Distress Among College Students: The Mediating Role of Maladaptive Schemas*, Child Abuse & Neglect 59, 65 (2009) (reporting on the harmful effect of childhood emotional maltreatment among college students and emphasizing the importance of studying co-occurring forms of childhood abuse, neglect and other adverse family experiences).

In addition to missing the forest for the trees on the circumstances which create familial pressure, the sentencing court misunderstood the overarching command of *Miller*. When analyzing the mitigating circumstance of youth, we must look to a science-informed understanding of how childhood development impacts moral culpability in the still-developing brain. *See Miller*, 567 U.S. at 471–72; *Roper*, 543 U.S. at 569; *Graham*, 560 U.S. at 68.

II. Conclusion

A chaotic home life or psychological maltreatment is not, nor will it ever be, an excuse for the heinous murders Tristan committed. Tristan should be held accountable for his crimes. However, the command from and the spirit of *Miller* require us, and sentencing court, to consider the "mitigating qualities of youth" and the "transient" nature

of the "immaturity, irresponsibility, impetuousness, and recklessness" that define this period. *Miller*, 567 U.S. at 476. That consideration is not based upon an immutable understanding of child development from when *Miller* was decided; rather from an evidence-based and growing understanding of the effect of psychological harm on a developing brain and the resulting impact on criminal culpability. Moreover, it was error not to credit manifestly credible, uncontradicted evidence of a factor that has mitigating value under *Miller*. We respectfully dissent and would remand this matter for a second sentencing hearing to consider the full scope of mitigating circumstances.

STATE OF NORTH CAROLINA
v.
KAYLORE FENNER

No. 289PA23

Filed 21 March 2025

Constitutional Law—waiver of right to counsel—statutory colloquy—range of permissible punishments—tantamount to a life sentence

Where defendant sought to waive his right to counsel and represent himself on numerous felony charges—arising from his assault, kidnapping, and rape of his mother—and the trial court, in undertaking the colloquy required by N.C.G.S. § 15A-1242, erroneously informed defendant (then 29 years old) that he could face a term of imprisonment of 75 to 175 years (the actual sentence imposed upon defendant's convictions totaled 121 to 178 years), the Supreme Court affirmed the Court of Appeals' determination that defendant was not entitled to a new trial because, despite the trial court's numerically inaccurate statement of the range of sentences defendant could receive, defendant was made aware that he faced what was tantamount to a life sentence; accordingly, no statutory error occurred. The Court of Appeals' decision was modified to clarify that the trial court was responsible for engaging defendant in a thorough colloquy as required by statute as to all charges—not just the most serious—and could not delegate that duty to the prosecutor.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous, unpublished decision of the Court of Appeals, No. COA23-6 (N.C.

Ct. App. Sept. 19, 2023), finding no error after appeal from judgments entered on 11 March 2022 by Judge Paul C. Ridgeway in Superior Court, Wake County. Heard in the Supreme Court on 30 October 2024.

Jeff Jackson, *Attorney General*, *by Sherri Horner Lawrence*, *Special Deputy Attorney General*, *for the State-appellee.*

Glenn Gerding, *Appellate Defender*, *by Wyatt Orsbon*, *for defendant-appellant.*

DIETZ, Justice.

Shortly before trial on numerous felony charges, defendant Kaylore Fenner told the trial court that he wanted to waive his right to counsel and represent himself. When a criminal defendant asks to do so, a state statute requires the trial court to discuss the right to counsel and the consequences of waiving it. N.C.G.S. § 15A-1242 (2023). Among the conditions listed in § 15A-1242 is a requirement that the trial court ensure the defendant comprehends the "range of permissible punishments" that could be imposed for the charged offenses. *Id.*

When the trial court engaged in this statutory colloquy with Fenner, the court informed him that he faced 75 to 175 years in prison. That was a miscalculation. After the jury found Fenner guilty, he was sentenced to 121 to 178 years in prison. A theoretical defendant with an even worse criminal history could have received five consecutive life sentences plus several more years in prison if convicted on those same charges.

Fenner appealed and sought a new trial, arguing that the trial court erred by miscalculating the range of possible punishments he faced. The Court of Appeals affirmed Fenner's criminal judgments, holding that Fenner "was aware he was facing a life sentence." *State v. Fenner*, No. COA23-6, slip op. at 12 (N.C. Ct. App. Sept. 19, 2023) (unpublished).

We agree with this portion of the Court of Appeals' reasoning. As a practical matter, the upper limit to the range of any criminal defendant's period of incarceration is the remainder of the defendant's natural life. If the trial court miscalculates the range of permissible incarceration during the statutory colloquy but both the miscalculation and the actual range are tantamount to the remainder of the defendant's life, the trial court complies with the statute. That is what occurred here because the court informed Fenner, who was nearly thirty years old at the time of the offenses, that he faced 75 to 175 years in prison, which is tantamount

to the remainder of his life. Accordingly, as modified below, we affirm the decision of the Court of Appeals.

Facts and Procedural History

In 2021, defendant Kaylore Fenner kidnapped, assaulted, and raped his own mother. The State charged Fenner with many serious criminal offenses including forcible rape, kidnapping, robbery, and breaking or entering to terrorize and injure. Many of the charged offenses were Class B1 felonies, which carry some of the highest punishments under our structured sentencing statutes. *See* N.C.G.S. § 15A-1340.17 (2023).

At a pre-trial hearing, Fenner asked to represent himself for the remainder of the case. Before addressing Fenner directly, the trial court asked the State for its view of the "exposure that the defendant has if convicted." The State explained that Fenner was charged with multiple B1 felonies and "all told, total[,] he is facing a life sentence." The trial court then calculated the maximum possible sentence for the Class B1 felony charges and informed Fenner that he faced the possibility of 300 to 420 months in prison for each charge:

> THE COURT: Okay. I'm going to deal with the B1s, I do believe that's pertinent. So, therefore, his exposure if he were convicted by a jury of his peers on the high end of the aggravated range would be 300 months minimum, I believe, to 420 months maximum and that's for each charge of the B1 felonies.

The trial court then put Fenner under oath and engaged in the statutory colloquy required by N.C.G.S. § 15A-1242, including exchanges with Fenner concerning his capacity to represent himself, whether he was under the influence of any substances, whether he had any mental or physical impairments, whether he understood that he was entitled to a court-appointed attorney, whether he understood that he would have to follow the same rules of evidence and procedure as a licensed attorney, and whether he understood the range of permissible punishments he faced for the charged offenses.

When addressing the range of permissible punishments, the trial court again explained that Fenner faced 300 to 420 months in prison for each Class B1 felony charge and that, in total, Fenner faced a possible punishment of 75 to 175 years in prison:

> THE COURT: And do you understand that if you were convicted — and I believe it's appropriate to focus on the B1 felonies. If you were convicted of the B1

> felonies and if the State gives notice of aggravating factors and if a jury — I'm not saying they're going to, but if a jury of your peers were to convict you of the substantive offenses and also agree that there are aggravating factors, that a court could impose a sentence of 300 months minimum to 420 months maximum on each of the B1 felonies.
>
> THE DEFENDANT: Yes.
>
> . . . .
>
> [THE COURT:] Apparently — so there are five, and the court did read the charges. So there are five B1 felonies. At a minimum, that's 900 months at a minimum. So, therefore, that is 75 years that you could receive at a minimum if convicted of the B1 felonies if it's an aggravated offense and if a court were to run those consecutively. Do you understand that?
>
> THE DEFENDANT: Right. Yep. Yes.
>
> THE COURT: And I'm going to honor what the Supreme Court has said. I've given you the minimum. I'm going to also give you the maximum. And the maximum is 175 years.
>
> So now, with all of these things in mind, do you now wish to ask me any questions about what I've just said to you?
>
> THE DEFENDANT: No.

Later in the colloquy, the trial court again informed Fenner that he faced the possibility of 75 to 175 years in prison for the charged offenses:

> [THE COURT:] [A]re you sure you want me to release [court-appointed counsel] given your exposure of 75 years at a minimum to 175 years maximum? Which a court of competent jurisdiction can give you all of that. So is that what you want to do? Do you want to keep your lawyer?
>
> THE DEFENDANT: No, I'll be waiving my right to — to full representation almost exclusively for the reasons that you just named, aside from the exposure. Yeah, I'm competent—or I'm sure of my decision.

After completing this colloquy, the trial court permitted Fenner to represent himself and Fenner reviewed and signed a written waiver of counsel.

Several months later, the case went to trial and Fenner represented himself. The jury found Fenner guilty of all charges. After properly calculating the applicable sentencing ranges for all the convictions, the trial court sentenced him to a total of 121 to 178 years in prison.

Fenner appealed, arguing that the trial court failed to ensure that he understood the "range of permissible punishments" as required by N.C.G.S. § 15A-1242. Fenner contended that the trial court only advised him "of the range of punishments for the five B1 felonies and not for all nine charges for which he was indicted" and that, as a result, the court mistakenly told him he faced 75 to 175 years in prison when in fact the court sentenced him to 121 to 178 years in prison and a theoretical defendant with the highest possible sentencing range for the charged offenses could have received multiple life sentences. *State v. Fenner*, No. COA23-6, slip op. at 6 (N.C. Ct. App. Sept. 19, 2023) (unpublished).

The Court of Appeals unanimously found no error. *Id.* Relying on earlier Court of Appeals precedent, the court held that the trial court's colloquy with Fenner complied with N.C.G.S. § 15A-1242 because Fenner "was aware he was facing a life sentence." *Id.* at 10, 12.

Fenner petitioned for discretionary review, arguing that the line of Court of Appeals precedent on which the court relied conflicted with this Court's precedent interpreting N.C.G.S. § 15A-1242. Specifically, the issue presented in the petition was whether the Court of Appeals "erred in concluding the trial judge didn't commit prejudicial error by failing to conduct the 'thorough inquiry' mandated by N.C.G.S. § 15A-1242 before allowing Mr. Fenner to waive his right to assistance of counsel and represent himself at trial."

We allowed discretionary review of that issue.

Analysis

Criminal defendants have a constitutional right to represent themselves. *See Faretta v. California*, 422 U.S. 806, 832–34 (1975); *State v. LeGrande*, 346 N.C. 718, 725 (1997). This constitutional right means that a criminal defendant must be allowed "to handle his own case without interference by, or the assistance of, counsel forced upon him against his wishes." *State v. Mems*, 281 N.C. 658, 670–71 (1972).

Of course, invoking this right to self-representation necessarily involves waiving another constitutional right—the right to counsel.

Faretta, 422 U.S. at 835. Thus, before permitting a defendant to proceed without counsel, the trial court must ensure that the defendant is "aware of the dangers and disadvantages of self-representation, so that the record will establish that he knows what he is doing and his choice is made with eyes open." *Id.* (cleaned up).

To safeguard this constitutional right, the General Assembly enacted a statute titled "Defendant's election to represent himself at trial." N.C.G.S. § 15A-1242. The statute permits a defendant to "proceed in the trial of his case without the assistance of counsel" only after the trial judge has engaged in a "thorough inquiry" with the defendant and is satisfied that the defendant understands an enumerated list of rights and consequences of the decision. *Id.* Among these statutory criteria is the requirement that the defendant comprehends "the range of permissible punishments" that could be imposed at sentencing. *Id.*

This Court has never squarely addressed how a mistake or miscalculation in the range of possible punishments impacts the trial court's compliance with N.C.G.S. § 15A-1242. But there is a long line of Court of Appeals precedent addressing this question, beginning with *State v. Gentry*, 227 N.C. App. 583 (2013).

In *Gentry*, the trial court miscalculated the defendant's maximum possible sentence by 14 years during the statutory colloquy. *Id.* at 600. The Court of Appeals acknowledged the mistake but nevertheless found no violation of N.C.G.S. § 15A-1242 because both the miscalculated sentence and the actual sentence were "tantamount to a life sentence." *Id.* The court observed that the "practical effect of either sentence" was "identical in any realistic sense." *Id.*

We agree with this portion of *Gentry*'s statutory analysis. As a practical matter, there is an upper limit to the range of any criminal defendant's period of incarceration. That upper limit is the life of the defendant. Because any remaining period of incarceration becomes meaningless after a defendant dies, the "range of permissible punishments" described in N.C.G.S. § 15A-1242 contains a ceiling equivalent to the defendant's natural life. If the trial court miscalculates the range of permissible punishments during the statutory colloquy but both the miscalculation and the actual range are tantamount to the remainder of the defendant's life, the trial court complies with the statute.

That is what occurred here. The trial court repeatedly informed Fenner that he faced a possible sentence of 75 to 175 years in prison. The actual sentence Fenner received was 121 to 178 years. The theoretical maximum sentence Fenner could have received (assuming a

maximum prior record level and aggravating factors) was five consecutive sentences of life in prison plus an additional 53 to 71 years in prison. N.C.G.S. § 15A-1340.17. Because Fenner was nearly thirty years old at the time, all of these sentencing ranges were tantamount to the remainder of Fenner's life.

Thus, although the range of punishments that the trial court discussed with Fenner was numerically inaccurate, the court complied with N.C.G.S. § 15A-1242. The court informed Fenner that, if convicted, he could spend the rest of his life in prison. That accurately conveyed the sentencing range that Fenner faced in this case and therefore confirmed that Fenner comprehended the range of permissible punishments. We therefore affirm the decision of the Court of Appeals, which found no error in the trial court's statutory colloquy under N.C.G.S. § 15A-1242.[1]

Fenner also makes several additional arguments to this Court that we briefly address. First, Fenner argues that the Court of Appeals decision wrongly held that N.C.G.S. § 15A-1242 does not require a "thorough inquiry" with the defendant concerning the range of permissible punishments so long as the defendant was " 'aware' of the information at the time he waived counsel."

That is not our reading of the Court of Appeals decision. In its decision, the court first engaged in an analysis of the trial court's own colloquy with Fenner and determined that it complied with the statute. *Fenner*, slip op. at 10–11. The court then separately discussed an earlier exchange between the court and the prosecutor concerning Fenner's possible sentence. *Id.* at 11–12. In that exchange, the prosecutor stated, in Fenner's presence, that "all told, total[,] he is facing a life sentence."

The Court of Appeals held that this exchange was "an acceptable part of the inquiry required by N.C. Gen. Stat. § 15A-1242." *Id.* at 12. To be clear, the "thorough inquiry" described in the statute must be between the trial court and the defendant. But it is entirely appropriate for the trial court, in the course of the inquiry required under N.C.G.S. § 15A-1242, to ask the State what it believes is the properly calculated range of

1. Another portion of *Gentry* suggests that a miscalculation in describing the range of permissible punishments under N.C.G.S. § 15A-1242, even if that miscalculation rose to the level of error under the statute, would not be a reversible error unless "there was a reasonable likelihood that the defendant might have made a different decision with respect to the issue of self-representation had he or she been more accurately informed." 227 N.C. App. at 600. Because we hold that there was no error in this case, we do not address whether this discussion in *Gentry* created a prejudice test for calculation errors in the range of punishments or whether that prejudice test is permissible under this Court's precedent.

permissible punishments for the charged offenses. Indeed, given the complexity of our State's structured sentencing scheme, asking the State for its own calculation of the range of punishments is prudent. We emphasize that the trial court ultimately is responsible for engaging in the "thorough inquiry" required by the statute and cannot delegate that duty to the prosecutor. To the extent the Court of Appeals held otherwise, we modify the court's decision.

Next, Fenner argues that the Court of Appeals erred by holding that the trial court was not required to inform him of "all the charges he faced" and instead could address only those charges "the judge deemed pertinent." Again, this is not our reading of the Court of Appeals decision. Fenner's argument stems from the trial court's decision during the statutory colloquy to "focus on the B1 felonies," which were the most serious charges, without also considering the impact of the remaining charges.

As explained above, the trial court's colloquy in this case complied with the statute because, even without addressing the remaining charges, the range of possible punishments was tantamount to the remainder of Fenner's life. But we agree with Fenner that trial courts should not focus solely on the charges that the court deems most serious. Given the complexity of the structured sentencing scheme, other lesser charges in some circumstances can impact the maximum range of a sentence. When calculating the permissible range of punishments, the best practice is for trial courts to use the checklist of inquiries we articulated in *State v. Moore*, 362 N.C. 319, 327–28 (2008). This includes informing the defendant of all charges in the case and the minimum and maximum possible sentence the defendant faces if convicted of all those charges. *Id.* We do not interpret the Court of Appeals decision to suggest otherwise but, to the extent it does, we modify the court's decision.

Finally, we address Fenner's constitutional argument, which is not properly before this Court. In his petition for discretionary review, Fenner only sought review of whether the Court of Appeals "erred in concluding the trial judge didn't commit prejudicial error by failing to conduct the 'thorough inquiry' mandated by N.C.G.S. § 15A-1242 before allowing Mr. Fenner to waive his right to assistance of counsel and represent himself at trial."

The petition included only a single, introductory paragraph citing any constitutional doctrine and that paragraph did not assert that the trial court violated Fenner's constitutional rights. The remainder of the 27-page petition focused on Fenner's argument that if the "Court

of Appeals' decision stands, there's not much left of this Court's case law enforcing § 15A-1242."

In his new brief to this Court, Fenner asserted both a statutory argument under N.C.G.S. § 15A-1242 and, separately, a constitutional claim under the Sixth Amendment to the United State Constitution. The latter issue was not addressed in the Court of Appeals decision and not listed as an issue in the petition for discretionary review.

We therefore conclude that the constitutional issue is not properly before this Court. On discretionary review, this Court limits its review solely to the issue or issues presented in the petition. *State v. Alonzo*, 373 N.C. 437, 443–44 (2020); *see also* N.C. R. App. P. 16(a).

A little less than two weeks before oral argument in this case, Fenner filed a petition for a writ of certiorari, asking this Court to examine his constitutional argument. By separate order, we deny the petition for a writ of certiorari. At that late stage of the proceeding, it is not appropriate to add an additional issue that was not addressed by the Court of Appeals decision and not presented as a proposed issue in the initial petition for discretionary review.

Conclusion

For the reasons discussed above, we modify and affirm the decision of the Court of Appeals.

MODIFIED AND AFFIRMED.

STATE v. GREGORY

[387 N.C. 339 (2025)]

STATE OF NORTH CAROLINA
v.
KENDRICK KEYANTI GREGORY

No. 23A24

Filed 21 March 2025

Appeal pursuant to N.C.G.S. § 7A-30(2) (2023) from the decision of a divided panel of the Court of Appeals, 291 N.C. App. 617 (2023), finding no error after appeal from judgments entered on 4 August 2021 by Judge Thomas H. Lock in Superior Court, Wake County. Heard in the Supreme Court on 18 February 2025.

Jeff Jackson, *Attorney General*, *by Zachary K. Dunn*, *Special Deputy Attorney General*, *for the State-appellee.*

Kellie Mannette for defendant-appellant.

PER CURIAM.

AFFIRMED.

Justice RIGGS dissenting.

In the case at bar, the trial court limited, in a significant way, defendant Mr. Kendrick Gregory's cross-examination of the State's expert. Mr. Gregory was on trial for a series of terrible crimes, and the only issue at the trial was whether his significant mental illness could warrant a jury's conclusion that he lacked legal culpability because of that illness. Questioning the credibility of the State's expert witness—the only expert opining that Mr. Gregory was not legally insane at the time of the crime—was central to Mr. Gregory's defense. "Even a partial restraint" on a defendant's "right to cross-examine a witness" on a subject matter relevant to the witness's credibility can "be an abuse of discretion and a violation of [the] constitutional right[ ]" to confront witnesses. *State v. Legette*, 292 N.C. 44, 53 (1977) (cleaned up). Because the trial court excluded cross-examination material that was highly probative of the expert witness's credibility, limiting the cross-examination in this case was an abuse of discretion and a violation of Mr. Gregory's constitutional right to confront the witnesses against him. For that reason, I respectfully dissent.

Mr. Gregory does not dispute the facts of his crimes; the sole issue in his trial was whether his mental illness at the time he committed the crimes rose to the level of impeding his criminal culpability. On 30 August 2015, Mr. Gregory, at just twenty years old, went on a violent crime spree. For the eighteen months leading up to these events, it is undisputed that Mr. Gregory was struggling with the onset of schizoaffective disorder, a severe mental illness that tends to develop in males in their late teens. With only a limited support system, Mr. Gregory attempted to admit himself to psychiatric care facilities on *twenty* separate occasions in the eight months prior to his crimes. He presented at these facilities complaining of suicidal ideations and auditory hallucinations commanding him to kill himself and others. And for six weeks prior to these crimes, Mr. Gregory was not taking antipsychotic medication to treat his schizoaffective disorder.

Mr. Gregory's challenges in coping with his severe mental health illness were certainly amplified by a troubled childhood. Mr. Gregory grew up in a family that frequently moved around and, at times, experienced homelessness and food insecurity. From the age of seven until he was fifteen, Mr. Gregory was raised by a stepfather who routinely abused him. This chaotic family life disrupted Mr. Gregory's education and he eventually dropped out of school in ninth grade. Around this time, he turned to substance abuse, likely to self-medicate.

After Mr. Gregory's arrest in September 2015, even the State struggled to manage Mr. Gregory's mental illness in jail. In early 2016, the Wake County Detention Center asked the trial court to transfer Mr. Gregory to the Department of Correction for safekeeping because the jail was unable to handle Mr. Gregory's mental health problems. On two separate occasions after the commission of the crimes, Mr. Gregory was found incompetent to proceed to trial due to his severe mental illness. Dr. Nicole Wolfe, a forensic psychiatrist at Central Regional Hospital, evaluated Mr. Gregory's capacity to proceed to trial in 2017 and 2019. On both occasions, she expressed her opinion that Mr. Gregory's severe mental illness, including psychosis, schizophrenia, and mania, rendered him incompetent to proceed to trial.

In 2020, the State petitioned the court to order forced medication to restore Mr. Gregory's capacity to stand trial for the 2015 crimes. *See Sell v. United States*, 539 U.S. 166, 180–81 (2003) (holding that a trial court may require involuntary administration of drugs if it is necessary to further an important governmental interest and the only means of rendering the defendant competent to stand trial). At a *Sell* hearing, the State must proffer a medical expert to (1) demonstrate that forced medication

is the only way the defendant's competency for trial can be restored, and (2) that the proposed plan is medically appropriate. *Id*. at 181. The State must provide clear and convincing evidence that the State interest outweighs the defendant's liberty interest. *United States v. Bush*, 585 F.3d 806, 814 (4th Cir. 2009) (collecting cases as to the clear and convincing standard for *Sell* hearings).

Dr. Wolfe was one of two witnesses to testify for the State at the *Sell* hearing. Dr. Wolfe testified that she did "not believe that [Mr. Gregory] would regain capacity without antipsychotic medication." In her view, Mr. Gregory was "not going to spontaneously improve without treatment." Further, she highlighted that "there are significant risks with lack of treatment, and psychotic people do unpredictable actions, and sometimes that's dangerous[ ] to [themselves] or others." "[U]ntreated psychosis can lead to suicide, not uncommonly, and it can also lead to aggression."

At the *Sell* hearing, the State's other witness was Dr. Brandon Harsch, an expert in forensic psychiatry. He testified about the diagnosis of schizophrenia and schizoaffective disorder in general and the treatments for these illnesses. He testified about the policies at Central Regional Hospital for involuntarily medicating noncompliant patients.

Dr. Harsch testified about his experiences and interactions with Mr. Gregory and his review of Mr. Gregory's medical records. At the time of the hearing, he and Dr. Wolfe possessed and reviewed medical records from eight of Mr. Gregory's admissions to Holly Hill Hospital in the eight months prior to the crimes. He also testified about the process and level of medication required to restore Mr. Gregory's capacity in late 2017 and into early 2018. Dr. Harsch acknowledged during the *Sell* hearing that, on occasion, Mr. Gregory would malinger, meaning he would exaggerate his symptoms for personal gain.

Still, during Dr. Wolfe's testimony, she did not mention any malingering or feigning of symptoms on Mr. Gregory's part. Instead, she painted a picture of a severely mentally ill man who could only be restored to capacity to stand trial through regular treatment of high-dose antipsychotic medication.

At the trial, in 2021 (one year after the *Sell* hearing), the sole issue was whether Mr. Gregory's untreated mental disorder, schizoaffective disorder, prevented him from understanding the nature and quality of his actions when he committed the crimes at issue. *See State v. Jones*, 293 N.C. 413, 425 (1977) (explaining the standard for not guilty by reason of insanity as a person "incapable of knowing the nature and quality

of the act, or, if he does know this, was, by reason of such defect of reason, incapable of distinguishing between right and wrong in relation to such act"). Mr. Gregory presented two expert witnesses who testified about his severe schizoaffective disorder. Both experts described Mr. Gregory's presentation of schizoaffective disorder as causing hallucinations, delusional thinking, and disorganized or catatonic behavior alongside depression, mania, bipolar, and other mood disorders. Both concluded that he was not able to discern right from wrong when it came to his actions. The sole witness who testified that Mr. Gregory had the capacity to understand the quality and nature of his actions and to distinguish between right and wrong was Dr. Wolfe.

At trial, Dr. Wolfe painted a very different picture of Mr. Gregory than she had at the *Sell* hearing. Dr. Wolfe described Mr. Gregory as a manipulative and cunning man who feigned symptoms of mental illness to get meals and a place to sleep. To Dr. Wolfe, the medical records from the months leading up to the crimes that, in the context of a *Sell* hearing, demonstrated the severity of Mr. Gregory's illness, now represented evidence that Mr. Gregory was feigning symptoms and malingering for housing and bus tickets. Dr. Wolfe characterized the same symptoms—hallucinations, suicidal ideation, and illogical responses—differently at trial than she characterized them at the *Sell* hearing. During the *Sell* hearing, the symptoms supported her conclusion that he suffered from schizoaffective disorder bipolar type, requiring forced medication. But at trial, these same symptoms were so severe that they had to be false.

Dr. Wolfe acknowledged that in her 2018 evaluation of Mr. Gregory's mental state at the time of the crimes, she noted "significant concern that [Mr. Gregory's] psychiatric condition w[ould] decompensate" without antipsychotic medication. However, she emphasized her opinion that Mr. Gregory's medical records establish a "pretty consistent pattern that Mr. Gregory is . . . endorsing symptoms when it serves him." Ultimately, Dr. Wolfe concluded that "Mr. Gregory's mental illness did not prevent him from understanding the nature and quality or wrongfulness of his actions" when he committed the crimes.

On cross-examination, the defense tried to question Dr. Wolfe about the purpose of her testimony in the *Sell* hearing. The trial court sustained the State's objection and limited the defense's cross-examination of Dr. Wolfe about the reason for the *Sell* hearing. In other words, the defense could not let the jury know that the purpose of her testimony during the *Sell* hearing was to enable the State to forcibly medicate Mr. Gregory to restore his competency for trial. While the defense could cross-examine Dr. Wolfe about her testimony at the *Sell* hearing, the jury could not know

the purpose of that hearing and make an informed assessment regarding the motivation behind Dr. Wolfe's seemingly inconsistent opinions.

"The right to confront and cross-examine one's accusers is central to an effective defense and a fair trial." *Legette*, 292 N.C. at 53 (citing *Greene v. McElroy*, 360 U.S. 474 (1959)). In a criminal case, "every circumstance that is calculated to throw any light upon the supposed crime is admissible." *State v. Sneeden*, 274 N.C. 498, 502 (1968) (quoting *State v. Hamilton*, 264 N.C. 277, 286 (1965)). For that reason, "our courts have allowed wide latitude in admitting evidence having a tendency to throw light upon the mental condition of a defendant who has entered a plea of not guilty by reason of insanity." *State v. Bundridge*, 294 N.C. 45, 51 (1978). Cross-examination explores "possible biases, prejudices, or ulterior motives of the witness as they may relate directly to issues or personalities in the case at hand." *Davis v. Alaska*, 415 U.S. 308, 316 (1974). Our rules of evidence permit the broadest possible scope for cross-examination of expert witnesses to test the value of their testimony. *See State v. Bacon*, 337 N.C. 66, 88 (1994) ("The largest possible scope should be given, and almost any question may be put to test the value of his testimony." (cleaned up)). The jury's evaluation of a witness's truthfulness and reliability often turns on subtle factors such as the witness's motivation in testifying. *See, e.g.*, *Napue v. Illinois*, 360 U.S. 264, 269 (1959) ("The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying . . . that a defendant's life or liberty may depend.").

Our rules of evidence and a defendant's constitutional right to confront witnesses allow a defendant to fully explore a vast array of bases on which a jury can assess the credibility and motives of a witness. *See Bacon*, 337 N.C. at 88 (permitting cross-examination of an expert witness "to obtain further details with regard to his testimony on direct examination, to impeach the witness or attack his credibility, or to elicit new and different evidence relevant to the case as a whole"). The significance of cross-examining a witness's credibility is particularly important where, like here, a single witness constitutes "the State's sole direct evidence on the ultimate issue." *State v. Whaley*, 362 N.C. 156, 161 (2008) (quoting *State v. Williams*, 330 N.C. 711, 723–24 (1992)).

While it is true that the standard for assessing competency to stand trial is different than the standard for assessing legal insanity, the jury must have all relevant information to assess the credibility and motivations of an expert witness. *See Bundridge*, 294 N.C. at 49–50 (recognizing that the test for capacity to stand trial, which is "capacity to

comprehend his position, to understand the nature of the proceedings against him, to conduct his defense in a rational manner and to cooperate with his counsel so that any available defense may be interposed," differs from the standard for a plea of not guilty by reason of insanity in which the defendant cannot "distinguish between right and wrong at the time of and in respect to the matter of investigation"). Because of the trial court's ruling, the jury here was not privy to the motivation behind Dr. Wolfe's testimony at the *Sell* hearing—to provide an expert opinion that the *only* way Mr. Gregory would have the capacity to stand trial was if he was forcibly medicated with antipsychotic medication. At the *Sell* hearing, Dr. Wolfe testified it was "very clear" that Mr. Gregory's psychotic symptoms were "representative of genuine mental illness" and not just an exaggerated state. Only a year later, she testified that his hallucination symptoms were not consistent with schizophrenia and his records demonstrated a "strong pattern of manipulative, deceitful behavior." A reasonable juror could conclude that the differences in Dr. Wolfe's testimony in these different contexts (*Sell* hearing versus trial) undermined her credibility at trial.

At trial, Dr. Wolfe explained that the variation in her testimony was based on her receipt of additional medical records she received after she testified at the prior hearing. However, the defense should have been allowed to explore whether the purpose of the *Sell* hearing—persuading a court to allow forcible medication for the purpose of bringing a defendant to trial—factored into the change in her opinion or whether her decision to proffer that testimony undermined her credibility at trial. Put another way, the fact that she previously testified with the intent of facilitating the State's forcible medication of Mr. Gregory without reviewing all of his relevant medical records could have led the jury to question her reliability as an expert witness.

The trial court relied upon Rule 403 of the Rules of Evidence to support its decision to preclude any reference to the State's desire to forcibly medicate Mr. Gregory so he could stand trial for his crimes. *See* N.C.G.S. § 8C-1, Rule 403 (2023) ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. . . ."). However, the trial court did not explain why the probative value of the *Sell* hearing's purpose was "substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." The Court of Appeals decision, which the majority summarily affirms, presumed that any probative value of *Dr. Wolfe's motivation* for testifying at the *Sell* hearing was substantially outweighed by its *unfair*

prejudicial effect. *See State v. Gregory*, 291 N.C. App. 617, 628–29 (2023). In its brief to this Court, the State offers that "any mention of the State attempting to forcibly medicate [Mr. Gregory] likely would have played on the jury's emotions and been viewed by the jury as the State improperly medicating [Mr. Gregory] against his will." Such an explanation is as troubling as it is incredible.

Unfair prejudice in the context of Rule 403 means "an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, as an emotional one." *State v. DeLeonardo*, 315 N.C. 762, 772 (1986) (cleaned up). As a primary matter, the jury was already aware that the state hospital had forcibly medicated Mr. Gregory under its policy for involuntary medication of aggressive or violent patients. But more centrally, in a trial with only one issue—whether Mr. Gregory was incapable of knowing the nature and quality of the criminal act or distinguishing between right and wrong in relation to his crime—Dr. Wolfe was the only witness testifying he was legally sane at the time of the crimes. *See Jones*, 293 N.C. at 425 (explaining the standard for not guilty by reason of insanity). There exists a mechanism by which the State can forcibly medicate a criminal defendant to render him mentally healthy enough to stand trial. The State cannot pretend that a mechanism of which it avails itself is somehow so emotionally troubling to a jury that the State and the court have to pretend that such a mechanism does not exist. And if the State is proffering a medical expert at a *Sell* hearing for the purpose of forcibly medicating a criminal defendant and that expert alters his or her opinion, our rules of evidence and constitution require that the defense be allowed to raise questions about that expert's credibility and intentions.

Fundamental fairness dictates that the jury should appreciate the complete picture of Dr. Wolfe's evaluations of Mr. Gregory as the jury considered her credibility. In this scenario, any prejudice stemming from the State's desire to forcibly medicate Mr. Gregory in order for him to stand trial was outweighed by the probative value of the jury's full understanding of the *Sell* hearing in relation to Dr. Wolfe's credibility.

A violation of a "defendant's rights under the Constitution of the United States is prejudicial unless the appellate court finds that it was harmless beyond a reasonable doubt. The burden is upon the State to demonstrate, beyond a reasonable doubt, that the error was harmless." N.C.G.S. § 15A-1443(b) (2023). In contrast, an error relating to rights arising other than under the Constitution of the United States is prejudicial "when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at

the trial." N.C.G.S. § 15A-1443(a). Under either standard, the limitation on the defense's cross-examination of Dr. Wolfe prejudiced Mr. Gregory.

The record easily supports this conclusion. The jury deliberated on the only question in this case—whether Mr. Gregory met the standard for legal insanity—for a day and a half and struggled to reach a unanimous decision about whether Mr. Gregory was "incapable of knowing the nature and quality of the act, or, if he does know this, was, by reason of such defect of reason, incapable of distinguishing between right and wrong in relation to such act." *See Jones*, 293 N.C. at 425. During its deliberations, the jury asked for the trial court to define the phrase "nature and quality" and explain how "nature and quality" affects whether a defendant can distinguish between right and wrong. In response to these two questions, the trial court reinstructed the jury on the definition of not guilty by reason of insanity. Several hours after being told to use the ordinary meaning of "nature and quality," the jury asked: "Can we have a dictionary definition of 'nature and quality' as it pertains to the law?" The court and attorneys spent several hours researching the question and ultimately told the jury that "for a person to understand the nature and quality of his act means that the person must have sufficient mental capacity to know and understand what he is doing at the time he is doing it." Several hours later, the jury reported that it was hung. After being told to resume deliberation, the jury then finally found Mr. Gregory guilty of the charges.

We cannot know what the jury discussed over the course of nearly two days while it deliberated about the nature and quality of the act and whether Mr. Gregory could distinguish between right and wrong. But what we know—and the jury did not know—is that Dr. Wolfe testified that Mr. Gregory's "capacity was contingent on medication," and she suggested the State use the mechanism of a *Sell* hearing to forcibly medicate him because of the severity of his mental illness. Neither side disputes that in the six weeks leading to these crimes, Mr. Gregory's schizoaffective disorder was untreated. "Who knows, however, how much evidence it takes to persuade a jury?" *Bundridge*, 294 N.C. at 59 (Exum, J., dissenting). In a case that can be distilled down to a battle of expert witnesses, there is a reasonable possibility that the motivation for Dr. Wolfe's testimony at the *Sell* hearing, had it been offered, would have led the jury to a different result. *See* N.C.G.S. § 15A-1443(a).

The Confrontation Clause protects the right to cross-examine a witness, and cross-examination, amongst other things, tests the credibility of that witness. *Davis*, 415 U.S. at 315–16. "[E]xposure of a witness'[s] motivation in testifying is a proper and important function of the

constitutionally protected right of cross-examination." *Id.* at 316–17. To exclude the important context of Dr. Wolfe's motivation for testifying at the *Sell* hearing was an abuse of discretion and a violation of Mr. Gregory's constitutional right to confront the witness testifying against him.

Justice EARLS joins in this dissenting opinion.

STATE OF NORTH CAROLINA
v.
RONALD WAYNE MACON, JR.

No. 10PA24

Filed 21 March 2025

On discretionary review pursuant N.C.G.S. § 7A-31 of a unanimous, unpublished decision of the Court of Appeals, 291 N.C. App. 520 (2023), finding no error after appeal from judgments entered on 26 May 2022 by Judge Gale M. Adams in Superior Court, Randolph County. Heard in the Supreme Court on 30 October 2024.

Jeff Jackson, *Attorney General*, *by Caden William Hayes*, *Assistant Attorney General*, *for the State-appellee.*

Glenn Gerding, *Appellate Defender*, *by Wyatt Orsbon*, *Assistant Appellate Defender*, *for defendant-appellant.*

PER CURIAM.

The decision of the Court of Appeals is modified and affirmed in light of our decision in *State v. Fenner*, No. 289PA23 (N.C. Mar. 21, 2025).

Defendant's conditional petition for writ of certiorari to review the decision of the Court of Appeals is denied.

MODIFIED AND AFFIRMED.

STATE v. MILLER

[387 N.C. 348 (2025)]

STATE OF NORTH CAROLINA
v.
MARK ALAN MILLER

No. 81A24

Filed 21 March 2025

Appeal pursuant to N.C.G.S. § 7A-30(2) (2023) from the decision of a divided panel of the Court of Appeals, 292 N.C. App. 519 (2024), finding no error after an appeal from judgments entered on 19 November 2021 by Judge Peter B. Knight in Superior Court, Henderson County. On 28 June 2024, the Supreme Court allowed in part defendant's petition for discretionary review as to additional issues. Heard in the Supreme Court on 18 February 2025.

Jeff Jackson, Attorney General, by Jodi P. Carpenter, Assistant Attorney General, for the State-appellee.

The Carolina Law Group, by Kirby H. Smith III and Thomas A. Kellis II, for defendant-appellant.

PER CURIAM.

AFFIRMED.

STATE v. SIMS

[387 N.C. 349 (2025)]

STATE OF NORTH CAROLINA
v.
ANTWAUN KYRAL SIMS

No. 297PA18

Filed 21 March 2025

1. Appeal and Error—murder prosecution—juvenile defendant—gender discrimination in jury selection—issue raised post-conviction—procedurally barred

In a first-degree murder case involving a juvenile defendant who, during the pendency of his appeal to the Supreme Court from the Court of Appeals' decision affirming his conviction, filed a motion for appropriate relief asserting for the first time a claim of unconstitutional gender discrimination in jury selection, pursuant to *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994), defendant's *J.E.B.* claim was procedurally barred under N.C.G.S. § 15A-1419 (barring appellate review of issues raised in post-conviction proceedings, including when the defendant was in a position to raise the issue in a prior appeal but failed to do so) for the reasons stated in his co-defendant's appeal in *State v. Bell*, No. 86A02-2 (N.C. Mar. 21, 2025).

2. Constitutional Law—cruel and unusual punishment—juvenile defendant—life imprisonment without parole—consideration of mitigating factors

In a first-degree murder case involving a juvenile defendant, the sentence of life imprisonment without parole (LWOP) did not violate defendant's Eighth Amendment rights despite his contention that he was not one of those "rare" juveniles who were "irreparably corrupt." Defendant's argument failed on appeal because: (1) the trial court properly followed the sentencing procedure enunciated in the state's *Miller*-fix statute—consisting of weighing mitigating factors regarding defendant's youth and attendant characteristics—and it is the adherence to this procedure that makes LWOP sentences "rare" for juveniles, thereby eliminating any Eighth Amendment concerns; and (2) the *Miller*-fix procedure did not require the court to make a separate finding that defendant was "irreparably corrupt" before imposing LWOP. Further, the trial court did not abuse its discretion when weighing the *Miller* factors where its challenged findings of fact were supported by the evidence, the court properly considered any mitigating evidence pertaining to each factor, and—although the court did not enter findings as to every fact arising from the

evidence and perhaps could have said more about particular mitigating circumstances—the factors could not be reweighed on appeal.

3. Appeal and Error—standard of review—cruel and unusual punishment—life imprisonment without parole—juvenile defendant

In a first-degree murder case involving a juvenile defendant who, after his conviction, appealed his sentence of life imprisonment without parole on the ground that it violated his Eighth Amendment rights, the appellate court properly reviewed the trial court's sentencing determination for an abuse of discretion. Thus, there was no merit to defendant's argument that, instead of applying an abuse of discretion standard, the appellate court should have engaged in a "meaningful analysis" of whether the trial court's findings supported a conclusion that he was "irreparably corrupt."

Justice EARLS concurring in the result only.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 260 N.C. App. 665 (2018), finding no error after an appeal from an order entered on 21 March 2014 by Judge Jack W. Jenkins in Superior Court, Onslow County. Heard in the Supreme Court on 9 April 2024.

Jeff Jackson, Attorney General, by Kimberly N. Callahan, Assistant Attorney General, for the State.

Glenn Gerding, Appellate Defender, by David W. Andrews, Assistant Appellate Defender, for defendant.

BERGER, Justice.

Defendant was sentenced to life in prison without parole for his actions in the abduction and murder of Ms. Elleze Kennedy. Defendant was seventeen years old at the time of the murder. In motions for appropriate relief filed with the sentencing court, defendant made two primary arguments: (1) that gender bias in jury selection pursuant to *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994) entitles him to a new trial; and (2) that his sentence of life in prison without parole runs counter to the constitutional requirements set forth in *Miller v. Alabama*, 567 U.S. 460 (2012) and N.C.G.S. §§ 15A-1340.19A to -1340.19D. Defendant's *J.E.B.* claim is procedurally barred, and we affirm the Court of Appeals judgment holding that there was no error in defendant's sentence of life without parole.

I. Factual and Procedural Background

Eighty-nine-year-old Elleze Kennedy was abducted from her driveway and murdered by defendant and his co-defendants on 3 January 2000. At trial, the State's evidence tended to show that co-defendant Christopher Bell told Chad Williams and defendant that he wanted to steal a vehicle and flee the state to avoid a pending probation violation hearing. Defendant and Williams agreed to help Bell.

The three identified Ms. Kennedy as their target and followed her home, where they confronted her with a BB gun and demanded that she turn over her car keys. When Ms. Kennedy resisted, Bell hit her repeatedly in the face with the gun until she was unconscious. Defendant drove Ms. Kennedy's vehicle away after she was thrown into the back seat of the car. She was later moved to the trunk of the vehicle.

Defendant and his co-defendants stopped to smoke marijuana and left Ms. Kennedy in the trunk. While there, Williams said he was not going to travel out-of-state in a stolen vehicle with Ms. Kennedy in the trunk. In response, Bell and defendant left Williams at the house. They later returned and convinced Williams to get back into the car by telling him that they had dropped Ms. Kennedy off at a McDonalds. Before leaving the house, defendant obtained a rag and cleaned Ms. Kennedy's blood from the backseat of the vehicle.

Williams thereafter discovered that Ms. Kennedy was still in the trunk of the car, but he remained with the group. At defendant's urging, the men drove the car to a field, parked the car, and opened the trunk. Ms. Kennedy was moving around and moaning in pain. Williams suggested they let her go, but Bell replied that Ms. Kennedy had seen his face and he was going "to leave no witnesses." Bell asked defendant for his lighter so that he could burn his blood-covered jacket. Bell threw the burning jacket into the backseat of the car while Ms. Kennedy was still alive in the trunk.

The next morning, Bell asked defendant to go check to see if Ms. Kennedy was dead, and Bell stated that if she was not, defendant should burn the rest of the car. Defendant discovered that Ms. Kennedy was dead in the trunk of the car and that the windows of the car were smoked. In an attempt to cover up the evidence, defendant and Bell wiped the car down intending to remove fingerprints and then left the scene.

Police discovered the stolen car with Ms. Kennedy's body in the trunk that same morning. Among the evidence obtained at the crime scene were footprint markings on the ground around the car, Bell's burned

jacket, the cloth defendant used to wipe up Ms. Kennedy's blood, latent fingerprints on the car, and hairs in the back seat, which were matches to defendant and Bell. Upon searching Ms. Kennedy's residence, police discovered a puddle of blood in the driveway, a pair of eyeglasses, a dental partial, a walking cane, and blood smear marks on the driveway consistent with dragging.

An autopsy report revealed that Ms. Kennedy suffered blunt force injuries to her face, which resulted in facial fractures and loosened teeth. In addition, Ms. Kennedy's body had extensive bruising of her torso consistent with being kicked. The extent of soot in Ms. Kennedy's trachea and lungs led to the conclusion that she was alive at the time that the car was burned but that she ultimately succumbed to carbon monoxide poisoning.

Williams was questioned by police and confessed to his involvement and the role of his co-defendants in Ms. Kennedy's murder. Williams pleaded guilty to first-degree murder, first-degree kidnapping, and assault with a deadly weapon inflicting serious injury, and he agreed to testify against defendant and Bell at trial.

Defendant and Bell were arrested and subsequently indicted for first-degree murder, first-degree kidnapping, assault with a deadly weapon inflicting serious injury, and burning personal property. The State revealed its intent to seek the death penalty against both defendant and Bell, and their matters were joined for trial. On 14 August 2001, an Onslow County jury found defendant and Bell guilty of first-degree murder under the theories of felony murder and premeditated and deliberated murder. Defendant was also convicted of first-degree kidnapping and burning of personal property.

Following the capital sentencing hearing, defendant was sentenced to life in prison without parole, followed by consecutive sentences totaling 108 to 139 months in prison. Bell was sentenced to death. Both defendant and Bell appealed their convictions.

On 18 November 2003, the Court of Appeals held that there was no error in defendant's conviction and sentence and concluded that defendant received a fair trial free of prejudicial error. *State v. Sims*, 161 N.C. App. 183, 196 (2003). This Court upheld Bell's convictions and death sentence on 7 October 2004. *State v. Bell*, 359 N.C. 1 (2004), *cert. denied*, 544 U.S. 1052 (2005).

On 8 April 2013, defendant filed a motion for appropriate relief in superior court, arguing that his sentence of mandatory life imprisonment

without parole as a juvenile was unconstitutional under *Miller*, 567 U.S. 460. On 2 July 2013, defendant's motion was granted, and a resentencing hearing was ordered pursuant to this state's *Miller*-fix statute. *See* N.C.G.S. § 15A-1340.19B (2023). On 20 February 2014, the resentencing hearing was held before the Honorable Jack W. Jenkins, and the MAR court[1] determined that defendant's sentence of life without parole was to remain in place.

On 9 September 2016, defendant filed a petition for writ of certiorari with the Court of Appeals seeking review of the MAR order. The Court of Appeals allowed defendant's petition and subsequently issued a published decision holding there was no error. *State v. Sims*, 260 N.C. App. 665, 682-83 (2018). Specifically, the Court of Appeals determined that the sentencing court did not abuse its discretion in weighing the *Miller* factors and resentencing defendant to life without parole. *Id.* at 682.

On 11 September 2018, defendant filed with this Court a notice of appeal based upon a constitutional question and a petition for discretionary review. On 7 December 2018, this Court dismissed defendant's notice of appeal based upon a constitutional question but allowed the petition for discretionary review to address whether the Court of Appeals erred in upholding defendant's life without parole sentence under *Miller*.

In addition, on 8 October 2019, while the appeal was pending before this Court, defendant filed another motion for appropriate relief, asserting for the first time a claim of gender-discrimination during jury selection under *J.E.B.*, 511 U.S. 127. Consequently, this Court entered an order remanding the case to the Superior Court, Onslow County, for an evidentiary hearing. This Court also remanded co-defendant Bell's case to the Superior Court, Onslow County, for a joint evidentiary hearing with defendant.

On 25 January 2022, the superior court issued an order finding that the State's use of a peremptory strike for juror Viola Morrow violated *J.E.B.* We then ordered supplemental briefing in both cases regarding the merits of their *J.E.B.* claims. We address both issues below.

II. Analysis

A. *J.E.B.* Claims

[1] Section 15A-1419 "provides a mandatory procedural bar for issues a party seeks to litigate in post-conviction proceedings." *State v. Tucker*,

1. The MAR court is hereinafter referred to as the sentencing court as appropriate.

385 N.C. 471, 484 (2023), *cert. denied*, 145 S. Ct. 196 (2024). The procedural bar precludes review when, relevant here, "[u]pon a previous appeal the defendant was in a position to adequately raise the ground or issue underlying the present motion but did not do so." N.C.G.S. § 15A-1419(a)(3) (2023). "[I]t is well settled that constitutional matters that are not raised and passed upon at trial will not be reviewed for the first time on appeal[.]" *State v. Garcia*, 358 N.C. 382, 420 (2004).

"An exception to the procedural bar applies only if the defendant can demonstrate: (1) '[g]ood cause for excusing the ground for denial listed in subsection (a) of this section and ... actual prejudice resulting from the defendant's claim,' or (2) '[t]hat failure to consider the defendant's claim will result in a fundamental miscarriage of justice.' " *Tucker*, 385 N.C. at 485 (alterations in original) (quoting N.C.G.S. § 15A-1419(b) (2021)).

"[G]ood cause" only exists if the defendant demonstrates "by a preponderance of the evidence that his failure to raise the claim or file a timely motion" was:

> (1) The result of State action in violation of the United States Constitution or the North Carolina Constitution including ineffective assistance of trial or appellate counsel;
>
> (2) The result of the recognition of a new federal or State right which is retroactively applicable; or
>
> (3) Based on a factual predicate that could not have been discovered through the exercise of reasonable diligence in time to present the claim on a previous State or federal postconviction review.

N.C.G.S. § 15A-1419(c) (2023).

"[A] fundamental miscarriage of justice" under subsection (b)(2) is established only when a defendant demonstrates by a preponderance of the evidence that "but for the error, no reasonable fact finder would have found the defendant guilty of the underlying offense"; or, when reviewing a death sentence, a defendant demonstrates "by clear and convincing evidence that, but for the error, no reasonable fact finder would have found the defendant eligible for the death penalty." N.C.G.S. § 15A-1419(e) (2023).

Similar to his co-defendant in *State v. Bell*, No. 86A02-2 (N.C. Mar. 21, 2025), defendant makes no argument that failure to consider his *J.E.B.* claim will result in a fundamental miscarriage of justice. Defendant

instead argues that he was "[u]ltimately . . . not in a position to assert a violation of *J.E.B.* in his direct appeal[.]" Defendant acknowledges in his brief to this Court that his *J.E.B.* argument was neither raised at trial, nor argued on direct appeal, but he contends that because the prosecutor's affidavit[2] was not released until well after the trial, he could not have discovered it through reasonable diligence.

For the reasons stated in this Court's opinion filed today in his co-defendant's matter, *see State v. Bell*, No. 86A02-2 (N.C. Mar. 21, 2025), and based upon a fair consideration of the record, defendant's *J.E.B.* claim is procedurally barred pursuant to N.C.G.S. § 15A-1419. *See Tucker*, 385 N.C. at 484-86.

B. Defendant's LWOP Sentence

[2] Defendant poses two challenges to the sentencing court's 21 March 2014 order affirming his sentence of life without parole. First, defendant asserts that the sentence violates the Eighth Amendment because defendant "showed that he was not irreparably corrupt and that his role in Ms. Kennedy's murder was the result of transient immaturity." Second, defendant contends that the Court of Appeals erred when it determined that the sentencing court did not abuse its discretion when considering mitigating evidence presented by defendant. Related thereto, defendant also contends that this matter should be remanded to the Court of Appeals because that court failed to apply relevant legal standards in rendering its opinion.

For each of his arguments, defendant essentially asks this Court to reweigh evidence, and for the reasons discussed below, we affirm defendant's sentence of life in prison without parole.

1. Constitutional Principles

"Absent specific authority, it is not the role of an appellate court to substitute its judgment for that of the sentencing court as to the appropriateness of a particular sentence; rather, in applying the Eighth Amendment the appellate court decides only whether the sentence . . . is within constitutional limits." *State v. Ysaguire*, 309 N.C. 780, 786 (1983) (quoting *Solem v. Helm*, 463 U.S. 277, 290 n.16 (1983)). Moreover, "[i]n non-capital cases we do not, and are not required to, conduct factual comparisons of different cases to determine whether a given sentence is constitutional." *Id.* at 786 n.3.

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2. For background information on this affidavit, *see State v. Bell*, No. 86A02-2 (N.C. March 21, 2025).

The Eighth Amendment guarantees the right to be free from "cruel and unusual punishments." U.S. Const. amend. VIII. The Supreme Court of the United States has opined that this right "flows from the basic precept of justice that punishment for crime should be graduated and proportioned to both the offender and the offense." *Miller*, 567 U.S. at 469 (cleaned up). Because of the inherent differences between juveniles and adults, "children are constitutionally different from adults for purposes of sentencing." *Id.* at 471. *But see State v. Tirado*, No. 267PA21 (N.C. Jan. 31, 2025) (holding that Article I, Section 27 of our state constitution does not provide juveniles with the more robust sentencing protections the Supreme Court of the United States has developed in its Eighth Amendment jurisprudence and is to be read consistent with the Eighth Amendment).

In 2012, the Supreme Court of the United States struck down sentencing schemes which imposed mandatory sentences of life without parole for juveniles without first allowing a sentencing court to consider the "mitigating qualities of youth." *Miller*, 567 U.S. at 476 (cleaned up). According to *Miller*, a sentencing court must "take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." *Id.* at 480. This requires a sentencing court to consider each individual defendant and "take into account the differences among defendants and [their] crimes." *Id.* at 480 n.8. Foundationally, *Miller* permits sentences of life without parole for juvenile murderers provided the sentencing court (1) considers a defendant's youth in mitigation, and (2) has discretion to impose a punishment other than life without parole. *See id.*

The Supreme Court subsequently clarified that *Miller* does not create an outright ban on juvenile life-without-parole sentences, but it does prohibit such sentences "for all but the rarest of juvenile offenders, those whose *crimes* reflect permanent incorrigibility." *Montgomery v. Louisiana*, 577 U.S. 190, 209 (2016) (emphasis added). The Court also concluded that "a finding of fact regarding a child's incorrigibility . . . is not required." *Id.* at 211.

The Supreme Court recently reiterated that all a sentencing court must do to comply with the Eighth Amendment is "follow a certain process—considering an offender's youth and attendant characteristics—before imposing" a particular penalty. *Jones v. Mississippi*, 141 S. Ct. 1307, 1311 (2021) (quoting *Miller*, 567 U.S. at 483). *See also United States v. Holt*, 116 F.4th 599, 607 (6th Cir. 2024) ("If sentencing courts consider a juvenile defendant's youth as one factor in the sentencing calculus, *Miller* does not prohibit the court from imposing a life sentence

as a 'discretionary' matter."); *Helm v. Thornell*, 112 F.4th 674, 683 (9th Cir. 2024) (a sentencing hearing "where youth and its attendant characteristics are considered as sentencing factors enforces the Eighth Amendment's substantive limits." (cleaned up)); *Bell v. Uribe*, 748 F.3d 857, 870 (9th Cir. 2014) ("[b]ecause the sentencing judge [] consider[ed] both mitigating and aggravating factors under a sentencing scheme that affords discretion and leniency, there is no violation of *Miller*"); *United States v. Briones*, 35 F.4th 1150, 1156 (9th Cir. 2021) ("*Jones* clarified that a discretionary sentencing system . . . suffices to ensure individualized consideration of a defendant's youth."); *Jessup v. Shinn*, 31 F.4th 1262, 1266 (9th Cir. 2022) ("*Miller* requires, for a juvenile offender, an individualized sentencing hearing during which the sentencing judge assesses whether the juvenile defendant warrants a sentence of life with the possibility of parole.").

According to *Jones*, it is the adherence to the sentencing procedure enunciated in *Miller* – consideration of the murderer's age, "diminished culpability[,] and heightened capacity for change," *id.* at 1316 (cleaned up) – that "helps ensure that life without parole sentences are imposed only in cases where that sentence is appropriate[.]" *Id.* at 108–112. Thus, it is the discretionary sentencing protocol itself that "help[s] make life without-parole sentences relatively rare for murderers under 18." *Id.* at 112 (cleaned up).

To ensure juvenile sentences complied with evolving federal jurisprudence, the legislature codified the *Miller* "factors" in N.C.G.S. § 15A-1340.19B. The *Miller*-fix statute "gave trial courts the discretion to determine whether juvenile murderers receive life without parole or the lesser sentence of life imprisonment with parole . . . . In making this determination, the trial court must consider certain enumerated mitigating factors along with any other mitigating factor or circumstance." *Tirado*, slip op. at 4-5 (cleaned up).

Pursuant to the *Miller*-fix, when a juvenile has been convicted of first-degree murder on the theory of premeditation and deliberation, the sentencing court must conduct a sentencing hearing to determine whether a sentence of life without parole is warranted. N.C.G.S. § 15A-1340.19B(a)(2). At this hearing,

> [t]he defendant or the defendant's counsel may submit mitigating circumstances to the court, including, but not limited to, the following factors:
>
> (1) Age at the time of the offense.
>
> (2) Immaturity.

(3) Ability to appreciate the risks and consequences of the conduct.

(4) Intellectual capacity.

(5) Prior record.

(6) Mental health.

(7) Familial or peer pressure exerted upon the defendant.

(8) Likelihood that the defendant would benefit from rehabilitation in confinement.

(9) Any other mitigating factor or circumstance.

N.C.G.S. § 15A-1340.19B(c). A sentencing court is required to "consider any mitigating factors" presented, and its sentencing order "shall include findings on the absence or presence of any mitigating factors and such other findings as the court deems appropriate." N.C.G.S. § 15A-1340.19C(a) (2023).

This statutory scheme "facially conform[s] to the federal constitutional case law," *State v. Conner*, 381 N.C. 643, 666 (2022), because it "provide[s] sufficient guidance to allow a sentencing judge to make a proper, non-arbitrary determination of the sentence that should be imposed upon a juvenile." *State v. James*, 371 N.C. 77, 95 (2018). The statutory language provides no presumption in favor of either potential sentence, but instead "treats the sentencing decision required by N.C.G.S. § 15A-1340.19C(a) as a choice between two equally appropriate sentencing alternatives" consistent with *Miller*. *Id.* at 90.

In its resentencing order, the sentencing court made the following findings of fact:[3]

1. The Court finds as the facts of the murder the facts as stated in *State v. Sims*, 161 N.C. App. 183 (2003).

2. The Court finds that the murder in this case was a brutal murder. The Court finds instructive the trial/sentencing jury's finding beyond

3. Defendant did not challenge these findings of fact, and as such, they "are deemed to be supported by competent evidence and are binding on appeal." *State v. Cobb*, 381 N.C. 161, 164 (2022) (cleaned up); *see also Cherry Cmty. Org. v. Sellars*, 381 N.C. 239, 246 (2022) (unchallenged findings are "presumed to be supported by competent evidence and are binding on appeal" (cleaned up)).

a reasonable doubt that the murder was "especially heinous, atrocious, or cruel" pursuant to N.C.G.S. 15A-2000(e)(9). According to the trial testimony from Dr. Carl Barr, Ms. Kennedy had blunt force trauma all over her body . . . . Soot had penetrated deep into her lungs, meaning that she was alive when her car was set on fire with her in it, and she therefore died from suffocation from carbon monoxide poisoning.

3. The Court finds that the defendant has not been a model prisoner while in prison. His prison records indicate that he has committed and been found responsible for well over 20 infractions since he has been in prison.

4. The Court finds that the defendant, although expressing remorse during the hearing, has not demonstrated remorse based on his actions and statements. During a meeting with a prison psychiatrist on January 20, 2009, the defendant complained that he was in prison and should not be. Further, the Court reviewed materials and heard evidence that as a juvenile in Florida, the defendant had been charged with armed robbery but denied any culpability in the case. Also, this Court heard and reviewed evidence that the defendant was removed from Hobbton High School in September 1998 in large part due to bad behavior. Specifically, the Court notes that defendant was accused, along with two others, of stealing from the boy's locker room after school as part of a group, but again denied doing anything wrong. The school specifically found that Sims' acts during this theft were not due to his learning disabilities. This Court notes in all three incidents, the Florida armed robbery, the Hobbton high school theft, and the murder of Ms. Kennedy, the defendant was with a group of people, and in the light most favorable to him, was at a minimum a criminally culpable member of the group but was unwilling to admit any personal wrongdoing.

5. The Court finds that Dr. Tom Harbin testified that the defendant knew right from wrong. Further, Dr. Harbin testified that the defendant would have known that the acts constituting the kidnapping [and the] murder were clearly wrong.

6. The Court finds that Dr. Tom Harbin testified that the defendant was a follower, and was easily influenced. Dr. Harbin testified that the defendant may not see himself as responsible for an act if he himself did not actually perform the act even if he helped in the performance of the act. Further, Dr. Harbin testified that the defendant has a harder time paying attention than others and a harder time restraining himself than others. Dr. Harbin testified that the defendant had poor social skills, very poor judgment, would be easily distracted and would be less focused than others. Further, the defendant has a hard time interacting with others and finds it harder to engage others and predict what others might do.

7. The Court finds that while this evidence was presented by the defendant to try to mitigate his actions on the night Ms. Kennedy was murdered, that this evidence also demonstrates that the defendant is dangerous. Dr. Harbin acknowledge[d] on cross-examination that all of the mental health issues he identified in the defendant, taken as a whole, could make him dangerous.

8. The Court finds that the defendant was an instrumental part of Ms. Kennedy's murder. She died from carbon monoxide poisoning from inhaling carbon monoxide while in the trunk of her car when her car was set on fire. According to witness testimony at the trial, the defendant provided the lighter that Chris Bell used to light the jacket on fire that was thrown in Ms. Kennedy's car and eventually caused her death.

9. The Court finds that the evidence at trial clearly demonstrated that the defendant did numerous things to try to hide or destroy the evidence that

would point to the defendant's guilt. The most obvious part is his participation in killing Ms. Kennedy, the ultimate piece of evidence against the defendants. Additionally, this defendant was the one who drove the car to its isolated last resting place in an attempt to hide it, even asking his co-defendants if he had hidden it well enough. Further, he personally went back to the car the morning after the night it was set on fire to make sure Ms. Kennedy was dead.

10. The Court finds that the physical evidence demonstrated not only his guilt, but specifically demonstrated the integral role the defendant played in Ms. Kennedy's death. Fingerprints, DNA, and footwear impressions at the scene where Ms. Kennedy was burned alive in her car all matched the defendant. Most notably, Ms. Kennedy died in the trunk of her car, and the palmprint on the trunk of the car, the only print found on the trunk, matched the defendant.

The sentencing court thereafter analyzed the *Miller* factors in light of the underlying facts as directed by N.C.G.S. § 15A-1340.19B. The sentencing court specifically addressed in its written order defendant's age, immaturity, ability to appreciate the risks of the conduct, intellectual capacity, prior record, mental health, familial and peer pressure, likelihood defendant would benefit from rehabilitation in confinement, and other mitigating factors and circumstances. Thus, the sentencing court complied with *Miller* when it weighed factors attendant to defendant's youth and, appreciating the discretion available, sentenced defendant to life in prison without parole.

Defendant contends, however, that his sentence violates the Eighth Amendment because the evidence showed that his role in Ms. Kennedy's murder reflects transient immaturity and that he is "not one of the exceedingly rare juveniles who are irreparably corrupt." As stated above, however, it is the adherence to the sentencing procedure enunciated in *Miller* that provides the individualized consideration of a defendant's age and attendant circumstances of youth, combined with the nature of the crime, that will "make life-without-parole sentences relatively rar[e] for murderers under 18." *Jones*, 141 S. Ct. 1318 (cleaned up). Because N.C.G.S. § 15A-1340.19B complies with *Miller* and neither sentence is presumptive, a sentencing court is not required to apply an additional

filter to ensure rarity of the sentence. Again, it is the sentencing court's exercise of discretion in light of the nature of the crime that makes a sentence of life without parole relatively rare, thus safeguarding Eighth Amendment concerns.

We also note that, contrary to the assertions in the concurrence at the Court of Appeals, the inquiry is not whether a defendant is permanently incorrigible or irreparably corrupt; nor is it potential for redemption. *See Sims*, 260 N.C. App. at 683–84 (Stroud, J., concurring). The Supreme Court in *Miller* stated that life without parole should be reserved for "the rare juvenile offender whose *crime* reflects irreparable corruption." *Miller*, 567 N.C. at 479-80 (cleaned up) (emphasis added). *Montgomery* thereafter confirmed that *Miller* prohibited life without parole "for all but the rarest of juvenile offenders, those whose *crimes* reflect permanent incorrigibility." *Montgomery*, 577 U.S. at 209 (emphasis added).

Just as the discretion invested in sentencing courts protects against what could be considered overutilization of life without parole sentences, so too the *Miller*-fix process puts the focus on the juvenile and his crimes by considering the mitigating circumstances of youth. There is no separate requirement that a sentencing court make a finding the murderer is permanently incorrigible or irreparably corrupt. We know this because the Supreme Court explicitly stated such. *See Jones*, 141 S. Ct. at 1322 ("*Miller* and *Montgomery* …[squarely rejected the argument] that the sentencer must make a finding of permanent incorrigibility…."). Thus, under *Miller*, *Montgomery*, and *Jones*, the Eighth Amendment does not require a sentencing court to make a separate finding that a juvenile is permanently incorrigible or irreparably corrupt to impose a sentence of life in prison without parole. *See id.* at 1320 ("*Miller* did not say a word about requiring some kind of particular sentencing explanation with an implicit finding of permanent incorrigibility, as *Montgomery* later confirmed."). *See also United States v. Holt*, 116 F.4th 599, 608 (6th Cir. 2024) (In *Jones*, "the Court disavowed [defendant's] view that . . . an express incorrigibility finding before imposing a life sentence" is required.); *United States v. Briones*, 35 F.4th 1150, 1157 (9th Cir. 2021) ("permanent incorrigibility is not an eligibility criterion for juvenile LWOP" under *Jones*); *Crespin v. Ryan*, 56 F.4th 796, 799 (9th Cir. 2023) *(Jones* specifically assessed "whether a sentencer must actively find a juvenile permanently incorrigible before imposing an LWOP sentence. The Supreme Court clarified that no fact-finding requirement exists[.]" (cleaned up)); *Helm*, 112 F.4th at 687 (*Miller* "does not require that a state court's weighing of the mitigating factors associated with youth be conducted in accordance with any particular substantive criteria of incorrigibility.").

Rather, a sentencing court must simply consider youth and its attendant circumstances in light of the defendant's crime. *Miller* requires no more. Judges do not engage in predictive analytics or employ redemption anticipation algorithms to gauge whether a defendant will remain incorrigible or corrupt into his seventies; nor should we. To the contrary, sentencing courts must merely apply the straightforward language of our *Miller*-fix statute and exercise discretion in handing down an appropriate sentence to comply with the Eighth Amendment and, by extension, Article I, § 27 of our state constitution. *See Tirado*, slip op. at 42.

Defendant, however, specifically challenges the sentencing court's *Miller* findings as to his (1) immaturity, (2) ability to appreciate the risks, (3) likelihood of benefitting from rehabilitation in confinement, (4) prior record, and (5) familial and peer pressure, and to the sentencing court's weighing of those factors. Further, defendant argues that the sentencing court disregarded mitigating evidence and improperly considered otherwise mitigating evidence in favor of a sentence of life without parole. We review each challenged finding in turn.

A sentencing court must consider the *Miller*-fix factors "in determining whether, based upon all the circumstances of the offense and the particular circumstances of the defendant, the defendant should be sentenced to life imprisonment with parole instead of life imprisonment without parole." N.C.G.S. § 15A-1340.19C(a). In addition, a sentencing court is required to enter an order which "include[s] findings on the absence or presence of any mitigating factors and such other findings as the court deems appropriate." N.C.G.S. § 15A-1340.19C(a). But, our appellate courts will not reverse a discretionary sentence "merely because the sentencer could have said more about mitigating circumstances." *Jones*, 141 S. Ct. 1321.

The Court of Appeals has properly stated that "[o]rders weighing the *Miller* factors and sentencing juveniles are reviewed for abuse of discretion." *State v. Golphin*, 292 N.C. App. 316, 322 (2024). *See also State v. Antone*, 240 N.C. App. 408, 410 (2015); *State v. Hull*, 236 N.C. App. 415, 421 (2014). Therefore, "[i]t is not the role of an appellate court to substitute its judgment for that of the sentencing judge." *State v. Lovette*, 233 N.C. App. 706, 721 (2014).[4]

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4. Historically, we have stated that "on sentencing decisions appellate courts do not substitute their judgment for that of the trial court." *State v. Ysaguire*, 309 N.C. 780, 786, (1983). Thus, sentencing courts are afforded "wide latitude in determining the existence of aggravating and mitigating factors, for it . . . observes the demeanor of the witnesses and hears the testimony." *State v. Canty*, 321 N.C. 520, 524 (1988); *see also State v. Ahearn*, 307

a. Immaturity

Defendant argues that the sentencing court disregarded mitigating evidence presented by the forensic psychologist, Dr. Thomas Harbin, that defendant was no more mature than an eight- or ten-year-old at the time of the murder. Additionally, defendant contends that the sentencing court erred by weighing defendant's immaturity as an aggravating factor rather than a mitigating factor.

The sentencing court analyzed defendant's immaturity under the *Miller*-fix statute at the time of Ms. Kennedy's murder and determined:

> The Court does not find this factor to be a significant mitigating factor in this case based on all the evidence presented. The Court notes that any juvenile by definition is going to be immature, but that there was no evidence of any specific immaturity that mitigates the defendant's conduct in this case.

Based upon Dr. Harbin's testimony, the sentencing court found in unchallenged finding of fact 6 that "defendant was a follower, and was easily influenced"; that "defendant has a harder time paying attention than others and a harder time restraining himself than others"; and that "defendant had poor social skills, very poor judgment, [and] would be easily distracted." These factors were the basis for Dr. Harbin's testimony regarding defendant's immaturity. The sentencing court obviously considered Dr. Harbin's testimony regarding defendant's immaturity and made relevant findings.

That the sentencing court did not make a specific finding as to defendant's alleged maturity of an eight- or ten-year-old is immaterial, as the sentencing court properly addressed evidence of immaturity, and it "need not make a finding as to every fact which arises from the evidence." *See In re A.E.S.H.*, 380 N.C. at 693 (cleaned up). Moreover, simply because a sentencing court could have said more about this mitigating circumstance is not grounds for a determination that the sentence violated the Eighth Amendment. *Jones*, 141 S. Ct. at 1321.

N.C. 584, 596 (1983). Similarly, we have concluded that the weight assigned to any particular mitigating circumstance is solely the province of the sentencer. *See State v. Jaynes*, 342 N.C. 249, 285 (1995). Although these cases arose under the Fair Sentencing Act, we think this deference to the sentencing court is particularly important in light of *Miller*'s insistence that discretionary sentencing and consideration of factors attendant with youth are of paramount importance. *See Miller*, 567 U.S. at 472 (emphasizing a juvenile defendant's youth as a "distinctive attribute[ ].").

Further, in unchallenged finding of fact 7, the sentencing court found that "while this evidence was presented by the defendant to try to mitigate his actions . . . th[e] evidence *also* demonstrate[d] that the defendant is dangerous." (Emphasis added). Defendant argues that this finding impermissibly construed his immaturity as an aggravating factor rather than a mitigating factor, in violation of the principle that statutory mitigating factors, if found to exist, must be given mitigating value. *See State v. Jaynes*, 342 N.C. 249, 285 (1995) (holding that if a sentencer determines that "a statutory mitigating circumstance exists, [it] must give that circumstance mitigating value."). However, the use of the word "also" by the sentencing court in this finding demonstrates that it acknowledged the existence of defendant's immaturity as a mitigating circumstance, but found that its weight, in light of the other evidence presented, was of minimal significance, and defendant has not demonstrated that the sentencing court abused its discretion. *See Golphin*, 292 N.C. App. at 44-322 ("Orders weighing the *Miller* factors and sentencing juveniles are reviewed for abuse of discretion."); *Lovette*, 233 N.C. App. at 721 ("It is not the role of an appellate court to substitute its judgment for that of the sentencing judge…."). Because the weight afforded to a mitigating circumstance is within the sound discretion of the sentencing court, defendant's contention is without merit.

b. Ability to Appreciate the Risks

Defendant next argues that the sentencing court disregarded evidence presented by Dr. Harbin that defendant was unable to appreciate the risks and consequences of his conduct at the time of the murder. Further, defendant contends that the sentencing court conflated a juvenile's ability to differentiate between right and wrong with the ability to appreciate the risks of certain conduct.

The sentencing court made the following *Miller* finding as to the mitigating nature of defendant's ability to appreciate the risks of his conduct at the time of Ms. Kennedy's murder:

> Dr. Harbin, the defendant's psychologist, testified that in spite of the defendant's diagnoses and mental health issues, the defendant would have known that the acts he and his co-defendants committed while they stole Ms. Kennedy's car, kidnapped her, and ultimately murdered her were wrong.

The sentencing court's uncontested findings of fact 5, 6, and 9 related to this *Miller* factor are binding on appeal and demonstrate that the sentencing court considered the material portions of Dr. Harbin's testimony

and other evidence regarding defendant's ability to appreciate the risks associated with his conduct. The sentencing court discussed and considered that even though Dr. Harbin testified that defendant had poor judgment, defendant also understood right from wrong at the time of Ms. Kennedy's murder, and defendant understood that kidnapping, assaulting, and murdering Ms. Kennedy was "clearly wrong." Defendant's role in the murder and his attempts to conceal or destroy evidence thereafter are also indicative of defendant's ability to understand and appreciate the risks associated with his conduct.

As with defendant's argument concerning immaturity, the sentencing court was not required to make a finding as to every fact which arose from the evidence. *See In re A.E.S.H.*, 380 N.C. at 693. Simply because a sentencing court could have said more about a mitigating circumstance is not grounds for a determination that the sentence violated the Eighth Amendment. *Jones*, 141 S. Ct. at 1321. Because there is no "formulaic checklist" or "magic-words requirement," *id.*, the sentencing court properly considered the material portions of Dr. Harbin's testimony concerning defendant's ability to appreciate the risks of his conduct at the time of the murder. Therefore, defendant's argument is without merit.

Further, we find defendant's argument that the sentencing court improperly conflated defendant's knowledge of right and wrong with his ability to appreciate the risks unpersuasive. In *Miller*, the Supreme Court stated that the ability to appreciate the consequences of conduct involves the "calculation of the risk[s] [the conduct] pose[s]" by a defendant at the time of the crime. *Miller*, 567 U.S. at 478. This is not intended to be a formulaic determination, but rather a common sense view of the evidence in light of the defendant's specific circumstances.

In addition to its finding that defendant could differentiate between right and wrong, the sentencing court found that defendant engaged in a plan to assist his co-defendant in evading a probation violation hearing. This included driving Ms. Kennedy's stolen car, throwing her in the trunk, lying to co-defendant Williams about letting Ms. Kennedy go, cleaning Ms. Kennedy's blood from the vehicle, providing Bell the lighter to start the fire that killed Ms. Kennedy, and returning to the scene to wipe down Ms. Kennedy's vehicle in an attempt to avoid detection. *See State v. Roberts*, 876 N.W.2d 863, 869 (Minn. 2016) (holding that the defendant "indicated an awareness of the consequences of his behavior when," among other things, he "dispos[ed] of evidence"); *Cook v. State*, 242 So.3d 865, 875 (Miss. Ct. App. 2017) ("[Defendants'] efforts to cover their tracks suggested an awareness of the consequences."). Therefore, the sentencing court did not misapprehend the nature of this mitigating

circumstance, and we will not substitute our judgment for that of the sentencing court. *See Lovette*, 233 N.C. App. at 721.

c. Likelihood that Defendant Would Benefit from Rehabilitation in Confinement

Defendant next asserts that the sentencing court erroneously weighed his ability to be rehabilitated in favor of a sentence of life without parole. More specifically, defendant argues that the sentencing court's finding that though "defendant has seemed to do somewhat better in prison," the "rigid, structured environment" of prison will serve him best, was improper.

At the resentencing hearing, defendant testified that over the course of his thirteen years in prison, he had taken several character-education and vocational courses, competed in sports competitions, worked several jobs, obtained his GED, and had been moved down to medium custody. However, defendant also admitted that he had received thirty-nine infractions while in prison for fighting, disobeying orders, being in unauthorized locations, using profane language, possessing tobacco and contraband, and tampering with locks. Further, defendant also confirmed that during his first ten years of prison, he refused to obtain his GED despite pleas from multiple case managers, and that he told a psychiatrist that he did not believe he should be in prison. Additionally, Dr. Harbin confirmed on cross-examination that defendant's psychological issues could make him "a pretty dangerous person," but that "being in a very structured environment would . . . tend to lessen the symptoms of [his] psychological problems."

In light of unchallenged finding of fact 2 set forth above, the sentencing court made the following *Miller* finding as to the mitigating nature of defendant's potential for rehabilitation while in confinement:

> The defendant's prison records demonstrate that the defendant has been charged and found responsible for well over 20 infractions while in prison. He consistently refused many efforts to obtain substance abuse treatment. While the defendant has in fact obtained his GED which the Court finds is an important step towards rehabilitation, the Court notes that the defendant during the first ten years plus of his confinement often refused multiple case managers pleas to obtain his G.E.D. According to prison records submitted into evidence during the February 20, 2014 evidentiary hearing, the Court notes that during a 2009

> meeting with a psychiatrist the defendant noted that he was depressed in part because he was in prison and should not be. The Court finds that throughout the defendant's life he did not adjust well to whatever environment he was in. The Court finds that in recent years, the defendant has seemed to do somewhat better in prison, which includes being moved to medium custody. Most importantly to this Court, the evidence demonstrates that in prison, the defendant is in a rigid, structured environment, which best serves to help him with his mental health issues, and serves to protect the public from the defendant, who on multiple occasions in non-structured environments committed unlawful acts when in the company of others.

The sentencing court clearly considered the mitigating evidence of defendant's slight improvements and weighed that evidence against defendant's continual bad behavior, as well as his own expert's testimony that defendant would benefit from the structured environment that prison provides. Because the weight afforded to a mitigating circumstance is entirely for the sentencing court to determine, defendant's contention is without merit.

d. Prior Record

Defendant next argues that the sentencing court erred by considering two incidents which did not constitute convictions on his criminal history. These two prior incidents included (1) defendant being charged with an armed robbery offense in Florida and (2) defendant being removed from a high school after being accused of stealing from the boy's locker room with two accomplices.

Again, defendant did not challenge finding of fact 4 related to his prior record. It is therefore undisputed that defendant was charged with robbery in Florida and that he was removed from Hobbton High School in 1998, at least in part because he was accused of stealing, and the school determined the incident did not result from any learning disability he may have had. The sentencing court further noted that these two incidents were substantially similar to his actions related to the murder of Ms. Kennedy because, in each incident, defendant was part of a group, was a criminally culpable part of each group, and failed to acknowledge his wrongdoing.

Moreover, the sentencing court stated in a footnote that, in considering the robbery, it was not specifically considering the charge or any

punishment, but rather it focused on "defendant's complete denial of any wrongdoing while involved in criminal activity as part of a group."

The Court then made its *Miller* finding as to defendant's prior record:

> The defendant's formal criminal record as found on the defendant's prior record level worksheet was for possession of drug paraphernalia. However, the Court notes that because defendant was 17 ½, he had only been an adult for criminal purposes in North Carolina courts for a short period of time. The Court considers the defendant's Armed Robbery juvenile situation in Florida and the defendant's removal from high school for stealing as probative evidence in this case, specifically because both occurrences occurred when the defendant was with others, and the defendant denied culpability in Ms. Kennedy's murder and the other two incidents. The Court does not find this to be a compelling mitigating factor for the defendant.

Defendant argues that by considering the evidence of these two incidents, the sentencing court went beyond the scope of the meaning of "prior record" under N.C.G.S. § 15A-1340.19B(c)(5). However, as the Court of Appeals correctly observed, "prior record" is not defined under N.C.G.S. § 15A-1340.19B. *Sims*, 260 N.C. App. at 677. Instead, defendant requests that this Court interpret "prior record" under the statute at issue as it is defined under the Structured Sentencing Act. *See* N.C.G.S. § 15A-1340.14(a) (2023) ("The prior record level of a felony offender is determined by calculating the sum of the points assigned to each of the offenders prior convictions . . . .").

Defendant's preferred reading, however, ignores the obvious fact that it is the rare juvenile who would have prior convictions under the Structured Sentencing Act given the presumption in favor of juvenile dispositions for delinquents. Moreover, such a reading would lead to the illogical result of precluding consideration of any delinquency adjudications under the Juvenile Code. *See* N.C.G.S. § 7B-2412 (2023) ("An adjudication that a juvenile is delinquent . . . shall n[ot] be considered conviction of any criminal offense . . . ."). This would defeat the purpose iterated in *Miller* that a sentencing court should consider a juvenile's "past criminal history." *Miller*, 567 U.S. at 479. An increase or decrease in criminal conduct would certainly be relevant to a sentencing court's determination, and limiting "prior record" only to convictions under the Structured Sentencing Act would not allow for the meaningful review of a juvenile's entire criminal history.

Moreover, the *Miller*-fix statute specifically allows a sentencing court to consider any evidence "as to any matter that the court deems relevant to sentencing, and any evidence which the court deems to have probative value may be received." N.C.G.S. § 15A-1340.19B(b). Thus, the intent of the legislature, in light of the language in *Miller*, is to allow the sentencing court to obtain, to the extent possible, a more complete picture of a defendant so that it can effectively exercise its broad discretion in sentencing juvenile murderers. Absent specific direction from the legislature that a consideration of a juvenile's "prior record" under N.C.G.S. § 15A-1340.19B only concerns convictions under the Structured Sentencing Act, we decline to read such a limitation into the statute.

Further, even if the consideration of a juvenile's "prior record" was limited to convictions, the sentencing court here did not abuse its discretion in weighing this factor. The sentencing court specifically stated that it was not "consider[ing] the charge itself or the subsequent punishment itself as evidence against the defendant," but rather, that it found both the armed robbery offense and the high school theft incident probative of defendant's tendency to be involved in group criminal conduct and then subsequently deny responsibility. Moreover, in its finding as to defendant's prior record, it noted that "defendant's formal criminal record . . . was for possession of drug paraphernalia"—not any other crime—which demonstrates that the sentencing court did not weigh the two prior incidents as substantive evidence of crimes. Rather, the sentencing court found that, in light of all the evidence presented, defendant had a tendency to be involved in group criminal activity. We find no abuse of discretion, and as discussed, the weight afforded to a mitigating factor lies within the sound discretion of the sentencing court.

e. Familial and Peer Pressure

Finally, defendant contends that the sentencing court misapprehended the peer pressure mitigating factor. Specifically, defendant argues that the sentencing court erred by discounting the peer pressure factor on the basis that defendant was not "threatened or coerced," as peer pressure is more properly determined by "whether a deliberate choice made by the defendant *was influenced by his peers*."

At defendant's trial and the resentencing hearing, evidence was presented that defendant was admonished by multiple family members and mentors that he should stay away from co-defendant Bell. Specifically, defendant's mom, sister, and his manager from Hardee's, Ms. Vickie Kurch, testified that they warned defendant to stay away from Bell, but that defendant nonetheless continued to associate with him. Further,

other evidence presented at defendant's trial demonstrated that he took initiative to be involved in the plan to steal Ms. Kennedy's vehicle and ultimately kill her. Defendant told Bell that he was "down for whatever," he provided Bell with the lighter to start the fire in the car, and he personally attempted to clean up evidence of his involvement in the crime. Additionally, defendant admitted at the resentencing hearing that he personally had made "wrong choices" on the day Ms. Kennedy was murdered. On the other hand, the only evidence presented that defendant may have been susceptible to peer pressure was Dr. Harbin's testimony that defendant was "a follower" and thus could have been easily influenced.

Again, defendant did not challenge relevant findings of fact 6, 8, and 9, and those findings are binding on appeal.

In its analysis under N.C.G.S. § 15A-1340.19B, the sentencing court made the following *Miller* finding as to the familial and peer pressure defendant experienced at the time of Ms. Kennedy's murder:

> A. The Court finds that there was no familial pressure exerted on the defendant to commit this crime. In fact, the opposite is true. Sophia Strickland, Sims' mother, testified both at the trial and at the February 20, 2014 evidentiary hearing that she had warned Sims repeatedly to stay away from the co-defendant[s] in this case. Specifically, Ms. Strickland stated at the evidentiary hearing that if Sims continued to hang out with his co-defendants, something bad was going to happen. Further, Sims' sister, Tashia Strickland, also told Sims that she did not like the co-defendants, that the co-defendants were not welcome at her residence, and that Sims should not hang out with them. Also, Vicki K[u]rch, Sims' Hardee's manager, who tried to help Sims when she could, sometimes gave Sims a free ride to work, bought Sims a coat, and fed Sims' younger brother for free, warned Sims not to hang out with co-defendants, one of whom had worked for her and she knew well. The Court finds that the defendant refused to listen to his family members' warnings to stay away from the co-defendants.
>
> B. Peer Pressure. There was no evidence in this case that Sims was threatened or coerced to do any of the things he did during the kidnapping, assault, murder, and burning of Ms. Kennedy's car. At trial,

> co-defendant Chad Williams stated that when Chris Bell first brought up the idea of stealing the car, Sims stated "I'm down for whatever." The only evidence that may fit in this category is Dr. Harbin's testimony that the defendant could be easily influenced. Nevertheless, the defendant made a choice to be with his co-defendants during Ms. Kennedy's murder, and actively participated in it. The evidence demonstrated that the defendant was apparently only easily influenced by his friends, but not his family who consistently told him to avoid the co-defendants. This demonstrates that the defendant made choices as to whom he would listen.

Based upon the record here, there was substantial evidence presented that defendant made deliberate decisions to be involved in this criminal activity. While taking into account Dr. Harbin's testimony that defendant was easily influenced, the sentencing court assigned little weight to this evidence, finding that "defendant was apparently only easily influenced by his friends, but not his family who consistently told him to avoid the co-defendants."

Further, defendant's argument that the sentencing court misapprehended the meaning of "peer pressure" by discussing the lack of threats or coercion is unpersuasive, as it fails to take the entirety of the sentencing court's finding into account. The sentencing court's *Miller* finding discussed the evidence that was presented in detail, noting the absence of any threats or coercion, but more importantly, that defendant made individual and deliberate choices to participate in the crimes. Thus, the sentencing court did not abuse its discretion.

C. Court of Appeals' Application of the Proper Standards

[3] Defendant argues that the Court of Appeals erred by applying an abuse of discretion standard to the sentencing court's resentencing order, rather than engaging in a "meaningful analysis" of whether the sentencing court's findings supported the conclusion that defendant is irreparably corrupt. However, as discussed herein, defendant's argument is contrary to authority and is without merit.

A sentence of life without the possibility of parole for juveniles is allowed and the standard of review to be applied by our appellate courts is an abuse of discretion. Our sentencing courts stand in the best position to determine whether a specific defendant should be sentenced to life without the possibility of parole. *Miller* discusses the "rarity" of

juvenile life without parole sentences, but it does not advise against applying an abuse of discretion standard. *See People v. Skinner*, 502 Mich. 89, 137 (2018) ("All crimes have a maximum possible penalty, and when trial judges have discretion to impose a sentence, the imposition of the maximum possible penalty for any crime is presumably 'uncommon' or 'rare.' "). Defendant's contention is without merit.

III. Conclusion

> "It is a great tragedy when a juvenile commits murder—most of all for the innocent victims. But also for the murderer, whose life has gone so wrong so early. And for society as well, which has lost one or more of its members to deliberate violence, and must harshly punish another."

Miller, 567 U.S. at 501 (Roberts, C.J., dissenting). The *Miller*-fix sentencing scheme satisfies federal and state constitutional concerns by requiring that sentencing courts consider a defendant's youth in mitigation and conferring discretion upon those courts to impose a punishment other than life without parole. Because it is not the role of the appellate courts to reweigh evidence on sentencing, we will generally defer to the sentencing courts on review, and the decision of the Court of Appeals is affirmed.

In addition, for reasons consistent with this Court's decision in *Bell*, defendant's *J.E.B.* claim is procedurally barred, and we affirm defendant's sentence of life in prison without parole.

AFFIRMED.

Justice EARLS concurring in the result only.

I concur in the result only. As to the *J.E.B.* issue, I concur in the result only for the reasons set out in my concurring in the result only opinion in *State v. Bell*, No. 86A02-2 (N.C. Mar. 21, 2025). *See J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994). As to the *Miller* resentencing issue, I concur in the result only for the reasons set forth in the Court of Appeals opinion below, *State v. Sims*, 260 N.C. App. 665 (2018). *See Miller v. Alabama*, 567 U.S. 460 (2012).

I write separately to respond to two profound errors in the majority's analysis of *Miller*'s sentencing requirements. First, the majority signals a shift in the *Miller* sentencing hearing inquiry away from the

circumstances of the offender *and* his offense in favor of his offense only. That shift is inconsistent with state statutes, our precedent, and precedent of the United States Supreme Court. Second, the majority's opinion commits a perverse logical fallacy by engaging in the exact type of predictive analytics it purports to reject, threatening to mislead sentencing judges as to what is expected of them under our Constitutions.[1]

As to the first point, the majority distills the *Miller* sentencing inquiry to a singular focus on the facts of the crime. It does this implicitly in how it structures its opinion. It reiterates over ten paragraphs the sentencing court's findings of fact on the details of Sims's atrocious acts. It then devotes two sentences to its observation that the sentencing court made the required findings and conclusions, before it concludes that the court complied with the Eighth Amendment's requirements. (This is not because the trial court provided scarce reasoning. Quite the opposite. Its order carefully explained what evidence was presented, how the hearing proceeded, what evidence it thought was credible, and why the evidence was or was not mitigating, and spent three pages analyzing N.C.G.S. § 15A-1340.19B's requirements.) The majority also shifts the focus explicitly. In its words, "[A] sentencing court must simply consider youth and its attendant circumstances in light of the defendant's crime."

This myopic focus on the facts of the crime violates *Miller*. That case instructed that the Eighth Amendment provides substantive protections that make juvenile sentences of life without parole *rare* in light of the totality of the circumstances of the offense and the offender. We confirmed in *State v. James*, 371 N.C. 77 (2018), that the statutory scheme that implements *Miller*'s mandate was facially constitutional only because it was designed to have a sentencer analyze "*all of the relevant facts and circumstances* in light of the substantive standard enunciated in *Miller*" to decide the appropriate sentence "based upon all the circumstances of the offense and the particular circumstances of the defendant." *Id.* at 89 (first emphasis added). The offense *and* the offender are the hearing's subject. Analyzing both is how a sentencer has discretion.

Miller is no substantive requirement at all, however, if the offender's crime is all that matters. In North Carolina, by the time a juvenile is even eligible for life without the possibility of parole, the juvenile must have been convicted of killing another person intentionally and in the first

1. In *State v. Borlase*, No. 33A24 (N.C. Mar. 21, 2025) (Earls, J., dissenting), I address the majority's other errors related to its new standard of review and its break from Eighth Amendment jurisprudence and our precedent.

degree. *See Graham v. Florida*, 560 U.S. 48, 82 (2010) (forbidding under the Eighth Amendment juvenile sentences of life without parole for non-homicide offenses); N.C.G.S. § 15A-1340.19B(a)(1) (2023) (excluding juveniles convicted of first-degree murder under a felony murder theory from life without the possibility of parole sentences). Every juvenile convicted of intentionally killing another person has by definition committed a heinous crime. It eliminates the exercise of discretion, then, to make the sentencing decision entirely dependent on whether the crime was heinous. Thus the majority's overt focus on the nature of the crime "in light of" the defendant's youth effectively revives the mandatory sentencing approach that *Miller* rejected. And the majority oversteps its appropriate role as a state's highest court by effectively overturning that Supreme Court precedent.[2]

Second, the majority asserts without a hint of irony that "[j]udges do not engage in predictive analytics or employ redemption anticipation algorithms to gauge whether a defendant will remain incorrigible or corrupt into his seventies; nor should we." But imposing on a juvenile a sentence of life without the possibility of parole is exactly such an exercise in "predictive analytics." In so doing, a sentencer predicts that a teenage defendant, who may live far longer within a prison's walls than they ever lived without, will never change. It is a prediction that "in 25 years, in 35 years, in 55 years—when the defendant may be in his seventies or eighties"—he will remain as dangerous as he was when he was a teenager, so that even the possibility of parole is futile and should be denied to him. *Sims*, 260 N.C. App. at 683 (Stroud, J., concurring in the result only). Science and common sense support that most people are not permanently frozen with the characteristics they exhibited as a teenager. *See Miller*, 567 U.S. at 471; *Jones v. Mississippi*, 141 S. Ct. 1307, 1340–41 (2021) (Sotomayor, J., dissenting). But a sentence of life without the possibility of parole for teenagers makes exactly the opposite prediction.

Following North Carolina's statutorily mandated procedures, the trial court made the necessary findings about Mr. Sims to support its conclusion that he is one of the rare juveniles for whom a life without

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2. The majority's reasoning is wrong to suggest that *Jones v. Mississippi*, 141 S. Ct. 1307 (2021), blessed this overt focus on the juvenile's crimes. Rather *Jones* embraced *Miller*'s core holding and observed that "life-without-parole sentences [would be] 'relatively rar[e]' for murderers under 18." 141 S. Ct. at 1318 (second alteration in original) (quoting *Miller v. Alabama*, 567 U.S. 460, 484 (2012)). Again, those eligible for this sentence are only those who committed murders while under the age of eighteen. It is among that pool—"murderers under 18"—for whom the sentence will be rare. *See id.*

parole sentence is constitutional. However, because I strongly disagree with the majority's circular reasoning and its departure from binding Supreme Court precedent, I concur in the result only.

Justice RIGGS joins in this concurring in the result only opinion.

VANGUARD PAI LUNG, LLC AND PAI LUNG MACHINERY MILL CO. LTD.
v.
WILLIAM MOODY, NOVA TRADING USA, INC., AND NOVA WINGATE HOLDINGS, LLC

No. 15A24

Filed 21 March 2025

Appeal and Error—preservation of issues—motion for judgment notwithstanding the verdict—not specifically raised in motion for directed verdict—waiver

In a complex business case, the Supreme Court endorsed a line of precedent from the Court of Appeals holding that, to preserve an issue for use in a motion for judgment notwithstanding the verdict (JNOV) pursuant to Civil Procedure Rule 50(b)—which is essentially a renewal of a motion for directed verdict (DV)—a party must first have timely moved for a DV on the issue, articulating the same specific argument or theory to the trial court. Here, because defendant's JNOV argument as to a conversion claim rested upon a theory raised in his DV motion only as to a separate claim (for embezzlement), the Business Court properly held that the JNOV argument was waived as to conversion. Likewise, the argument underlying defendant's JNOV motion as to a fraud claim—insufficient evidence of intent to deceive—was waived where his DV motion on that claim was based upon insufficient evidence of another element—his having made misrepresentations.

Appeal pursuant to N.C.G.S. § 7A-27(a)(2) from an opinion and order entered on 31 August 2022, a corrected final judgment entered on 28 September 2022, and an order and opinion on post-trial motions entered on 27 June 2023 by Judge Adam M. Conrad, Special Superior Court Judge for Complex Business Cases, in Superior Court, Mecklenburg County, after the case was designated a mandatory complex business case by the Chief Justice pursuant to N.C.G.S. § 7A-45.4(a). Heard in the Supreme Court on 29 October 2024.

Womble Bond Dickinson (US) LLP, by Matthew F. Tilley, for plaintiff-appellees.

James, McElroy & Diehl, P.A., by Preston O. Odom III, for defendant-appellants.

DIETZ, Justice.

Following an adverse jury verdict in this complex business case, defendants filed several post-trial motions, including a motion for judgment notwithstanding the verdict. The business court determined that two issues raised in that motion were not properly preserved because the issues were not raised in defendants' motion for directed verdict.

To support this preservation ruling, the business court relied on a line of Court of Appeals cases. As explained below, we agree with this Court of Appeals precedent and take the opportunity to endorse it. We hold that, to preserve an issue for use in a motion for judgment notwithstanding the verdict under Rule 50(b) of the Rules of Civil Procedure, the movant first must timely move for a directed verdict on that same issue. In a case involving multiple claims or defenses, an issue is raised at the directed verdict stage only if the movant expressly articulates that specific argument or theory to the trial court.

Applying this rule here, the business court properly determined that several of defendants' arguments were not preserved. The court also properly rejected defendants' other post-trial arguments on the merits. We therefore affirm the decision of the business court.

Facts and Procedural Background

Plaintiff Vanguard Pai Lung, LLC is a manufacturer and distributor of high-speed circular knitting machines. Defendant William Moody served as the president and chief executive officer of Vanguard Pai Lung through much of the 2010s.

Vanguard Pai Lung both manufactures its own equipment and serves as the sales agent for Pai Lung Machinery Mill Co. Ltd., a Taiwanese manufacturer.

Pai Lung Machinery owns a two-thirds interest in Vanguard Pai Lung. The remaining one-third interest is owned by defendant Nova Trading USA, Inc., which in turn is owned by William Moody. Moody also owns defendant Nova Wingate Holdings, LLC.

In 2017, Pai Lung Machinery brought in an accountant to investigate Vanguard Pai Lung's finances after becoming concerned about financial losses and mismanagement at the company. That investigation led Pai Lung Machinery to conclude that Moody had engaged in various forms of fraud and embezzlement of company assets.

Plaintiffs sued Moody, his family members, and the Nova entities that he owned. Plaintiffs brought sixteen claims grounded in Moody's alleged fraud and deceptive business practices. In response, defendants asserted twelve counterclaims primarily based on alleged breaches of contract.

Many claims and defendants fell away during the pretrial proceedings or are not relevant to this appeal. In 2022, the parties went to trial on plaintiffs' claims for fraud, conversion, embezzlement, unfair and deceptive trade practices, and unjust enrichment.

After the close of the plaintiffs' case in chief, defendants orally moved for a directed verdict in open court. In that oral motion, defendants made a series of arguments directed at specific claims and defenses in the case. The business court reserved a ruling on that motion. Defendants timely renewed the motion at the close of the evidence. The business court denied the motion in part and granted it in part, eliminating one of plaintiffs' theories for the unfair and deceptive trade practices claim but allowing the remaining claims to go to the jury.

The jury returned a verdict finding Moody and Nova Trading liable for fraud, Moody liable for conversion, Moody liable for embezzlement, Moody liable for constructive fraud, Moody and Nova Wingate liable for unfair and deceptive trade practices, and all defendants liable for unjust enrichment. The jury also found that Moody controlled the Nova business entities in committing the acts that constituted the fraud, unfair and deceptive trade practices, and unjust enrichment.

After the jury returned its verdict, defendants moved for dissolution of Vanguard Pai Lung, arguing that the business could not continue in light of the jury verdict. Defendants pointed to the fact that Moody and the Nova businesses, against whom Vanguard Pai Lung had pursued these claims, owned a substantial stake in the company.

The business court denied that motion, reasoning that there was no evidence of a deadlock on Vanguard Pai Lung's board and no evidence that the company withheld any distributions to defendants. The court also reasoned that dissolution would frustrate the jury's verdict, which found that plaintiffs had not breached the operating agreement or withheld any contractually owed payments.

The business court later entered a final judgment, and defendants timely moved for judgment notwithstanding the verdict or, in the alternative, a new trial or amendment of the judgment.

The business court granted the motions in part and denied the motions in part. It rejected defendants' arguments concerning the fraud, conversion, embezzlement, and unjust enrichment claims. The court granted defendants' motion for judgment notwithstanding the verdict with respect to the unfair and deceptive trade practices claim, concluding that there was insufficient evidence of conduct "in or affecting commerce."

Defendants timely appealed the business court's judgment and the rulings on the post-trial motions. *See* N.C.G.S. § 7A-27(a)(2) (2023).

Analysis

I. Preservation of Defendants' JNOV Arguments

We begin our review with defendants' motion for judgment notwithstanding the verdict, also known as a motion for JNOV.[1] Specifically, we address the business court's determination that several of defendants' JNOV arguments were not preserved for review.

Whether a party is entitled to JNOV under Rule 50(b) of the Rules of Civil Procedure is a question of law that we review de novo. *Morris v. Scenera Research, LLC*, 368 N.C. 857, 861 (2016); *see also* N.C.G.S. § 1A-1, Rule 50(b)(1) (2023).

The purpose of a motion for JNOV is to test the sufficiency of the evidence on which the jury relied and to enter a judgment contrary to the jury's verdict if, as a matter of law, the evidence presented does not support that verdict. *Scarborough v. Dillard's, Inc.*, 363 N.C. 715, 719–20 (2009). The legal standard applied to a JNOV motion is quite demanding and the motion should be granted "cautiously and sparingly." *Bryant v. Nationwide Mut. Fire Ins. Co.*, 313 N.C. 362, 369 (1985).

A court may enter JNOV only if "it appears, as a matter of law, that a recovery cannot be had by the plaintiff upon any view of the facts which the evidence reasonably tends to establish." *Scarborough*, 363 N.C. at 720 (cleaned up). Thus, to survive a motion for JNOV, the nonmovant need only point to "more than a scintilla of evidence" that supports its claim. *Morris*, 368 N.C. at 861. The nonmovant meets this low bar by

1. The term JNOV is an abbreviation of the phrase "judgment *non obstante veredicto*." In our case law, this is the most common abbreviation used for judgment notwithstanding the verdict. *See, e.g.*, *Morris v. Scenera Research, LLC*, 368 N.C. 857, 861 (2016).

demonstrating that the evidence would permit the jury to resolve the evidentiary conflicts in its favor based on more than raw "suspicion, conjecture, guess, surmise, or speculation." *Id.*

Importantly, however, there is a preservation question that must be addressed before a court examines the merits of a JNOV motion. A JNOV motion "is essentially a renewal of an earlier motion for directed verdict." *Scarborough*, 363 N.C. at 720. Thus, Rule 50(b)(1) provides that a motion for JNOV may be pursued only "in accordance with" an earlier motion for directed verdict asserted during the trial. N.C.G.S. § 1A-1, Rule 50(b)(1). Moreover, the motion for JNOV may be granted only "if it appears that the motion for directed verdict could properly have been granted." *Id.*

Implicit in this language is the understanding that a JNOV motion is limited to the specific grounds raised in the motion for direct verdict that is being renewed. Although this Court has never expressly adopted this rule, there is a long line of Court of Appeals case law holding that to "have standing after the verdict to move for JNOV, a party must have made a directed verdict motion at trial on the *specific issue* which is the basis of the JNOV." *Plasma Ctrs. of Am., LLC v. Talecris Plasma Res., Inc.*, 222 N.C. App. 83, 87 (2012) (cleaned up) (emphasis added).

The business court relied on this Court of Appeals precedent in the absence of controlling precedent from this Court. We agree with the Court of Appeals and take this opportunity to endorse that court's holding. The text of Rule 50(b) emphasizes that JNOV is available only if the JNOV motion is made "in accordance with" an earlier motion for directed verdict that "could properly have been granted." N.C.G.S. § 1A-1, Rule 50(b)(1). Thus, as the Court of Appeals has observed, under Rule 50(b), a movant "cannot assert grounds on a motion for JNOV that were not previously raised in the directed verdict motion" because those new grounds are not "in accordance with" the earlier motion. *Couch v. Priv. Diagnostic Clinic*, 133 N.C. App. 93, 100, *aff'd without precedential value*, 351 N.C. 92 (1999). We adopt the reasoning of this line of Court of Appeals cases and hold that to preserve an issue for use in a motion for JNOV under Rule 50(b), the movant first must have timely moved for a direct verdict based on that same issue.

Our adoption of this holding gives rise to a follow-on question that the Court of Appeals addressed in *Plasma Centers*: how does a court determine what "specific issues" a litigant raised in a motion for directed verdict? *See Plasma Ctrs.*, 222 N.C. App. at 87–88. Rule 50(a) requires that a motion for directed verdict "state the specific grounds therefor."

N.C.G.S. § 1A-1, Rule 50(a). This ensures that the trial court and the nonmoving party have "adequate notice" of those arguments. *See Feibus & Co. (N.C.) v. Godley Constr. Co.*, 301 N.C. 294, 299 (1980).

But this Court also has held that courts "need not inflexibly enforce the rule when the grounds for the motion are apparent to the court and the parties." *Anderson v. Butler*, 284 N.C. 723, 729 (1974), *overruled on other grounds by Nelson v. Freeland*, 349 N.C. 615 (1998). In *Anderson*, for example, there was a single claim for negligence and, at the close of the evidence, the defendants moved for a directed verdict without identifying any specific grounds. 284 N.C. at 729. This Court held that it was "obvious that the motion challenged the sufficiency of the evidence to carry the case to the jury." *Id.*

The defendant in *Plasma Centers* pointed to *Anderson* as support for an argument that, having expressly raised several contract theories in the directed verdict motion, other related theories could be raised in the JNOV motion. *Plasma Ctrs.*, 222 N.C. App. at 88. The Court of Appeals rejected this argument and distinguished *Anderson* by noting that, unlike the straightforward negligence claim in *Anderson*, the *Plasma Centers* case involved multiple contract theories and defenses. *Id.* Moreover, the movant "only argued two very specific grounds for its directed verdict motion," leading the trial court to disregard other "unasserted, but potentially viable," arguments that also could have been made. *Id.* The Court of Appeals thus concluded that only the two specific issues raised in the direct verdict motion were available in a later motion for JNOV. *Id.*

Again, we agree with the Court of Appeals reasoning and take the opportunity to endorse it. This Court's holding in *Anderson* is limited to uncomplicated, single-issue cases where the basis for the motion is the sufficiency of the evidence supporting the elements of the claim. *Anderson*, 284 N.C. at 729. In cases involving "multiple defenses and theories of liability, it is critical that the movant direct the trial court with specificity to the grounds for its motion for a directed verdict." *Plasma Ctrs.*, 222 N.C. App. at 88. When a specific argument or theory that forms a ground for relief is not expressly stated in a directed verdict motion, that issue is waived both at the directed verdict stage and later at the JNOV stage.

Having endorsed this reasoning of the Court of Appeals, we turn to its application in this case. The business court determined that several of the issues raised in defendants' motion for JNOV were not previously asserted in the oral motion for directed verdict. The court therefore ruled that these claims were waived under the precedent described above.

We begin with the court's analysis of the conversion claim. That claim involved conversion of Vanguard Pai Lung money for Moody's personal benefit, as well as conversion of company property including automobiles, cell phones, laptops, and luxury box football tickets for the benefit of Moody and his family members. The jury awarded plaintiffs $272,300 for conversion of the company funds and property.

In the motion for JNOV, Moody argued that the evidence was insufficient to support the jury's verdict because plaintiffs did not adequately identify the allegedly converted funds and because plaintiffs failed to show that Moody himself possessed much of the allegedly converted property such as automobiles and cell phones.

In the motion for directed verdict, Moody argued only that there was insufficient evidence that he converted the company laptops used by his family members:

> And as it relates to the claim of conversion related to the laptops of the Moody children, there is no allegation that Bill Moody participated in that in any way, and the claims for conspiracy have been dismissed; therefore, that claim will fail as a matter of law.

The business court determined that most of Moody's conversion arguments in the JNOV motion were not preserved. The court explained that those arguments "go far beyond what Moody raised at trial" because, in the directed verdict motion, Moody "did not refer to the disputed money, cars, cell phones, and football tickets." The court observed that with "the benefit of hindsight, Moody points to the argument that he made in his motion to direct a verdict on the *embezzlement* claim and argues that he intended that argument to apply to the *conversion* claim as well." But, the business court explained, if that was Moody's intent in his original directed verdict motion, "it was not apparent at the time, and it is not apparent from the transcript so many months after the fact."

The business court emphasized that this case "was not a single-claim trial with one or two self-evident disputes" and, relying on the rule articulated in *Plasma Centers*, concluded that "Moody made a specific, narrow argument at trial and therefore waived the more expansive arguments that are the basis of his JNOV motion."

This is a correct application of the rule from *Plasma Centers*, which we have now confirmed is the law governing this preservation issue. The arguments that Moody sought to raise in the JNOV motion were not among the "specific grounds" asserted in the motion for directed

verdict. *See* N.C.G.S. § 1A-1, Rule 50(a). Accordingly, those arguments were not preserved and the business court properly concluded that they were waived.

We next examine the fraud claim. A fraud claim has five essential elements: (1) a false representation, (2) reasonably calculated to deceive, (3) made with intent to deceive, (4) that does in fact deceive, and (5) that results in damage to the deceived party. *Ragsdale v. Kennedy*, 286 N.C. 130, 138 (1974). Here, plaintiffs alleged that Moody and his business, Nova Trading, committed fraud under two theories: by misrepresenting the value of industrial machinery that they contributed to secure a minority stake in Vanguard Pai Lung and by misrepresenting Moody's intent to have the machinery appraised in the future to confirm that purported value.

In the motion for JNOV, Moody and Nova Trading argued that there was insufficient evidence to satisfy the third element of that fraud claim—that the false representations were made with intent to deceive. The business court determined that this was not a specific ground on which they moved for a directed verdict during trial.

In the oral motion for directed verdict, Moody and Nova Trading focused on the sufficiency of the evidence concerning the first element—that defendants made misrepresentations:

> As it relates to the claims of fraud specifically related to the misrepresentations alleged to have been made related to the value of inventory and as it relates to any claims for fraud or misrepresentation on — of the intent to have the inventory appraised, that it creates more than a mere scintilla even in the light most favorable to the plaintiff here.

To be fair, this argument is so confusingly worded that defendants might have intended for it to encompass *all* the elements of fraud, including the third element, with respect to both theories of fraud asserted in the case. But under the rule we adopt from *Plasma Centers*, this confusion results in waiver. As the business court observed, this was far from a "single-claim trial with one or two self-evident disputes." The court "tendered thirty-six issues to the jury" on multiple theories and claims. In this type of multi-claim, multi-theory case, the movant must direct the trial court "with specificity" to the grounds for the motion.

Here, for example, to preserve the argument raised in the JNOV motion, Moody and Nova Trading needed to specifically assert to the

business court that they were challenging the sufficiency of the evidence that the alleged misrepresentations were made with an intent to deceive (the third element of the fraud claim). They did not do so, instead making a confusingly worded argument that led the business court to believe it was based on insufficiency of the evidence of any misrepresentations (the first element of the claim).

Compounding this confusion, in other arguments in defendants' oral motion for directed verdict, defendants repeatedly focused on specific issues or elements of individual claims. This led the business court, understandably, to focus on what defendants expressly said rather than "unasserted" issues that could only be implied from context. *Plasma Ctrs.*, 222 N.C. App. at 88. Taking all of this together, the business court properly determined that the JNOV arguments concerning the third element of the fraud claims were not adequately preserved.

We conclude by acknowledging that at the close of the plaintiffs' case and again at the close of all the evidence, litigants and their counsel might feel pressured to move the case along. Spending a substantial amount of time outside the presence of the jury reading a lengthy list of directed verdict issues in open court—particularly when it seems obvious that the trial court will defer ruling on the motions—might feel like a formality. This, in turn, can lead to inadvertent waiver of issues the litigant intended to preserve.

The best practice in these multi-claim, multi-defense cases is to prepare and file a written motion for directed verdict. This provides the opposing parties and the court with notice of the specific grounds for the motion. The key issues can then be highlighted for the court's consideration in open court without raising concerns about preservation and waiver.

II. Remaining Post-Trial Issues

In addition to these waiver rulings, the business court also examined, in the alternative, the merits of defendants' unpreserved arguments, as well as other post-trial arguments from defendants that were properly preserved, including other JNOV issues under Rule 50(b), a request for a new trial or amended judgment under Rule 59 of the Rules of Civil Procedure, and a request for dissolution of Vanguard Pai Lung.

These remaining issues are highly fact-bound and involved the application of settled law from this Court to the evidence presented in the case. We cannot improve upon the well-reasoned memorandum opinions and orders entered by the business court on these matters.

Moreover, repeating that court's analysis would not meaningfully add to our jurisprudence on these issues. We therefore affirm the business court's orders on these additional grounds for the reasons stated by the business court.[2]

Conclusion

We affirm the judgment and post-trial orders of the business court.

AFFIRMED.

2. The order and opinion of the North Carolina Business Court concerning the request for dissolution is available at 2022 NCBC 48, https://www.nccourts.gov/documents/business-court-opinions/vanguard-pai-lung-llc-v-moody-2022-ncbc-48. The order and opinion concerning the remaining post-trial motions is available at 2023 NCBC 44, https://www.nccourts.gov/documents/business-court-opinions/vanguard-pai-lung-llc-v-moody-2023-ncbc-44.

JEFFERSON GRIFFIN

v.

NORTH CAROLINA BOARD OF ELECTIONS

From N.C. Board of Elections

No. 320P24

AMENDED ORDER

On 18 December 2024, petitioner filed a petition for writ of prohibition and motion for temporary stay related to the 2024 election for a Seat 6 on the Supreme Court of North Carolina. Prior to filing a response or this Court taking action on petitioner's filings, respondent Board of Elections filed with this Court on 19 December 2024 a notice of removal of this action to the United States District Court for the Eastern District of North Carolina. On 6 January 2025, the United States District Court for the Eastern District of North Carolina remanded the matter to this Court.

Even though we received notice from the Board of Elections of its appeal of the order from the United States District Court for the Eastern District of North Carolina, in the absence of a stay from federal court, this matter should be addressed expeditiously because it concerns certification of an election.

Therefore, petitioner's motion for temporary stay is allowed, and the Court upon its own motion sets the following expedited briefing schedule concerning the writ of prohibition:

1. Petitioner shall file his brief on or before 14 January 2025;
2. Respondent shall file its response on or before 21 January 2025; and
3. Petitioner shall file his reply brief on or before 24 January 2025.

By order of the Court in Conference, this the 7th day of January 2025.

/s/ Allen, J.
For the Court

Riggs, J., recused.

Justices Earls and Dietz dissent.

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 7th day of January 2025.

s/Grant E. Buckner

Grant E. Buckner
Clerk of the Supreme Court

Justice ALLEN concurring.

I write separately to stress that the Court's order granting Judge Griffin's motion for temporary stay should not be taken to mean that Judge Griffin will ultimately prevail on the merits. It seems necessary to make this point because the opinions filed by my dissenting colleagues could give the opposite impression to readers unfamiliar with the intricacies of appellate procedure. By allowing the motion, the Court has merely ensured that it will have adequate time to consider the arguments made by Judge Griffin in his petition for writ of prohibition. As Judge Griffin himself concedes in his filings with this Court, in the absence of a stay, the State Board of Elections will certify the election, thereby rendering his protests moot.

Justice EARLS dissenting.

I dissent on the grounds that the standard for a temporary stay has not been met here, where there is no likelihood of success on the merits and the public interest requires that the Court not interfere with the ordinary course of democratic processes as set by statute and the State Constitution. Petitioner Judge Jefferson Griffin's motion for a temporary stay is procedurally improper, as he has failed to follow the lawful process for appealing a final decision on an election protest, instead rushing to the very Court on which he seeks membership for validation of his extraordinary legal arguments.

Moreover, even if the filing were procedurally proper, his motion for a temporary stay should be denied because he has failed to meet the standard for granting preliminary relief. Simply put, the laws and the Constitution of this State provide for the proper execution of the will of the voters following an election, with the issuance of a certificate of election duly following the procedures set by law. Free and fair elections demand nothing less, and there is a substantial public interest served by

following the rule of law. For this Court to intervene in an unprecedented way to stop that process, where there is no underlying merit to the contention that some 60,000 citizens who registered to vote and voted should have their votes thrown out, there must be a strong showing of the likelihood of success on the merits. There is no such showing here. Therefore, I dissent.

I. Judge Griffin's Request for a Temporary Stay Is Procedurally Improper

Judge Griffin invokes North Carolina Rule of Appellate Procedure 23(e) in his application for a temporary stay. Under Rule 23(e), a party may seek "an order temporarily staying enforcement or execution of the judgment, order or other determination pending decision by the court upon the petition for supersedeas." N.C. R. App. P. 23(e) (2023). Griffin asserts that Rule 23(e)'s allowance of a stay for a *petition of writ of supersedeas* should be extended to encompass his *petition for writ of prohibition*—two completely separate requests for relief—but he cites no support for such a maneuver in the Rules of Appellate Procedure.

Assuming that the Rules of Appellate Procedure supported his standalone motion for temporary stay, Griffin still has not met his burden to show he is entitled to it, since his rights can be vindicated through existing legal channels. *See A.E.P. Industries, Inc. v. McClure*, 308 N.C. 393, 401 (1983); *Pruitt v. Williams*, 288 N.C. 368, 372 (1975) (noting that a party seeking a stay bears the burden to show their entitlement to it). A temporary stay is used "to preserve the status quo of the parties during litigation." *A.E.P. Industries, Inc.*, 308 N.C. at 401 (cleaned up) (quoting *Investors, Inc. v. Berry*, 293 N.C. 688, 701 (1977)); *cf. Huskins v. Yancey Hospital, Inc.*, 238 N.C. 357, 361 (1953) (explaining that a court must "necessarily refuse[ ] an interlocutory injunction if the plaintiff fails to make out an apparent case for the issuance of the writ"). In general, granting such a stay is proper only "if a plaintiff is likely to sustain irreparable loss" without it—in other words, that "issuance is necessary for the protection of a plaintiff's rights during the course of litigation." *Investors, Inc.*, 293 N.C. at 701; *accord Bd. of Provincial Elders v. Jones*, 273 N.C. 174, 182 (1968). That inquiry, in turn, looks to "whether the remedy sought by the plaintiff is the most appropriate for preserving and protecting its rights or whether there is an adequate remedy at law." *A.E.P. Industries, Inc.*, 308 N.C. at 406.

Here, Griffin cannot show a threat of irreparable harm because state law provides a specific procedure, in a specific venue, by a specific timeline, for raising the exact challenges he asks this Court to resolve.

See N.C.G.S. § 163-182.14 (2023). Specifically, for statewide judicial elections, "an aggrieved party has the right to appeal the final decision [of the State Board of Elections] to the Superior Court of Wake County within 10 days of the date of service." *Id.* at (b). After the final decision, the State Board shall issue the certification of the election "unless an appealing party obtains a stay of the certification from the Superior Court of Wake County within 10 days after the date of service." *Id.* The Superior Court of Wake County "shall not issue a stay of certification unless the petitioner shows the court that the petitioner has appealed the decision of the State Board of Elections, that the petitioner is an aggrieved party, and that the petitioner is likely to prevail in the appeal." *Id.* Simply put, state law provides that the Wake County Superior Court, not our Court, is to resolve these challenges, subject to the normal appeals process—all of which Griffin has disregarded in his insistence that we resolve the merits of his challenges in the first instance.

That further raises the question: why does Judge Griffin say he seeks relief in this Court instead of the court where he was supposed to file? His petition asserts that a stay and corresponding ruling on the merits is necessary because otherwise the case will be "improperly remov[ed] to federal court" and because "it will take considerable time before a remand motion is briefed and ruled on." But a party's apparent hope that they are more likely to get their way with a specific court, and quicker than they might through the appropriate channels, hardly meets the "irreparable harm" standard. The majority's special order does not explain why it finds its exercise of jurisdiction proper, notwithstanding a state statute expressly to the contrary, instead asserting that Griffin's action "concerns certification of an election."

II. Griffin Has Failed to Meet His Burden to Show He Likely Will Prevail on the Merits

Disregarding the importance of legal procedure, the majority today issued a nebulous "temporary stay related to the 2024 election" and ordered expedited briefing on the underlying merits of Griffin's challenge. This, too, is improper. Even assuming that our Court, instead of the Wake County Superior Court, were the proper place for an aggrieved party for judicial office to seek a stay of an election certification, Griffin has still failed to meet his burden to show that he is "likely to prevail in the appeal." *See* N.C.G.S. § 163-182.14(b).

To start, Griffin admits that one of his challenges, if successful, would not alter the outcome of the election given present vote totals. That challenge would affect the ballots of only 266 people, far fewer

than Justice Allison Riggs's lead of 734 votes. *See In re Election Protests of Jefferson Griffin, Ashlee Adams, Frank Sossamon, and Stacie McGinn*, Decision and Order 3 (State Bd. of Elections, Dec. 13. 2024) [hereinafter Griffin Order]. The substance of that challenge is that there is an apparent conflict between a state law dating back to 2011, which permits individuals living overseas who are the descendants of North Carolina residents to vote in state elections, and the North Carolina Constitution. *See* UMOVA, SL 2011-182, N.C. Sess. Laws 687–97 (2011); N.C.G.S. § 163-258.2(1)(e) (2023). Entertaining Griffin's challenge to the constitutionality of a statute that has existed for over a decade, *after* an election has already occurred, and especially where it would not affect the outcome, is inappropriate to say the least. *Cf. Singleton v. Dep't of Health and Human Servs.*, No. 260PA22, 2024 WL 4524680 (per curiam) (N.C. Oct. 18, 2024) (noting the lawful procedure for a party to follow to contest the facial validity of a statute).

Griffin's second challenge is to the votes of 1,409 overseas voters, including military and armed services members, who allegedly did not provide copies of their photo identification with their absentee ballots. *See* Griffin Order, *supra*, at 3. He argues that these votes should not be counted, because of his interpretation of two state statutes.

Notably this challenge was the only one unanimously rejected by the State Board of Elections in its 13 December 2024 decision and order on appeal here. *See* Griffin Order, *supra*, at 39. The State Board explained that, since April 2023, through six separate elections, it has interpreted the two statutes as not requiring military and overseas-citizen voters covered by Article 21A to show a photocopy of photo identification or an ID Exception Form. *Id.* at 32, 37, 39. Neither Griffin nor the North Carolina Republican Party objected to this Rule during the administrative rulemaking process, nor did they challenge it under the traditional administrative or judicial procedure. *Id.* at 37. Indeed an agency appointed by General Assembly leadership approved the rule unanimously. *Id.* Whatever the merits of the statutory interpretation question, "We decline to grant [a party] extraordinary relief when they are responsible for their own predicament." *Kennedy v. N. Carolina State Bd. of Elections*, 905 S.E.2d 55, 57 (N.C. 2024) (mem.).

Griffin's final challenge is to exclude the votes of more than 60,000 North Carolinians because a state database lacked either a North Carolina drivers license number or the last four digits of a social security number for a registered voter. The legal and factual assumptions in this challenge are too many to count, let alone to show Griffin "is likely to prevail on appeal." *See* N.C.G.S. § 163-182.14(b). Here I will note

only his extraordinary factual assumptions: nowhere in his more than 4,000 pages of filings with this Court does Griffin identify a single voter who actually possessed either number yet did not provide it when registering to vote, which must be true for his challenge to bear fruit even under his own legal theory. *Cf.* Griffin Order, *supra*, at 15, 17. Nor does Griffin identify a single voter who would not have been lawfully registered to vote absent an administrative technicality of a missing number in a state government database. Those factual omissions doom Griffin's challenge on this matter, because he has failed to show "probable cause to believe that a violation of election law or irregularity or misconduct has occurred," *see* N.C.G.S. § 163-182.10(a)(1), let alone one sufficient to change the outcome of the election at this late stage.

Even more fatal to the likelihood of success on this claim is the fact that at least twice before, as the State Board of Elections pointed out in its Order, this Court has rejected the proposition that a protest can be used to discount the ballots of eligible voters who did everything they were told to do to register to vote. *See Overton v. Mayor & City Comm'rs of Hendersonville*, 253 N.C. 306, 316 (1960); *Woodall v. W. Wake Highway Com.*, 176 N.C. 377, 388 (1918). That precedent instructs that alleged errors by election officials in the maintenance of voter databases or the processing of voter registration forms cannot be used to invalidate an otherwise eligible voter's ballot. That principle is especially applicable here, given that the State Board found that Griffin failed to properly serve his protests on the voters whose ballots he seeks to discard, as required by law. *Cf.* Griffin Order, *supra*, at 6–14.

At bottom, the timing of Griffin's claims speaks volumes about their substance. By waiting until after the votes were cast and the results tallied, Griffin seeks to retroactively rewrite the rules of the election to tilt the playing field in his favor. His filings amount to a broadside legal attack, raising a laundry list of statutory and constitutional objections to long-established election laws. These legal arguments rest on factual assumptions that he has failed to prove. These claims, sweeping as they are, could—and should—have been brought long before voters went to the polls. From the Court's indulgence of this sort of fact-free post-election gamesmanship, I dissent.

Justice DIETZ dissenting.

I would deny the petition and dismiss the stay request under our state's corollary to a federal election doctrine known as the "*Purcell*

principle." *See Purcell v. Gonzalez*, 549 U.S. 1, 4–5 (2006) (per curiam). The *Purcell* principle recognizes that, as elections draw near, judicial intervention becomes inappropriate because it can damage the integrity of the election process. *See generally Merrill v. Milligan*, 142 S. Ct. 879, 880-81 (2022) (Mem.) (Kavanaugh, J., concurring) (collecting cases). We have acknowledged a state version of this doctrine in past cases. *See, e.g.*, *Pender Cnty. v. Bartlett*, 361 N.C. 491, 510 (2007).

In my view, the challenges raised in this petition strike at the very heart of our state's *Purcell* principle. The petition is, in effect, post-election litigation that seeks to remove the legal right to vote from people who lawfully voted under the laws and regulations that existed during the voting process. The harm this type of post-election legal challenge could inflict on the integrity of our elections is precisely what the *Purcell* principle is designed to avoid.

Now, to be fair, I believe some of these legal challenges likely have merit. This case, understandably, has drawn a tremendous amount of public attention. Nearly all of the press coverage and public discourse seems focused on Judge Griffin's challenge to the votes of around 60,000 people whose voter registration information lacked complete driver's license or social security information.

In my view, this portion of the argument is almost certainly meritless. I also do not view it, having read Judge Griffin's petition, as a central part of the argument.

Instead, the crux of Judge Griffin's legal claims are two state law arguments that appear to me quite likely to be meritorious. It is worth articulating them here because, meritorious as they may be, they still invoke *Purcell* issues.

First, the State Board of Elections decided to permit people living in foreign countries to vote in our state elections although these people (1) have never stepped foot in North Carolina and (2) informed the State Board of Elections that they have no intent to ever reside in our state. This decision by the Board appears to me to be quite plainly unconstitutional. Only residents of North Carolina can vote in our state elections. *See* N.C. Const. art. VI, § 2.

Of course, many people not currently living within the borders of our state might nevertheless be residents for voting purposes—for example, college students attending a school in another state, or military servicemembers stationed overseas. *See* N.C.G.S. § 163-57. But under our state constitution and corresponding election laws, people

who admit that they have *never* resided in North Carolina and never *intend* to reside in North Carolina simply cannot vote in our state elections. *Id.* Remarkably, the State Board of Elections decided otherwise.

Second, the State Board of Elections decided that people living in foreign countries who want to vote in our state elections do not need to comply with our State's voter ID law, although all voters living in North Carolina must do so. *See* 8 N.C. Admin. Code § 17.0109(d).

I do not have the time in this opinion for a deep dive into the Board's strained reasoning for this choice. Suffice it to say that this decision—which appears to rely on the bizarre view that voter ID is a means of "authenticating" a ballot, not identifying the human being who is voting—does not appear consistent with the text of the applicable state laws. *See* N.C.G.S. § 163-166.16 & -230.1(f1); N.C.G.S. § 163-239.

Moreover, the Board's decision is obviously inconsistent with the law's intent. One does not need a law degree to understand that people claiming to be registered North Carolina voters while mailing in absentee ballots *from a foreign country* are among the key groups of people that the General Assembly (and we the people in our state constitution) intended to be subject to our voter ID law. That law is designed to protect the integrity of our elections. It is certainly easier for foreign actors to meddle in an election from overseas. Exempting voters in foreign countries from voter ID requirements that apply to everyone else simply cannot be squared with the text of the law or the obvious legislative intent.

Having said all this, these two decisions by the State Board of Elections were not made in the context of Judge Griffin's election. They are contained in election rules already in effect when Judge Griffin's election took place. The voter ID issue stems from a regulation promulgated by the Board through an open process long before the election. *See* 8 N.C. Admin. Code § 17.0109(d). Likewise, the decision to register voters who have never resided in our state and never intend to reside here is based on the Board's public interpretation of a statute in effect since 2011. *See* Uniform Military and Overseas Voters Act, S.L. 2011-182, 2011 N.C. Sess. Laws 687, 687–89; State Board of Elections Mem. 2012-01 (Jan. 23, 2012).

Thus, in my view, these potential legal errors by the Board could have been—and should have been—addressed in litigation long before people went to the polls in November. As the Fourth Circuit recently observed, in the past few years "North Carolina has been flooded with dozens of challenges to the State's electoral regulations." *Sharma*

v. Hirsch, 121 F.4th 1033, 1043 (4th Cir. 2024). Many of these challenges "are reasonably grounded in the law, and their gravity should not be understated." *Id.* But this constant litigation, although often important and laudable, "is not conducive to the most efficient administration of elections." *Id.*

This is the genesis of our state's *Purcell* principle. Because of the chaos that can emerge from repeated court-compelled changes to how we administer elections, at some point the rules governing an election must be locked in. As Justice Kavanaugh has observed, when "an election is close at hand, the rules of the road should be clear and settled." *Democratic Nat'l Comm. v. Wisconsin State Legislature*, 141 S. Ct. 28, 31 (2020) (Mem.) (Kavanaugh, J., concurring). Knowing that these rules are fixed and will no longer change is essential to "giving citizens (including the losing candidates and their supporters) confidence in the fairness of the election." *Id.* Taking this concept one logical step further, once people are actually *voting* in the election, it is far too late to challenge the laws and rules used to administer that election. This is, in my view, a central concept of the *Purcell* principle.

Admittedly, the *Purcell* principle itself is a federal doctrine that only applies to federal courts. *Id.* But this Court has long acknowledged a state version of *Purcell* (although not always by name). *See Pender Cnty.*, 361 N.C. at 510; *see also Holmes v. Moore*, 382 N.C. 690, 691 (2022) (Mem.) (Newby, C.J., dissenting); *Harper v. Hall*, 382 N.C. 314, 319 (2022) (Mem.) (Barringer, J., dissenting). I believe this principle is a necessary part of our state law doctrine for the same reasons it is incorporated into federal law. Accordingly, I believe we must apply it, when appropriate, in state election litigation. This is one of those cases.

In sum, I would hold that the relief sought in the petition for a writ of prohibition comes too late. Although these challenges to our state's election laws and regulations might be meritorious, they are not ones that can change the rules of an election after the voters of our state already went to the polls and voted.

Permitting post-election litigation that seeks to rewrite our state's election rules—and, as a result, remove the right to vote in an election from people who already lawfully voted under the existing rules—invites incredible mischief. It will lead to doubts about the finality of vote counts following an election, encourage novel legal challenges that greatly delay certification of the results, and fuel an already troubling decline in public faith in our elections. I therefore believe our state version of the *Purcell* principle precludes the relief sought in the petition and respectfully dissent from the Court's decision not to deny it outright.

JEFFERSON GRIFFIN

v.

NORTH CAROLINA BOARD OF ELECTIONS

From N.C. Board of Elections

No. 320P24

ORDER

Petitioner filed a petition for writ of prohibition and motion for temporary stay on 18 December 2024 which was subsequently renewed on 6 January 2025.[1] This Court entered an Amended Special Order on 7 January 2025 in which petitioner's emergency motion for a temporary stay was allowed and an expedited briefing schedule was established. Although the time for filing petitioner's reply brief has not expired, the arguments of the parties have been thoroughly developed.

Petitioner contests three categories of potentially illegal votes: (1) 5,509 overseas voters who purportedly violated state law by not providing photo ID; (2) 267 voters who were born abroad and have never resided in this state; and (3) 60,273 voters who failed to provide required information when they registered to vote.

This Court has stated that "[t]o permit unlawful votes to be counted along with lawful ballots in contested elections effectively 'disenfranchises' those voters who cast legal ballots, at least where the counting of unlawful votes determines an election's outcome." *James v. Bartlett*, 359 N.C. 260, 270, 607 S.E.2d 638, 644 (2005). Indeed, "votes are not accurately counted if ineligible voters' ballots are included in the election results." *Bouvier v. Porter*, 386 N.C. 1, 3 (2024). *See also Swaringen v. Poplin*, 211 N.C. 700 (1937) ("A free ballot and a fair count must be held inviolable to preserve our democracy."); *Harper v. Hall*, 384 N.C. 292, 363 (2023) (Free elections under art. I, § 10 of the North Carolina Constitution includes the right to an accurate counting of votes.).

But a writ of prohibition is an extraordinary writ. The writ "does not lie for grievances which may be redressed, in the ordinary course of judicial proceedings, [or] by appeal . . . it is to be used, like all such, with great caution." *State v. Whitaker*, 114 N.C. 818 (1894); *see also Holly*

1. Respondent removed this matter to the United States District Court for the Eastern District of North Carolina on 19 December 2024. The matter was remanded to this Court on 6 January 2025.

Shelter R. Co. v. Newton, 133 N.C. 132 (1903) (a writ of prohibition "will not issue when there is any sufficient remedy by ordinary methods, as appeal, injunction, etc., or when no irreparable damage will be done.").

State law allows an aggrieved party to appeal the final decision of the State Board of Elections on an election protest to the Superior Court of Wake County. N.C.G.S. § 163-182.14(b). After filing his petition for writ of prohibition with this Court, petitioner sought judicial review in the Superior Court of Wake County pursuant to N.C.G.S. § 163-182.14(b) on the same grounds as those set out in his petition (file numbers 24CV040619-910, 24CV040620-910, and 24CV040622-910).[2]

The Court on its own motion dismisses the petition for writ of prohibition so that the Superior Court of Wake County may proceed with the appeals that petitioner filed in 24CV040619-910, 24CV040620-910, and 24CV040622-910. Absent further action by this Court, the temporary stay allowed on 7 January 2025 shall remain in place until the Superior Court of Wake County has ruled on petitioner's appeals and any appeals from its rulings have been exhausted. The Superior Court of Wake County is ordered to proceed expeditiously.

IT IS SO ORDERED.

By order of the Court in Conference, this the 22nd day of January 2025.

/s/ Allen, J.
For the Court

Riggs, J., recused.

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 22nd day of January 2025.

s/Grant E. Buckner

Grant E. Buckner
Clerk of the Supreme Court

2. Respondent also removed the petitions for judicial review to the United States District Court for the Eastern District of North Carolina.

Chief Justice NEWBY concurring.

I concur in the decision to dismiss petitioner's petition for writ of prohibition. Our General Statutes clearly provide that petitioner's right of appeal from the decision of the State Board of Elections lies with the Superior Court of Wake County. N.C.G.S. § 163-182.14(b) (2023). Petitioner needs to follow this procedure.

I write separately to emphasize that this case is not about deciding the outcome of an election. It is about preserving the public's trust and confidence in our elections through the rule of law. On the night of the election, petitioner led his opponent by almost 10,000 votes. Over the course of the next several days, his lead slowly dwindled, and he now trails his opponent by 734 votes out of the 5,540,090 total votes cast. That is a highly unusual course of events. It is understandable that petitioner and many North Carolina voters are questioning how this could happen. Petitioner has a legal right to inquire into this outcome through the statutorily enacted procedures available to him. *See generally id.* §§ 163-182.9 to -182.15; N.C. Const. art. I, § 18.

Specifically, our General Statutes provide for the filing of election protests to inquire into the integrity of the election process. *See* N.C.G.S. § 163-182.9. Election protests allow candidates and voters to "alert" election officials "to perceived problems" in an election so that any errors may be rectified before the result is finalized. *See Bouvier v. Porter*, 386 N.C. 1, 4, 900 S.E.2d 838, 843 (2024). Election protests may address any "irregularity" or "misconduct" in the election process, N.C.G.S. §§ 163-182.9(b)(2), -182.10, including the counting and tabulation of unlawful ballots, *see id.* §§ 163-182.9(b)(2), -182.12, -182.13(a)(1). They are intended "to assure that an election is determined without taint of fraud or corruption and without irregularities that may have changed the result of an election." *Id.* § 163-182.12. Every lawful vote must be counted; every illegal vote must be disregarded. *See James v. Bartlett*, 359 N.C. 260, 270, 607 S.E.2d 638, 645 (2005).

There is nothing anti-democratic about filing an election protest. The process was designed by the people's representatives in the General Assembly as the lawful way to inquire into elections and is transparently set out in the General Statutes. *See* N.C.G.S. §§ 163-182.9 to -182.15. Accordingly, election protests are not unusual; they are established by law and intended to promote "the public's trust and confidence in our system of self-government." *Bouvier*, 386 N.C. at 4, 900 S.E.2d at 842.

This statutory scheme contemplates that throughout the entire protest process, certification of the election will be stayed until all

protests are fully resolved. *See* N.C.G.S. §§ 163-182.15(b)(1), (2). In other words, election protests are a crucial step in ensuring integrity in an election result before the result becomes final.

While designed to proceed expeditiously, *see Bouvier*, 386 N.C. at 16, 900 S.E.2d at 850, the election protest process can take months. For example, a 2004 race for Guilford County commissioner was not certified until a candidate's appeals of her election protests were fully resolved eighteen months after the election.[1] *See In re Wade*, 360 N.C. 481, 632 S.E.2d 773 (2006) (declining to grant further review of candidate's election protests). In the 2004 election for Superintendent of Public Instruction, this Court did not rule on the relevant election protests until three months after the election. *James*, 359 N.C. at 260, 607 S.E.2d at 638. Ultimately, that election result was not finalized or certified until August 2005—almost ten months after election night.[2] The 2004 election for Commissioner of Agriculture was also disputed for three months after the election.[3] After all, it is more important to ensure the result is accurate than to hurriedly finalize the process as quickly as possible. This is particularly true here where both candidates continue in their current judicial positions during the pendency of petitioner's protests.

The election protest process preserves the fundamental right to vote in free elections. *See* N.C. Const. art. I, § 10. "It is well settled in this State that" this fundamental right includes " 'the right to vote on equal terms,' " and "to participate in an electoral process that is necessarily structured to maintain the integrity of the democratic system." *James*, 359 N.C. at 270, 607 S.E.2d at 644 (quoting *Northampton Cnty. Drainage Dist. No. One v. Bailey*, 326 N.C. 742, 747, 392 S.E.2d 352, 356 (1990)). This right is violated when "votes are not accurately counted [because] [unlawful] [ ] ballots are included in the election results." *Bouvier*, 386 N.C. at 3, 900 S.E.2d at 842. Further, the inclusion of even one unlawful ballot in a vote total dilutes the lawful votes and "effectively 'disenfranchises' " lawful voters. *James*, 359 N.C. at 270, 607 S.E.2d at 644. Election protests protect against this risk of vote dilution by enabling candidates

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1. Gary D. Robertson, *Court resolves 2004 election*, Star News Online (May 6, 2006, 12:01 AM), https://www.starnewsonline.com/story/news/2006/05/06/court-resolves-2004-election/30265518007/.

2. Robert P. Joyce, *The Last Contested Election in America*, Popular Gov't, Winter 2007, at 43, 49.

3. *Cobb Concedes Ag Commissioner Race to Troxler*, WRAL News (Feb. 4, 2005, 4:02 AM), https://www.wral.com/story/115340/.

and voters to rigorously investigate the election process, identify unlawful ballots, and ensure those ballots are not counted. *See* N.C.G.S. § 163-182.10(d)(2)e (providing that the remedy for a meritorious election protest may be correction of the vote total). This process is even more important in very close elections like this one because it could affect the outcome. *See Bouvier*, 386 N.C. at 5, 900 S.E.2d at 843.

It is unfortunate that petitioner has been repeatedly chastised for pursuing his election protests in the manner authorized by law. Various filings in this matter have accused petitioner of seeking to "disenfranchise" voters in order to "overturn" the results of this election and of intentionally "delay[ing]" its certification. Such statements mischaracterize the election protest process, hindering its efficacy and breeding distrust in our elections. Blaming citizens for using the legal processes afforded them by law only discourages some from voicing their concerns and wrongfully taints those who do. *Cf. id.* at 16–17, 900 S.E.2d at 851.

Moreover, any delay in the resolution of petitioner's election protests was caused by the State Board. Pursuant to N.C.G.S. § 163-182.14(b), petitioner filed his appeals of the State Board's decision on his election protests in the Superior Court of Wake County on 20 December 2024. That same day, the State Board immediately removed those appeals to federal court, which automatically prevented the superior court from taking any action. *See* 28 U.S.C. § 1446(d). Seventeen days later, after considering the matter on an expedited briefing schedule, the district court remanded petitioner's election protest appeals to the superior court because they present issues that "arise purely under state law," and an avenue for "timely and adequate state court review is available." Nevertheless, it appears that the State Board once again has sought to delay the superior court's consideration of petitioner's appeals by immediately appealing the district court's remand order to the Fourth Circuit Court of Appeals and seeking a stay of the remand to prevent the superior court from regaining jurisdiction over the matter. If the Fourth Circuit grants that stay or reverses the district court's remand order, it will once again halt the statutory election protest process.

Over a month has passed since petitioner filed his appeals in the Superior Court of Wake County. Yet no progress toward finality has been made because the State Board has sought to elude the superior court's review. If the State Board is concerned about delaying the certification of this election, why does it seek to circumvent the statutory process for reviewing petitioner's election protests?

There appear to be valid concerns that some of the State Board's actions in this election may violate the law. *See Order*, *Griffin v. State Board of Elections*, No. 320P24 (Jan. 7, 2025) (Dietz, J., dissenting). It is possible that these actions may affect the outcome of the election. No court has addressed the merits of petitioner's claims. Nevertheless, if petitioner seeks to pursue his right to ensure that only lawful votes are counted and that the result of the election is accurate, he needs to follow the statutorily provided procedures. We have ordered that this statutory process be carried out expeditiously. Thus, I respectfully concur in the Court's order.

Justices BERGER and BARRINGER join in this concurrence.

Justice EARLS concurring in part and dissenting in part.

The Court today dismisses the petition that it improvidently indulged only two weeks ago, waiting until a possible future date to weigh in on the merits of Judge Jefferson Griffin's protests. It does so because it determines that it was improper for the petitioner Judge Jefferson Griffin to leapfrog over a direct appeal to the Wake County Superior Court, as state law requires, and instead to seek "an extraordinary writ" in our Court. *See* Order, *supra*. I agree with that conclusion, for the reasons I specified in the Court's last Amended Order in this matter. *Griffin v. N.C. State Bd. of Elections*, No. 320P24, Amended Order (Jan. 7, 2025) (Earls, J. dissenting).[1] However, I also continue to maintain, for the reasons explained in my dissent to that Order, that there is no merit to the Petition for a Writ of Prohibition in these circumstances and the Petition should be denied.

I dissent from the part of today's order that leaves in place the temporary stay that the Court issued on 7 January 2024. The Court has effectively ordered a preliminary injunction to keep the State Board of Elections from certifying the 2024 contest for the Supreme Court. Far from signaling that the "temporary stay should not be taken to mean

1. The Court apparently determined that this request for extraordinary relief was improper after ordering expedited briefing, on its own motion, two weeks ago. *See Griffin v. N.C. State Bd. of Elections*, No. 320P24, Amended Order (Jan. 7, 2025). This Court has since received over 700 pages of briefing in this matter, nearly half of which was submitted yesterday by 11:59 pm. Yet today the Court determined that "the issues before the Court are fully developed" and ready for resolution in its Order. It does so even as the briefing it ordered has not yet completed.

that Judge Griffin will ultimately prevail on the merits," *Griffin*, No. 320P24, Amended Order (Allen, J. concurring), a preliminary injunction is awarded only where the party requesting it "is able to show likelihood of success on the merits of his case." *A.E.P. Indus., Inc. v. McClure*, 308 N.C. 393, 401 (1983); *accord Triangle Leasing Co. v. McMahon*, 327 N.C. 224, 227 (1990); *Investors, Inc. v. Berry*, 293 N.C. 688, 701 (1977). The Court today apparently determines that Judge Griffin has met that standard and so the continued injunction is appropriate. (I say apparently, because the Court does not explain what justifies its decision to keep in place the temporary stay.) It is unclear, as well, how we have jurisdiction under our Rules of Appellate Procedure to Order a stay of the certification of election while simultaneously dismissing the Petition. In maintaining the temporary stay, the Court prevents the Wake County Superior Court from deciding for itself whether Griffin is likely to succeed on the merits and whether a stay is justified—a decision which state law vests in that court specifically. *See* N.C.G.S. § 163-182.14 (2023). Faithfully executing the law here means that the trial court should, in the first instance, be deciding whether a stay is warranted.

If, however, the Court still believes that allowing the stay to continue is not a reflection of the likelihood of success on the merits, that opens a different Pandora's Box. It means that an injunction to prevent the certification of an elected official is warranted any time a losing candidate decides to appeal an adverse decision on an election protest from the State Board of Elections to the Superior Court. If any losing candidate can make any sort of argument about votes in the election, no matter how frivolous, and automatically receive a court-ordered stay on appeal, preventing the winning candidate from being certified, nothing stops litigious losers from preventing duly elected persons from taking office for months or longer. Such a set-up incentivizes costly litigation of baseless claims for those candidates who can afford it, undermines confidence in our democratic system, and has no support in existing law. It sets up courts to be the arbiters of election outcomes instead of voters, and weakens faith in the democratic processes of this state. In seeking to invalidate the votes of over 60,000 voters, Judge Griffin cannot identify a single voter who fraudulently cast a ballot without being duly qualified under the laws of this state to do so.

I dissent finally on what I perceive to be a signal in this Order as to the Court's preferred outcome. The Order instructs the Superior Court to proceed expeditiously, while keeping in place a preliminary injunction against certification, which requires a showing of likelihood of the merits as I explained above. At the same time, the Order reiterates that the

petitioner has identified "potentially illegal votes" while citing caselaw to suggest that a constitutional violation will result from "unlawful votes" diluting other ballots. I do not join in that signal. We cannot overturn the results of an election on potentials. Notwithstanding these signals, I am confident that the members of our judiciary who evaluate these claims shall do so fairly and in furtherance of our solemn obligation to administer "right and justice . . . without favor, denial, or delay." N.C. const. art. I, § 18.

Justice BERGER concurring.

The underlying question is straightforward – one with a clear and evident answer. Strip away politics and reality-optional hot takes, the question presented, at its core, is what should be done if it is determined that those charged with faithfully executing the law fail or otherwise decline to follow the law? Agencies, boards, and commissions operating outside the bounds of established rules is a familiar trope, as is sweeping bureaucratic incompetence and neglect under the rug.

But a merits-based resolution by this Court is not appropriate at this time because there is a procedure in place to resolve these claims in superior court. This Court correctly dismisses petitioner's request for a writ of prohibition and wisely maintains the stay.

Justice BARRINGER joins in this concurring opinion.

Justice BARRINGER concurring.

I concur with the result of the per curiam order of the Court and with the reasoning and philosophy well-articulated in Chief Justice Newby's concurrence. I also concur with Justice Berger's concerns about the existential need to carefully monitor and control those administrative agencies "charged with faithfully executing the law [when they] fail or otherwise decline to follow the law." However, I write separately to suggest a more expeditious path to resolve, rather than further prolong, the judicial, legal, and political maze in which this dispute is now lodged.

Petitioner has asked this Court to allow the extraordinary writ of prohibition in order "to promptly resolve a novel issue of great import." *See Beaufort Cnty. Bd. of Educ. v. Beaufort Cnty. Bd. of Comm'rs*,

363 N.C. 500, 506 (2009). In my view, our State finds itself in a most extraordinary circumstance requiring decisive action. The North Carolina Constitution provides this Court the power to "issue any remedial writs necessary to give it general supervision and control over the proceedings of the other courts." N.C. Const. art. IV, § 12(1). Those "other courts," *id.*, include "administrative agencies performing judicial functions." *Comm. to Elect Dan Forest v. Emps. Pol. Action Comm.*, 376 N.C. 558, 568 n.11 (2021). Here, the State Board of Elections is an administrative agency purporting to perform judicial functions: deciding how to apply the law, hearing and then deciding the outcome of election protests.

This Court has held that a writ of prohibition is appropriately allowed when the writ prevents another court, or an administrative agency in this case, from "proceeding . . . after a manner which will defeat a legal right." *State v. Allen*, 24 N.C. (2 Ired.) 183, 188–89 (1841). Here, that is the right of every North Carolinian to an election "free" from the outcome-determinative influence of ineligible votes. N.C. Const. art. I, § 10.

Therefore, it is my view that this Court should "not hesitate to exercise" its constitutional authority in this extraordinary and historic circumstance, because there is a need for "the expeditious administration of justice." *Park Terrace, Inc. v. Phoenix Indem. Co.*, 243 N.C. 595, 597 (1956). My suggested better course of action would be for this Court to utilize its long-standing power in our State Constitution, as implemented through Rule 2 of the North Carolina Rules of Appellate Procedure, to suspend the ordinary procedure, maintain the stay against further action by the administrative agency in question, and proceed to a decision on the merits. *See* N.C. Const. art. IV, § 12(1); N.C. R. App. P. 2 ("this Court has the power to suspend the rules to expedite decision in the public interest").

This approach requires this Court to decide whether the State Board of Elections erred when it determined that the protests submitted were legally deficient. In light of the thousands of pages of evidentiary documentation and argumentative briefs from all parties and amici, this question of law requires no further factfinding. Accordingly, I do not see any need for this case, nor any party therein, to twist in the jurisprudential winds for the upcoming months before ultimately landing before this Court for the requisite de novo review. Instead, the citizens of North Carolina deserve a fair and final resolution.

Nevertheless, I join in the concurrences of Chief Justice Newby and Justice Berger. I also reluctantly concur with the result of the per curiam order of the Court, which moves the case through the State system as

expeditiously as possible. The Court's decision to dismiss the writ of prohibition but to continue the stay will allow that to happen, albeit at an inexorably slower pace.

Justice DIETZ concurring.

I acknowledge that there are parallels between this case and *James v. Bartlett*, 359 N.C. 260 (2005). In *James*, this Court held that more than 11,000 ballots could not be counted under state law because the votes were "cast outside voters' precincts of residence on election day." *Id.* at 269.

At the time, the applicable election law stated that a voter must "vote in the precinct in which he resides." *Id.* at 266. The State Board of Elections nevertheless accepted out-of-precinct ballots, marked them with an "incorrect precinct" notation, and then included them in the final vote count. We held that those voters were ineligible to vote in that way and, thus, their votes were unlawful and could not be counted. *Id.* at 271.

Here, too, Judge Griffin has identified categories of voters that he alleges were unlawfully permitted to vote in our state elections, including those who are not residents of North Carolina and those who did not comply with our State's voter ID requirements.

But I see an important distinction between *James* and this case. In *James*, counting the out-of-precinct votes was unlawful under the election rules that existed at the time of the election. *Id.* at 269. In other words, the State Board of Elections *violated* the election rules by counting those votes.

Here, by contrast, the State Board of Elections *complied* with the election rules existing at the time of the election. Judge Griffin's argument is not that the Board violated the existing rules, but that the rules themselves are either unlawful or unconstitutional.

This scenario is more akin to the post-election challenge in *Hendon v. N.C. State Bd. of Elections*, 710 F.2d 177 (4th Cir. 1983). In *Hendon*, a North Carolina congressional candidate alleged that a state election law was unconstitutional and sought a recount that complied with the United States Constitution. The Fourth Circuit agreed that the law was unconstitutional and struck it down for future elections. *Id.* at 182. But the court declined to apply that ruling to the election that had just

occurred, pointing to "the general rule that denies relief with respect to past elections." *Id.*

I acknowledge that this Court has never recognized the version of the *Purcell* principle described in *Hendon* and, until we do, our state courts are not bound to follow it. But I believe now is the time. Thus, although I concur in the Court's decision to dismiss this petition, I would also hold that the arguments raised in the petition are barred for the reasons articulated in my earlier dissent. *See Griffin v. State Bd. of Elections*, No. 320P24 (N.C. Jan. 7, 2025) (Mem.) (Dietz., J., dissenting).

STATE OF NORTH CAROLINA EX REL. NORTH CAROLINA UTILITIES COMMISSION, AND DUKE ENERGY PROGRESS, APPLICANT

v.

CAROLINA INDUSTRIAL GROUP FOR FAIR UTILITY RATES II AND HAYWOOD ELECTRIC MEMBERSHIP CORPORATION, INTERVENORS

AND

ATTORNEY GENERAL JOSHUA H. STEIN, INTERVENOR

From N.C. Utilities Commission
E-2, SUB 1300

From N.C. Utilities Commission
E-2, SUB 1300

No. 75A24

ORDER

The Motion to Extend Time for Oral Argument filed by appellants Attorney General Jeff Jackson, Carolina Utility Customers Association, Inc., Carolina Industrial Group for Fair Utility Rates II, Carolina Industrial Group for Fair Utility Rates III, Haywood Electric Membership Corporation (EMC), Blue Ridge EMC, and Rutherford EMC is denied. Appellee North Carolina Utilities Commission Public Staff's Conditional Motion that Equal Time be Granted to Appellants and Appellees is dismissed as moot. Appellees Duke Energy Carolinas, LLC and Duke Energy Progress, LLC's Conditional Motion that Equal Time be Granted to Appellants and Appellees is dismissed as moot. The Court on its own motion allows each side an additional 10 minutes of oral argument.

By order of the Court in Conference, this the 30th day of January 2025.

/s/ Riggs, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 30th day of January 2025.

s/Grant E. Buckner

Grant E. Buckner
Clerk of the Supreme Court

STATE OF NORTH CAROLINA EX REL. NORTH CAROLINA UTILITIES COMMISSION, AND DUKE ENERGY CAROLINAS, LLC, APPLICANT

v.

CAROLINA INDUSTRIAL GROUP FOR FAIR UTILITY RATES III, BLUE RIDGE ELECTRIC MEMBERSHIP CORPORATION, HAYWOOD ELECTRIC MEMBERSHIP CORPORATION, PIEDMONT ELECTRIC MEMBERSHIP CORPORATION, RUTHERFORD ELECTRIC MEMBERSHIP CORPORATION, AND ATTORNEY GENERAL JOSH STEIN, INTERVENORS

From N.C. Utilities Commission
E-7SUB1134 E-7SUB1276

From N.C. Utilities Commission
E-7SUB1134 E-7SUB1276

No. 139A24

ORDER

The Motion to Extend Time for Oral Argument filed by appellants Attorney General Jeff Jackson, Carolina Utility Customers Association, Inc., Carolina Industrial Group for Fair Utility Rates II, Carolina Industrial Group for Fair Utility Rates III, Haywood Electric Membership Corporation (EMC), Blue Ridge EMC, and Rutherford EMC is denied. Appellee North Carolina Utilities Commission Public Staff's Conditional Motion that Equal Time be Granted to Appellants and Appellees is dismissed as moot. Appellees Duke Energy Carolinas, LLC and Duke Energy Progress, LLC's Conditional Motion that Equal Time be Granted to Appellants and Appellees is dismissed as moot. The Court on its own motion allows each side an additional 10 minutes of oral argument.

By order of the Court in Conference, this the 30th day of January 2025.

/s/ Riggs, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 30th day of January 2025.

s/Grant E. Buckner

Grant E. Buckner
Clerk of the Supreme Court

JEFFERSON GRIFFIN

v.

NORTH CAROLINA STATE BOARD OF ELECTIONS

AND

ALLISON RIGGS, INTERVENOR

From N.C. Court of Appeals
P25-104

From Wake
24CV040619-910 24CV040620-910
24CV040622-910

No. 320P24-2

ORDER

Respondent's Petition for Discretionary Review Prior to Determination by the North Carolina Court of Appeals is denied. Respondent's Motion to Suspend Appellate Rules and Motion to Expedite are dismissed as moot.

By order of the Court in Conference, this the 20th day of February 2025.

/s/ Allen, J.
For the Court

Riggs, J., recused.

Earls, J., dissents.

Dietz, J., dissents.

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 20th day of February 2025.

s/Grant E. Buckner

Grant E. Buckner
Clerk of the Supreme Court

Justice BARRINGER concurring.

I concur with the order of the Court. I also concur with Justice Allen's concerns regarding the barebones orders entered by the superior court only a few hours after hearing extensive arguments from multiple parties and counsel.

When this Court last had the opportunity to exercise jurisdiction over this case outside the normal appellate process and render the most expeditious outcome to this Supreme Court race, I reluctantly concurred with this Court's decision to dismiss the extraordinary writ of prohibition. In that prior posture, I saw value in this Court addressing the most salient issues presented at that time without first passing through the lower courts. Now, the circumstances have changed.

The Court of Appeals has set an expedited briefing schedule that will propel this case at an extraordinary speed. Allowing the normal order of the appellate process will bring this case before this Court in relatively short order. Given the complexity and quantity of the issues presented in this case, this Court and our State will benefit from a well-reasoned, thoughtful, and deliberative analysis by the Court of Appeals.

Moreover, I am mindful that this Court has been able to fulfill its role in our judicial system despite the uncertainty of an uncertified election looming over our State. Even with the political and personal attacks being publicly promoted almost every day by many groups and individuals including, sadly, even some of the litigants in this case, this Court has continued to efficiently and effectively conduct its affairs.

In stark but positive contrast, none of the litigants in this Court's numerous other pending cases are in limbo. All of these other cases continue to proceed through this Court with thoughtful and deliberate focus and attention.

Now, it is time that we allow the Court of Appeals to exercise the same diligent and deliberate focus and attention to this case—thereby effectuating its important and vital constitutional and statutory role.

Justice ALLEN concurring.

I write separately to explain my rejection of the petition to bypass the Court of Appeals filed by the State Board of Elections. Having voted in last year's Supreme Court race, the citizens of North Carolina

understandably want to see the rightful winner of the election certified as soon as possible. For this reason, it might make sense to bypass the Court of Appeals pursuant to N.C.G.S. § 7A-31(b) if the superior court had provided us with a careful analysis of the factual and legal issues presented by this case.

The three nearly identical one-page orders entered by the superior court do not meet this standard. Perhaps influenced by this Court's order directing it to move expeditiously, the superior court simply ruled against Judge Griffin without explaining why, in its view, his claims should be denied. Consequently, if we were to take this case now, we would do so in the absence of any meaningful examination of those claims by a lower court. Given the significance of this case and the complexity of the issues raised, I think that this Court could benefit from a well-reasoned and thorough evaluation of the parties' arguments. I therefore believe that we should follow the ordinary process of appellate review—albeit at an accelerated pace—and allow the Court of Appeals to hear this case.

Justice EARLS dissenting.

The circumstances of this case, the statutory procedures, and our past practice all support our immediate review prior to determination by the Court of Appeals. I would allow the State Board's petition.

There is strong justification for this Court to expeditiously address, with transparency, the significant issues in this case that go to the heart of what democracy requires under the state Constitution. Judge Jefferson Griffin's opposition to the bypass petition begins by asserting that this Court should not hear this case because, as a Court of six members, we might split 3-3 leaving the lower court's ruling as the final ruling in the case. In other words, he asks us not to hear the case because he might lose. Such outcome-determined reasoning has no place in a court committed to the rule of law.

Prior to Judge Griffin's newfound opposition to our review, members of this Court and all parties agreed that this proceeding must be resolved expeditiously. That included Judge Griffin himself, who in a request for action by this Court nine weeks ago, asserted that "[t]he candidates and the public have a vital interest in this election receiving finality as expeditiously as possible." Pet. for Writ of Prohibition at 19, *Griffin v. N. Carolina Bd. of Elections*, No. 320P24 (filed Dec. 18, 2024); *see also id.* at 70 ("In the interests of finality and expediency, Judge Griffin respectfully

requests that the Court[ ] . . . address every issue that has been raised in this proceeding."). Our Court shared the same urgent sentiment in our 22 January 2025 Order dismissing that petition. Order, *Griffin v. N. Carolina Bd. of Elections*, No. 320P24, at 3 (N.C. Jan. 22, 2025) (per curiam) (compelling the Superior Court "to proceed expeditiously" in reviewing Griffin's election protests); *id.* at 3 (Earls, J. concurring in part and dissenting in part) (expressing concern that "litigious losers [may] prevent[ ] duly elected persons from taking office for months or longer"). Members of the Court now voting to deny the Board's petition objected just weeks ago to having this matter "twist in the jurisprudential winds for the upcoming months before ultimately landing before this Court for the requisite de novo review." *Id.* at 3 (Barringer, J. concurring). That change is unfortunate, as allowing immediate review would further the shared goal of expeditiously resolving this matter.

Immediate review is also consistent with our 22 January 2025 Order directing Judge Griffin to follow the law in bringing his election protests. Section 163-182.14(b) of the General Statutes specifies that candidates for judicial office must first appeal the State Board's decisions on elections protests to the Wake County Superior Court. At that point Judge Griffin had failed to do so. Thus it was appropriate for our Court to dismiss his attempt to circumvent that court in violation of the statutory procedure. But while the statutes specify where an election protest appeal must *begin*, they do not require a particular path of appeal *beyond* Wake County. Simply put, no statute requires the Court of Appeals to hear such appellate claims in the first instance. In fact, the statutes specifically contemplate that "an appellate court" may weigh in after the Wake County Superior Court—ours or the Court of Appeals. *See* N.C.G.S. § 163-182.15(a)(3) (2023). Since we previously "ordered that this statutory process be carried out expeditiously," Order, No. 320P24, at 6 (Newby, C.J. concurring), and since immediate review is consistent with the statutory process, bypassing the Court of Appeals under N.C.G.S. § 7A-31(b) and Appellate Procedure Rule 15(a) is warranted. Our Court is equally as capable as the Court of Appeals to resolve the disputed state law issues, including whether "retroactively invalidating votes that were cast consistent with the laws and regulations that existed during the voting process would be fundamentally unfair under state law."

Finally, our past practice further supports immediate review. We previously allowed a candidate for Superintendent of Public Instruction to bypass the Court of Appeals to receive immediate review of the Wake County Superior Court election protest orders. *James v. Bartlett*, 359 N.C. 260, 265 (2005). Our decision there was issued 4 February 2005, on

an even earlier timeline than the present appeal. That underscores that immediate review makes sense here, too.

Our past practice in other cases also supports allowing expedited review here. This case presents issues no less complicated or important to the public interest than other cases in which we have allowed bypass petitions. *E.g.*, Order, *Hoke Cnty. Bd. of Educ. v. State*, No. 425A21-3 (N.C. Oct. 18, 2023) (allowing petition for discretionary review prior to determination by the Court of Appeals as to whether the trial court lacked subject matter jurisdiction to enter an order); *Cmty. Success Initiative v. Moore*, 384 N.C. 194, 196 (2023) (judgment on a petition for discretionary review prior to determination by the Court of Appeals on a challenge to the constitutionality of statute governing restoration of citizenship rights); *Matter of A.R.A.*, 373 N.C. 190, 194 (2019) (same, for review of an order terminating parental rights); *Bailey v. State*, 348 N.C. 130, 135–36 (1998) (same, for review in an action challenging the constitutionality of legislation capping tax exemption for state and local employees' retirement benefits, where the lower court proceedings involved a two-week trial, twenty-four witnesses, and 1,689 pages of transcript); *State ex rel. Edmisten v. Tucker*, 312 N.C. 326, 327 (1984) (same, for review in a declaratory judgment action as to the meaning and validity of Safe Roads Act of 1983). At least as much as those other claims, the claims here—that threaten to undermine confidence in our democratic system and make courts, not voters, the arbiter of elections outcomes—are of significant public interest, involve legal principles of major significance, and are causing substantial harm from delayed adjudication. *See* N.C.G.S. § 7A-31(b)(1)–(3).

It is especially appropriate for our Court to immediately review the Board's claims because our Court left in place a temporary stay pending the exhaustion of any party's appeals. Order, No. 320P24, at 3 (per curiam) ("[T]he temporary stay allowed on 7 January 2025 shall remain in place until the Superior Court of Wake County has ruled on petitioner's appeals and any appeals from its rulings have been exhausted."). That temporary stay prevents the State Board from certifying the election "within 5 days after entry of a final order in the case in Superior Court" as it must under state law. N.C.G.S. § 163-182.15(a)(3). Since the Superior Court issued its final orders affirming the State Board's decisions nearly two weeks ago, our stay is what bars certification. *See* Order, *Griffin v. N. Carolina State Bd. of Elections*, Nos. 24CV040619-910, 24CV040620-910, 24CV040622-910 (Wake Cnty. Super. Ct. Feb. 7, 2025). Because it is still unclear "how we have jurisdiction under our Rules of Appellate Procedure to Order a stay of the certification of election

while simultaneously dismissing the Petition," Order, No. 320P24, at 2 (Earls, J. concurring in part and dissenting in part), we ought to resume jurisdiction in this appeal over the last uncertified statewide race in the country. The failure to do so is harmful to the parties seeking finality and to the public who voted over three months ago. Further delay at this stage continues to erode trust in our elections and calls into question the ability of the legal system to guarantee that fundamental principles of democracy are capable of being recognized and enforced by a fair and impartial judiciary. I dissent from today's Order deciding to further delay final resolution of the issues in this case.

ANDREW ALDERETE	From N.C. Court of Appeals 23-896
v.	
SUNBELT FURNITURE XPRESS, INC.	From Catawba 22CVS2821

No. 168PA24

ORDER

The parties in this case have reached a mediated settlement. Thus, we allow the defendants' motion to withdraw the appeal and leave the decision of the Court of Appeals undisturbed but without precedential value. *See Mole' v. City of Durham*, 384 N.C. 78 (2023) (stating the decision of the Court of Appeals was left undisturbed but without precedential value after discretionary review was improvidently granted). Additionally, we deny the defendants' motion to proceed notwithstanding the settlement.

By order of the Court in Conference, this the 19th day of March 2025.

/s/ Riggs, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 21st day of March 2025.

s/Grant E. Buckner

Grant E. Buckner
Clerk of the Supreme Court

IN RE T.S.

[387 N.C. 415 (2025)]

IN THE MATTER OF

T.S., III AND M.S.

From N.C. Court of Appeals
24-47

From Pitt
19JA107 19JA108

No. 1P25

ORDER

The petition for discretionary review filed by petitioners herein on 2 January 2025 is allowed for the limited purpose of vacating the Court of Appeals decision below, *In re T.S., III and M.S.*, No. 24-47 (N.C. Ct. App. Dec. 3, 2024), and remanding the matter to that court for reconsideration in light of *In re K.C.*, No. 142A23 (N.C. Dec. 13, 2024). Otherwise, discretionary review is denied.

The temporary stay issued 3 January 2024 is hereby dissolved. The joint petition for writ of supersedeas filed 2 January 2024 is denied. The respondent's conditional petition for discretionary review filed 14 January 2025 is also denied.

By order of the Court in Conference, this the 19th day of March 2025.

/s/ Riggs, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 21st day of March 2025.

s/Grant E. Buckner

Grant E. Buckner
Clerk of the Supreme Court

ARMISTEAD B. MAUCK AND LOUISE CHERRY MAUCK, PLAINTIFFS

v.

CHERRY OIL CO., INC., JULIUS P. "JAY" CHERRY, JR., AND ANN B. CHERRY, DEFENDANTS

AND

CHERRY OIL CO., INC. AND JULIUS P. "JAY" CHERRY, JR., COUNTERCLAIM-PLAINTIFFS

v.

ARMISTEAD B. MAUCK, COUNTERCLAIM-DEFENDANT

From N.C. Business Court
21CVS343

From Lenoir
21CVS343

No. 318A24

ORDER

Defendants' Motion for Extension of Time to File Brief is denied. The Court on its own motion extends the time for defendants to file their brief until 31 March 2025 and directs plaintiffs to file their reply brief by 10 April 2025.

By order of the Court in Conference, this the 6th day of March 2025.

Riggs, J. recused.

/s/ Allen, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 6th day of March 2025.

s/Grant E. Buckner

Grant E. Buckner
Clerk of the Supreme Court

SCHROEDER v. OAK GROVE FARM HOMEOWNERS ASS'N

[387 N.C. 417 (2025)]

CRAIG SCHROEDER AND MARY SCHROEDER	From N.C. Court of Appeals 22-919
v.	From Union 20CVS1882
THE OAK GROVE FARM HOMEOWNERS ASSOCIATION A/K/A THE OAK GROVE FARM HOMEOWNERS ASSOCIATION, INC.	

No. 123PA24

ORDER

Defendant's Motion to Continue Oral Argument is denied. The Court on its own motion calendars argument in this case for 22 April 2025.

By order of the Court in Conference, this the 19th day of March 2025.

/s/ Riggs, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 19th day of March 2025.

s/Grant E. Buckner

Grant E. Buckner
Clerk of the Supreme Court

STATE OF NORTH CAROLINA EX REL. GERALD CANNON, IN HIS INDIVIDUAL CAPACITY AND HIS OFFICIAL CAPACITY AS SHERIFF OF ANSON COUNTY

v.

ANSON COUNTY; ANSON COUNTY BOARD OF COMMISSIONERS; JARVIS T. WOODBURN, IN HIS OFFICIAL CAPACITY; JEFFREY BRICKEN, IN HIS OFFICIAL CAPACITY; ROBERT MIMS, JR., IN HIS OFFICIAL CAPACITY; LAWRENCE GATEWOOD, IN HIS OFFICIAL CAPACITY; JAMES CAUDLE, IN HIS OFFICIAL CAPACITY; PRISCILLA LITTLE, IN HER OFFICIAL CAPACITY; DAVID HAROLD C. SMITH, IN HIS OFFICIAL CAPACITY; SCOTT HOWELL

From N.C. Court of Appeals
23-1069

From Anson
23CVS82

No. 236P24

ORDER

Plaintiff's petition for discretionary review filed 9 September 2024 herein is denied. We leave the decision of the Court of Appeals undisturbed but without precedential value. *See Mole' v. City of Durham*, 384 N.C. 78 (2023).

By order of the Court in Conference, this the 19th day of March 2025.

/s/ Riggs, J.
For the Court

Justice Earls dissents from the denial of the petition and from the decision to unpublish and render without precedential value the Court of Appeals opinion for the reasons stated in her dissent in *Mole' v. City of Durham*, 384 N.C. 78, 91–101 (2023) (Earls, J. dissenting).

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 21st day of March 2025.

s/Grant E. Buckner

Grant E. Buckner
Clerk of the Supreme Court

STATE OF NORTH CAROLINA	From N.C. Court of Appeals 23-801
v.	
WILLIAM DAWSON	From Craven 97CRS8887
	From N.C. Court of Appeals 99-1268 P23-90

No. 109P01-4

ORDER

The Court agrees that this matter has become moot and therefore allows Defendant's motion to dismiss the State's petition for discretionary review. Thus, we leave the decision of the Court of Appeals undisturbed but without precedential value. *See Mole' v. City of Durham*, 384 N.C. 78 (2023).

By order of the Court in Conference, this the 19th day of March 2025.

/s/ Allen, J.
For the Court

Riggs, J., recused.

Justice Earls concurs in the dismissal of the State's petition for discretionary review but dissents from the decision to unpublish and render without precedential value the Court of Appeals opinion for the reasons stated in her dissent in *Mole' v. City of Durham*, 384 N.C. 78, 91–101 (2023) (Earls, J., dissenting).

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 21st day of March 2025.

s/Grant E. Buckner

Grant E. Buckner
Clerk of the Supreme Court

STATE OF NORTH CAROLINA	From N.C. Court of Appeals 23-568
v.	
TYRON LAMONT DOBSON	From Guilford 21CRS66424-25

No. 190P24

ORDER

On 11 July 2024, defendant filed a petition for discretionary review of the decision of the North Carolina Court of Appeals pursuant to N.C.G.S. § 7A-31. By this order, the petition is denied as to Issue #1 and is allowed as to Issue #2.

By order of the Court in Conference, this the 19th day of March 2025.

/s/ Riggs, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 21st day of March 2025.

s/Grant E. Buckner

Grant E. Buckner
Clerk of the Supreme Court

STATE OF NORTH CAROLINA	From N.C. Court of Appeals 24-64
v.	
TERREL DAWAYNE ROWDY	From Forsyth 20CRS57505

No. 300P24

ORDER

Defendant's petition for discretionary review is allowed in part to address the following issue:

I. What is the appropriate legal test when assessing whether the odor of marijuana gives rise to reasonable suspicion or probable cause of the commission of a crime.

By order of the Court in Conference, this the 19th day of March 2025.

/s/ Riggs, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 21st day of March 2025.

s/Grant E. Buckner

Grant E. Buckner
Clerk of the Supreme Court

STATE OF NORTH CAROLINA	From N.C. Court of Appeals 23-682
v.	
CODIE BRUCE SCHIENE	From Mecklenburg 20CRS232458-59 21CRS10389

No. 305P24

ORDER

On 27 November 2024, defendant filed a petition for discretionary review of the decision of the North Carolina Court of Appeals pursuant to N.C.G.S. § 7A-31. By this order, the petition is allowed as to Issue #1 and denied as to Issues #2, #2a, and #3.

By order of the Court in Conference, this the 19th day of March 2025.

/s/ Riggs, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 21st day of March 2025.

s/Grant E. Buckner

Grant E. Buckner
Clerk of the Supreme Court

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

21 MARCH 2025

1P25	In re T.S., III and M.S.	1. Guardian ad Litem and Petitioner's Motion for Temporary Stay (COA24-47) 2. Guardian ad Litem and Petitioner's Petition for Writ of Supersedeas 3. Guardian ad Litem and Petitioner's PDR Under N.C.G.S. § 7A-31 4. Respondent-Mother's Conditional PDR	1. Allowed **01/03/2025** Dissolved 2. Special Order 3. Special Order 4. Special Order
2P25	Corey A. Thomas v. E&J Automotive, Inc., and Martin Edwards and Associates, Inc.	Plt's Pro Se PDR Under N.C.G.S. § 7A-31 (COA24-365)	Denied
3P25	State v. Toboris Y. Buie	Def's Pro Se Petition for Writ of Habeas Corpus	Denied **01/07/2025**
5P25	State v. Joni Lyn Martinez	1. Def's Motion for Temporary Stay (COA23-905) 2. Def's Petition for Writ of Supersedeas 3. Def's PDR Under N.C.G.S. § 7A-31	1. Allowed **01/08/2025** Dissolved 2. Denied 3. Denied
6P25	Robert B. Maxwell v. Todd E. Ishee, Secretary NCDAC	Petitioner's Pro Se Motion to Appeal Petition for Writ of Habeas Corpus	Denied **01/08/2025**
7P25	State v. David Alberto Hernandez	1. Def's Pro Se Motion for Notice of Appeal (COA24-830) 2. Def's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Forsyth County 3. Def's Pro Se Petition for Writ of Certiorari to Review Order of the COA 4. Def's Pro Se Motion to Proceed *In Forma Pauperis*	1. Dismissed 2. Dismissed 3. Dismissed 4. Allowed
8A25	Durham Green Flea Market v. City of Durham	1. Petitioner's Notice of Appeal Based Upon a Dissent (COA24-246) 2. Petitioner's Conditional PDR Under N.C.G.S. § 7A-31 3. Petitioner's Motion to Extend and Stay the Deadline for Merits Briefing 4. Respondent's Motion to Dismiss Appeal 5. Respondent's PDR Under N.C.G.S. § 7A-31	1. --- 2. Dismissed as moot 3. Allowed **01/09/2025** 4. Denied 5. Denied

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

21 MARCH 2025

9P25	State v. James L. Bryant, Jr. and Sharon R. Bryant	1. Def's (James L. Bryant, Jr.) Motion for Temporary Stay (COA24-439) 2. Def's (James L. Bryant, Jr.) Petition for Writ of Supersedeas 3. Def's (Sharon R. Bryant) Motion for Temporary Stay 4. Def's (Sharon R. Bryant) Petition for Writ of Supersedeas 5. Def's (Sharon R. Bryant) Notice of Appeal Based Upon a Constitutional Question 6. Def's (Sharon R. Bryant) PDR Under N.C.G.S. § 7A-31 7. Def's (James L. Bryant, Jr.) Notice of Appeal Based Upon a Constitutional Question 8. Def's (James L. Bryant, Jr.) PDR Under N.C.G.S. § 7A-31 9. State's Motion to Dismiss Appeal of Def Sharon Bryant 10. State's Motion to Dismiss Appeal of Def James L. Bryant, Jr.	1. Allowed **01/09/2025** 2. 3. Allowed **01/09/2025** 4. 5. 6. 7. 8. 9. 10.
10PA24	State v. Ronald Wayne Macon, Jr.	Def's Conditional Petition for Writ of Certiorari to Review Decision of the COA (COA23-357)	Denied
11P25	Loretta Braswell v. Richard D. Braswell	Def's PDR Under N.C.G.S. § 7A-31 (COA24-74)	Denied
19P25	State v. Trivanti L. Teele	Def's Pro Se Motion for PDR	Denied
20P25	Woodrow Wilson White, Jr. v. Overtime Towing & Transport LLC	Plt's Pro Se Motion for Appeal	Dismissed
21P25	State v. Allen Jhalil Williams	1. State's Motion for Temporary Stay (COA24-50) 2. State's Petition for Writ of Supersedeas 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **01/15/2025** 2. 3.

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

21 MARCH 2025

23P25	Sessoms v. Toyota Motor Sales, U.S.A., Inc., et al.	1. Defs' (Toyota Motor Sales, U.S.A., Inc. and Subaru Corporation) Motion for Temporary Stay (COA24-265) 2. Defs' (Toyota Motor Sales, U.S.A., Inc. and Subaru Corporation) Petition for Writ of Supersedeas 3. Defs' (Toyota Motor Sales, U.S.A., Inc. and Subaru Corporation) PDR Under N.C.G.S. § 7A-31 4. Plt's Conditional PDR	1. Allowed **01/22/2025** 2. 3. 4.
24P23-7	SCGVIII Lakepointe, LLC v. Vibha Men's Clothing, LLC; Kalishwar Das	Def's Pro Se Motion for PDR Under Rule 60(b)(6) and Rule 60(d)(3)	Dismissed **Dietz, J., recused** **Riggs, J., recused**
24P25	Jeremy Keith Fincannon v. Sheriff Aaron Ellenburg	Petitioner's Pro Se Petition for Writ of Habeas Corpus	Denied **01/16/2025**
24P25-2	Jeremy Keith Fincannon v. Justice Riggs	Petitioner's Pro Se Petition for Writ of Certiorari	Dismissed
25P23-6	Kalishwar Das v. John F. Morgan, Jr. SCGVIII Lakepointe, LLC	1. Plt's Pro Se Petition for Writ of Mandamus 2. Plt's Pro Se Motion to Expedite Review of Petition for Writ of Mandamus 3. Plt's Pro Se Petition for Writ of Prohibition	1. Dismissed 2. Dismissed as moot 3. Dismissed **Dietz, J., recused** **Riggs, J., recused**
25P25	N.C. State Bar v. Tigress Sydney Acute McDaniel, JD	1. Def's Pro Se Motion for Temporary Stay (COAP24-803) 2. Def's Pro Se Petition for Writ of Supersedeas	1. Denied **01/21/2025** 2. Denied
26P25	In re C.J.S.	1. State's Motion for Temporary Stay (COA24-46) 2. State's Petition for Writ of Supersedeas 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **01/21/2025** 2. 3.

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

21 MARCH 2025

27P25	Michael B. Sosna v. Mike Causey, Commissioner of North Carolina Department of Insurance	Plt's Pro Se PDR Under N.C.G.S. § 7A-31 (COA24-338)	Denied
28P25	State v. Mitch Taybron Pittman and Purav Patel	1. Def's (Pittman) Motion for Temporary Stay (COA23-674) 2. Def's (Pittman) Petition for Writ of Supersedeas 3. Def's (Pittman) Notice of Appeal Based Upon a Constitutional Question 4. Def's (Pittman) PDR Under N.C.G.S. § 7A-31 5. Def's (Patel) Notice of Appeal Based Upon a Constitutional Question 6. Def's (Patel) PDR Under N.C.G.S. § 7A-31 7. State's Motion to Dismiss Appeal of Def Pittman 8. State's Motion to Dismiss Appeal of Def Patel	1. Allowed **01/21/2025** 2. 3. 4. 5. 6. 7. 8.
31P25	Charles D. Johnson and Medsyn.org d/b/a Medsyn Org., Inc. v. Aaron Low and Stott, Hollowell Windham & Stancil, PLLC	Plts' Pro Se Motion for Extension of Time to File PDR	Denied
36P25	State v. Imajae Jakis Rutherford	Def's PDR Under N.C.G.S. § 7A-31 (COA24-96)	Denied
40P03-2	Ray Beltran v. Leslie Dismukes, Secretary of NCDAC	Petitioner's Pro Se Petition for Writ of Habeas Corpus (COA01-911)	Denied **02/18/2025**
43P25	Derreka Clinkscale, et al. v. Judge Bill Davis, et al.	1. Plt's Pro Se Motion for Temporary Stay 2. Plt's Pro Se Motion for Petition for Writ of Supersedeas 3. Plt's Pro Se Motion for Appeal	1. Dismissed **02/06/2025** 2. Dismissed **02/06/2025** 3. Dismissed **02/06/2025**

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

21 MARCH 2025

46P25	David W. Collins, Employee v. Wieland Copper Products, LLC, Employer, Farmington Casualty Company, Carrier (CCMSI, Third-Party Administrator)	1. Defs' Motion for Temporary Stay (COA24-214) 2. Defs' Petition for Writ of Supersedeas 3. Defs' PDR Under N.C.G.S. § 7A-31	1. Allowed **02/06/2025** 2. 3.
47A25	No Limit Games, LLC v. Sheriff of Robeson County, et al.	1. Plt's Notice of Appeal Based Upon a Dissent (COA24-12) 2. Plt's Conditional PDR Under N.C.G.S. § 7A-31 3. Defs' Motion to Dismiss Appeal 4. Defs' Conditional PDR Under N.C.G.S. § 7A-31 5. Plt's Motion for Extension of Time to File Response to Motion to Dismiss Appeal 6. Plt's Motion to Stay the Briefing 7. Plt's Motion in the Alternative for Extension of Time to File Brief	1. 2. 3. 4. 5. Allowed **02/27/2025** 6. Allowed **02/26/2025** 7. Dismissed as moot **02/26/2025**
49P25	James Lee Ramsey v. Leslie Dismukes, NCDAC Secretary	Petitioner's Pro Se Petition for Writ of Habeas Corpus	Denied **02/07/2025**
52P25	Richard Devayne Creech v. Town of Cornelius, Electricities of North Carolina, Inc., and Ian Charles Kenner	1. Defs' Motion for Temporary Stay (COA24-505) 2. Defs' Petition for Writ of Supersedeas 3. Defs' PDR Under N.C.G.S. § 7A-31	1. Allowed **02/13/2025** 2. Allowed 3. Allowed
53P23-2	John P. Cox v. Jessica Sadovnikov (now Impson)	1. Def's Motion for Temporary Stay (COA23-657) 2. Def's Petition for Writ of Supersedeas 3. Def's PDR Under N.C.G.S. § 7A-31 4. Def's Motion to Seal Docket	1. Allowed **06/27/2024** Dissolved 2. Denied 3. Denied 4. Allowed **Dietz, J., recused**

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

21 MARCH 2025

53P25	Anthony Dove v. Secretary of N.C. Department of Corrections Leslie Cooley Dismukes, Nurse Practitioner Ifeoma C. Ben-Okororie, Nurse Supervisor Fnu Tilley	1. Petitioner's Pro Se Emergency Petition for Writ of Mandamus 2. Petitioner's Pro Se Emergency Motion for a Writ of Injunction 3. Petitioner's Pro Se Motion to Proceed *In Forma Pauperis*	1. Dismissed 2. Dismissed 3. Allowed
54PA24	Stephen Matthew Lassiter, Employee v. Robeson County Sheriff's Department, Alleged-Employer, Synergy Coverage Solutions, Alleged-Carrier, and Truesdell Corporation, Alleged-Employer, the Phoenix Insurance Co., Alleged-Carrier	Plt's Motion to Continue Oral Argument (COA23-267)	Allowed **12/19/2024**
55P25	Rita Kotsias, Employee v. Florida Health Care Properties, LLC, Employer, ESIS, Carrier	1. Plt's Pro Se Motion for Temporary Stay (COA23-1029-2) 2. Plt's Pro Se Petition for Writ of Supersedeas 3. Plt's Pro Se Notice of Appeal Based Upon a Constitutional Question 4. Plt's Pro Se PDR Under N.C.G.S. § 7A-31 5. Defs' Motion to Dismiss Notice of Appeal, PDR, Petition for Writ of Supersedeas, and Motion for Temporary Stay	1. Allowed **02/17/2025** Dissolved 2. Dismissed as moot 3. Dismissed 4. Dismissed 5. Dismissed as moot
57P25	In re H.R.P.	1. Respondent-Parents' Motion for Temporary Stay (COA24-494) 2. Respondent-Parents' Petition for Writ of Supersedeas 3. Respondent-Parents' PDR Under N.C.G.S. § 7A-31	1. Allowed **02/17/2025** Dissolved 2. Denied 3. Denied

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

21 MARCH 2025

61P25	Lisa Higgins, Administrator of the Estate of Michael S. Higgins v. Omar Romero Mendoza, in his individual capacity, and Brandon Cesar Cruz, in his individual capacity	1. Def's (Omar Romero Mendoza) Motion for Temporary Stay (COA24-140) 2. Def's (Omar Romero Mendoza) Petition for Writ of Supersedeas 3. Def's (Omar Romero Mendoza) PDR Under N.C.G.S. § 7A-31	1. Allowed **02/21/2025** 2. 3.
62P25	In re N.R.R.N. a/k/a N.R.N.	1. Respondent-Mother's Motion for Temporary Stay (COA24-403) 2. Respondent-Mother's Petition for Writ of Supersedeas 3. Respondent-Mother's PDR Under N.C.G.S. § 7A-31	1. Denied **02/25/2025** 2. 3.
63P25	In re Melvin Milivoj Marin	1. Petitioner's Pro Se Motion for Declaratory Judgment 2. Petitioner's Pro Se Petition for Writ of Mandamus 3. Petitioner's Pro Se Petition for Writ of Prohibition 4. Petitioner's Pro Se Motion to Amend the Rules for Admission to the Bar of the State of North Carolina 5. Petitioner's Pro Se Motion to Seal Document	1. Dismissed 2. Dismissed 3. Dismissed 4. Dismissed 5. Denied
65P25	State v. Nicholas James Spry	1. State's Motion for Temporary Stay (COA24-129) 2. State's Petition for Writ of Supersedeas	1. Allowed **02/26/2025** 2.
67A25	Laura R. Wise, Administrator of the Estate of Martha A. Reinert, and Stephanie Singletary Jacobs, Administrator of the Estate of Jerry Singletary, on behalf of themselves and all others similarly situated v. Lake Pointe Assisted Living, Inc., and Tony Bigler	1. Defs' Motion to Seal Document 2. Parties' Joint Motion to Hold Appeal in Abeyance and for Limited Remand	1. Allowed **02/25/2025** 2. Allowed **03/11/2025**
72P25	State v. Anthony Van Long	1. State's Motion for Temporary Stay (COA24-531) 2. State's Petition for Writ of Supersedeas	1. Allowed **03/10/2025** 2.

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

21 MARCH 2025

75A24	State of North Carolina ex rel. North Carolina Utilities Commission, and Duke Energy Progress, Applicant v. Carolina Industrial Group for Fair Utility Rates II and Haywood Electric Membership Corporation, Intervenors and Attorney General Joshua H. Stein, Intervenor	1. Piedmont EMC's Unopposed Motion to Withdraw Appeal Under N.C. R. App. P. 37(e)(2) 2. Appellants' Motion to Extend Time for Oral Argument 3. Appellee's (Public Staff) Conditional Motion that Equal Time be Granted to Appellants and Appellees 4. Appellees' (Duke Energy Carolinas, LLC and Duke Energy Progress, LLC) Conditional Motion that Equal Time be Granted to Appellants and Appellees	1. Allowed **12/31/2024** 2. Special Order **01/31/2025** 3. Special Order **01/31/2025** 4. Special Order **01/31/2025**
75P25	In re I.G.J.	Respondent-Father's Motion for Temporary Stay (COA24-655)	Allowed **03/18/2025**
86A23-2	Turpin v. Charlotte Latin Schools, Inc., et al.	1. Plts' Notice of Appeal Based Upon a Dissent (COA23-252) 2. Plts' PDR as to Additional Issues	1. --- 2. Allowed **01/24/2025**
87P24	William T. Sanders v. North Carolina Department of Transportation	1. Def's PDR Under N.C.G.S. § 7A-31 (COA22-440) 2. Beroth Oil Company and James and Carol Deans' Motion for Leave to File Amicus Brief 3. Plt's Conditional PDR Under N.C.G.S. § 7A-31	1. Allowed 2. Allowed **04/12/2024** 3. Allowed
91P14-11	State v. Salim Abdu Gould	1. Def's Pro Se Petition for Writ of Habeas Corpus (COA18-425) 2. Def's Pro Se Motion for Dismissal of Indictment	1. Denied **12/19/2024** 2. Dismissed **Dietz, J., recused** **Riggs, J., recused**
94P20-4	State v. Carlton Lashawn White	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA23-596) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed
98P21-2	State v. Corey Tashombae Hines	Def's Pro Se PDR Under N.C.G.S. § 7A-31 (COA24-171)	Denied

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

21 MARCH 2025

102P19-16	State v. Christopher Lee Neal	1. Def's Pro Se Motion for Petition for Writ of Audita Querela, Coram Nobis or for Appropriate Relief from Convictions Based Upon Juror Misconduct (COAP17-537) 2. Def's Pro Se Motion to Arrest Judgment for Errors Committed at Trial 3. Def's Pro Se Petition for Writ of Habeas Corpus	1. Dismissed 2. Dismissed 3. Denied **01/31/2025**
107A24	Blueprint 2020 Opportunity Zone Fund, LLLP, and Woodforest CEI Boulos Opportunity Fund, LLC v. 10 Academy Street QOZB I, LLC; CitiSculpt, LLC; CS 10 South Academy St, LLC; CitiSculpt SC, LLC; 10 Academy Street, LLC; CitiSculpt Fund Services, LLC; 10 Academy Opportunity Zone Fund I, LLC; Charles Lindsey McAlpine; and Michael J. Miller	Parties' Joint Motion for Withdrawal and Dismissal of Appeal	Allowed **02/21/2025**
108PA24	In re L.C.	Respondent-Mother's Motion to Strike Portion of Appellants' Brief	Denied **03/06/2025**
109P01-4	State v. William Dawson	1. State's Motion to Seal Petition for Writ of Supersedeas and Subsequent Filings 2. State's Motion for Temporary Stay (COA23-801) 3. State's Petition for Writ of Supersedeas 4. State's PDR Under N.C.G.S. § 7A-31 5. Def's Motion to Dismiss State's PDR 6. Def's Motion in the Alternative to Supplement Def's Response	1. Allowed **08/27/2024** 2. Allowed **08/27/2024** Dissolved 3. Dismissed as moot 4. Special Order 5. Special Order 6. Dismissed as moot **Riggs, J., recused**

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

21 MARCH 2025

119P04-2	State v. Robert Andrew Bartlett, Sr.	1. Def's Pro Se Petition for Writ of Certiorari to Review Order of the COA (COAP24-369) 2. Def's Pro Se Motion to Proceed *In Forma Pauperis*	1. Dismissed 2. Allowed
124A24	Atlantic Coast Conference v. Board of Trustees of Florida State University	1. Def's Motion to Admit David C. Ashburn *Pro Hac Vice* 2. Def's Motion to Admit John K. Londot *Pro Hac Vice* 3. Def's Motion to Admit Peter G. Rush *Pro Hac Vice* 4. Def's Motion to Admit Elliot H. Scherker *Pro Hac Vice* 5. States of Florida, et al.'s Motion to Admit Henry C. Whitaker *Pro Hac Vice* 6. States of Florida, et al.'s Motion to Withdraw Motion to Admit Henry C. Whitaker *Pro Hac Vice* 7. States of Florida, et al.'s Motion to Admit Allen Huang *Pro Hac Vice* 8. Def's Petition for Writ of Certiorari to Review Order of N.C. Business Court 9. Unopposed Motion by Amicus The State of Florida For Leave to Participate in Oral Argument 10. Parties' Joint Motion for Oral Argument to Occur at the Same Session of Court	1. Allowed **02/27/2025** 2. Allowed **02/27/2025** 3. Allowed **02/27/2025** 4. Allowed **02/27/2025** 5. Dismissed as moot **02/27/2025** 6. Allowed **02/27/2025** 7. Allowed **02/27/2025** 8. Denied **03/05/2025** 9. Allowed **03/18/2025** 10. Dismissed as moot **03/18/2025**
130P24	Jason M. Sneed v. Charity A. Johnston (Sneed)	1. Plt's Motion for Temporary Stay (COA23-446) 2. Plt's Petition for Writ of Supersedeas 3. Plt's PDR Under N.C.G.S. § 7A-31	1. Allowed **05/30/2024** 2. Allowed 3. Allowed

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

21 MARCH 2025

131P01-19	State v. Anthony Dove	1. Def's Pro Se Petition for Writ of Mandamus	1. Denied
		2. Def's Pro Se Motion to Compel Respondents to Stipulate to the Facts	2. Dismissed
		3. Def's Pro Se Motion to Alternatively Hold Petition for Writ of Mandamus and Motion to Compel Respondents to Stipulate to the Facts in Abeyance	3. Dismissed
		4. Def's Pro Se Motion to Proceed *In Forma Pauperis*	4. Allowed
		5. Def's Pro Se Motion to Dismiss Motion to Alternately Hold Petition for Writ of Mandamus and Motion to Compel Respondents to Stipulate to the to the Facts in Abeyance	5. Dismissed
		6. Def's Pro Se Motion in Alternative for Writ of Injunction	6. Dismissed
136PA22-2	State v. Wendy Dawn Lamb Hicks	1. State's Motion for Temporary Stay (COA20-665-2)	1. Allowed **01/16/2025**
		2. State's Petition for Writ of Supersedeas	2.
		3. State's Notice of Appeal Based Upon a Dissent	3. ---
		4. State's Conditional PDR Under N.C.G.S. § 7A-31	4.
		5. State's PDR as to Additional Issues	5.
139A24	State of North Carolina ex rel. NC Utilities Commission, et al. v. CIGFUR III, et al.	1. Piedmont EMC's Unopposed Motion to Withdraw Appeal Under N.C. R. App. P. 37(e)(2)	1. Allowed **12/31/2024**
		2. Appellants' Motion to Extend Time for Oral Argument	2. Special Order **01/31/2025**
		3. Appellee's (Public Staff) Conditional Motion that Equal Time be Granted to Appellants and Appellees	3. Special Order **01/31/2025**
		4. Appellees' (Duke Energy Carolinas, LLC and Duke Energy Progress, LLC) Conditional Motion that Equal Time be Granted to Appellants and Appellees	4. Special Order **01/31/2025**

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

21 MARCH 2025

140A24	Elizabeth and Jason White v. North Carolina Department of Health and Human Services, Forsyth County Department of Social Services, and Children's Home Society of North Carolina, Inc.	1. Petitioners' Notice of Appeal Based Upon a Dissent (COA23-529) 2. Petitioners' PDR Under N.C.G.S. § 7A-31 3. Respondents' (Forsyth County Department of Social Services and Children's Home Society of North Carolina) Motion to Dismiss Appeal 4. Respondent's (North Carolina Department of Health & Human Services) Motion to Dismiss Appeal	1. --- 2. Allowed **12/19/2024** 3. Denied **12/19/2024** 4. Denied **12/19/2024**
146P24-2	In the Matter of the Foreclosure of a Deed of Trust Michelle Y. Samuels	Petitioner's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Mecklenburg County	Dismissed
155P24	State v. James Earl Shepard, Jr.	Def's PDR Under N.C.G.S. § 7A-31 (COA23-824)	Denied
163P23-3	Jasmine E. Golden v. Amazon	1. Plt's Pro Se Petition for Writ of Certiorari to Review Order of the COA (COAP23-105) 2. Plt's Pro Se Motion for Notice of Appeal 3. Plt's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Guilford County 4. Plt's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Guilford County 5. Plt's Pro Se Motion to Proceed as an Indigent	1. Denied 2. Dismissed 3. Dismissed 4. Dismissed 5. Allowed
168PA24	Andrew Alderete v. Sunbelt Furniture Xpress, Inc.	1. Def's Motion to Proceed Notwithstanding the Settlement (COA23-896) 2. Def's Conditional Motion to Withdraw Appeal	1. Special Order 2. Special Order
172P24	Brandi Luke Deanes, Plaintiff v. William Ryan Deanes, Defendant v. Lisa Beamon and Gordon Beamon, Proposed Third Party Intervenors	Proposed Third Party Intervenor's PDR Under N.C.G.S. § 7A-31 (COA23-56)	Denied

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

21 MARCH 2025

173P24	Cottle v. Mankin, et al.	1. Defs' (Raleigh Orthopaedic Clinic, P.A. and Raleigh Orthopaedic Research Foundation) PDR Under N.C.G.S. § 7A-31 (COA22-633) 2. Defs' (Raleigh Orthopaedic Clinic, P.A. and Raleigh Orthopaedic Research Foundation) Motion to Admit Beth S. Reeves *Pro Hac Vice* 3. Plts' Conditional PDR	1. Allowed 2. Allowed **02/28/2025** 3. Allowed
177P24	State v. Terry Wayne Norris, Jr.	1. State's Motion for Temporary Stay (COA23-889) 2. State's Petition for Writ of Supersedeas (COA23-889) 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **06/28/2024** 2. Allowed 3. Allowed
180P24	State v. Daniel Lucas	Def's Petition for Writ of Certiorari to Review Decision of the COA (COA21-685)	Denied
182P24	Consolidated Distribution Corp. v. Harkins Builders, Inc. and Federal Insurance Company	1. Defs' Notice of Appeal Based Upon a Constitutional Question (COA23-914) 2. Defs' PDR Under N.C.G.S. § 7A-31 3. Plt's Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed
183P19-5	State v. Coriante Laquelle Pierce	Def's PDR Under N.C.G.S. § 7A-31 (COAP23-348)	Denied
187P24	In re I.F., B.F., M.F.	1. Guardian ad Litem's PDR Under N.C.G.S. § 7A-31 2. Respondent-Father's Conditional PDR Under N.C.G.S. § 7A-31 3. Guardian ad Litem's Motion to Supplement Petition with Additional Authority	1. Denied 2. Dismissed as moot 3. Allowed
190P24	State v. Tyron Lamont Dobson	1. Def's PDR Under N.C.G.S. § 7A-31 (COA23-568) 2. Def's Motion to Strike the State's Response to Def's PDR	1. Special Order 2. Denied
196A24	Howard, et al. v. MAXISIQ, Inc. et al.	1. Plts' Motion to Dismiss Appeal 2. Receiver's Motion to Dismiss Appeal	1. Allowed **01/31/2025** 2. Dismissed as moot **01/31/2025**

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203PA24	Java Warren and Jannifer Warren v. Cielo Ventures, Inc. d/b/a Servpro North Central Mecklenburg County	1. Def's Motion for Temporary Stay (COA22-926) 2. Def's Petition for Writ of Supersedeas 3. Def's PDR Under N.C.G.S. § 7A-31 4. Plts' Motion to Admit Hugo L. Chanez *Pro Hac Vice* 5. Plts' Motion to Admit Jeffrey Mitchell *Pro Hac Vice*	1. Allowed **07/26/2024** 2. Allowed **12/11/2024** 3. Allowed **12/11/2024** 4. Allowed **02/28/2025** 5. Allowed **02/28/2025**
204P24	Rodrigue Ndje Nlend v. Valerie Ndje Nlend	1. Plt's Pro Se Motion for Notice of Appeal (COA24-38) 2. Plt's Pro Se Motion for Extension of Time to File Brief	1. Dismissed *ex mero motu* 2. Dismissed as moot
208P23-4	Kalishwar Das v. State of North Carolina	Plt's Pro Se Motion for Detailed Reasons of Denial	Dismissed **Dietz, J., recused** **Riggs, J., recused**
214P24	Wanda French Brown and Louis Adimando, Plaintiffs/ Counterclaim Defendants v. Alpha Modus Ventures, LLC, Defendant/ Counterclaim Plaintiff/Crossclaim Plaintiff v. John Hayes, Crossclaim Defendant	Crossclaim Def's (John Hayes) PDR Under N.C.G.S. § 7A-31 (COA23-290)	Denied
217P24	Elizabeth A. Mata and the Mata Family, LLC v. North Carolina Department of Transportation and North Carolina Turnpike Authority	Def's (North Carolina Department of Transportation) PDR Under N.C.G.S. § 7A-31 (COA23-1140)	Allowed
219P24	Epcon Homestead, LLC v. Town of Chapel Hill	Plt's PDR Under N.C.G.S. § 7A-31 (COA23-1048)	Denied

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221A24	Atlantic Coast Conference v. Clemson University	1. Parties' Joint Motion for Oral Argument to Occur at the Same Session of Court 2. Amicus Curiae's (State of South Carolina) Motion to Admit Thomas Tyler Hydrick *Pro Hac Vice* 3. Amicus Curiae's (State of South Carolina) Motion to Admit Benjamin Michael McGrey) *Pro Hac Vice*	1. Dismissed as moot **03/18/2025** 2. Allowed **02/27/2025** 3. Allowed **02/27/2025**
226A24	Howard, et al. v. MAXISIQ, Inc. et al.	Receiver's Motion to Dismiss Appeal	Allowed **12/23/2024**
223P24	Pakuja Vang v. Valdese Weaver, USA Government	Plt's Pro Se Petition for Writ of Certiorari	Dismissed
226P06-7	State v. De'Norris L. Sanders	Def's Pro Se Petition for Writ of Mandamus (COA05-608 12-1243)	Dismissed
236P24	State of North Carolina *ex rel.* Gerald Cannon, in his individual capacity and his official capacity as Sheriff of Anson County v. Anson County; Anson County Board of Commissioners; Jarvis T. Woodburn, in his official capacity; Jeffrey Bricken, in his official capacity; Robert Mims, Jr., in his official capacity; Lawrence Gatewood, in his official capacity; James Caudle, in his official capacity; Priscilla Little, in her official capacity; David Harold C. Smith, in his official capacity; Scott Howell	Plt's PDR Under N.C.G.S. § 7A-31 (COA23-1069)	Special Order
238P24	State v. Douglas Clemon Siler	Def's PDR Under N.C.G.S. § 7A-31 (COA23-474)	Denied

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241P24	MR Entertainment, LLC d/b/a Off the Wagon Dueling Piano Bar, Jess T. Mills, IV, and Benjamin O. Reese v. The City of Asheville and the City of Asheville Board of Adjustment	1. Respondent's (City of Asheville) PDR Under N.C.G.S. § 7A-31 (COA23-1109) 2. Petitioners' Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 2. Dismissed as moot
242P24	City of Asheville v. MR Entertainment, LLC d/b/a Off the Wagon Dueling Piano Bar, Jess T. Mills, IV, and Benjamin O. Reese	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA23-1110) 2. Defs' Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 2. Dismissed as moot
243P24	Anhui Omi Vinyl Co. Ltd. v. USA Opel Flooring, Inc. f/k/a USA Flooring Importers, Inc. f/k/a USA Opel Flooring Importers LLC	Def's PDR Under N.C.G.S. § 7A-31 (COA23-993)	Denied
249PA19-2	Ashe County, North Carolina v. Ashe County Planning Board and Appalachian Materials, LLC	1. Respondent's (Appalachian Materials, LLC) Notice of Appeal Based Upon a Dissent (COA18-253-2) 2. Petitioner's Motion to Dismiss Appeal 3. Petitioner's Notice of Appeal Based Upon a Dissent 4. Petitioner's Conditional Motion to Withdraw Appeal 5. Respondent's (Appalachian Materials, LLC) Petition for Writ of Certiorari to Review Decision of the COA	1. --- 2. Denied 3. --- 4. Denied 5. Dismissed **Berger, J., recused**
252P24	State v. Herbert John Robinson, Jr.	1. Def's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Union 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
261P24	Angela Miles Stephens v. Sonton Lunnermon	Plt's Pro Se PDR Under N.C.G.S. § 7A-31 (COA24-243)	Denied

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270P24	Hope Swicegood Byrd, et al. v. Avco Corporation, et al.	1. Defs' (Avco Corporation and Lycoming Engines) Motion for Temporary Stay (COAP24-630) 2. Defs' (Avco Corporation and Lycoming Engines) Petition for Writ of Supersedeas 3. Defs' (Avco Corporation and Lycoming Engines) Petition for Writ of Certiorari to Review Order of the COA	1. Allowed **10/18/2024** 2. Allowed 3. Allowed
274P24	State v. Pandora Ann Smith Dumas	Def's PDR Under N.C.G.S. § 7A-31 (COA24-76)	Denied
277P23-2	In re B.E., L.E., L.E., C.W., F.W., B.W.	Respondent-Mother's Pro Se PDR Under N.C.G.S. § 7A-31 (COA24-416)	Denied
277P24	Wardson Construction, Inc. and Homequest Builders, Inc. v. City of Raleigh	1. Def's Motion to Bypass Court of Appeals 2. Def's Petition in the Alternative for Discretionary Review Prior to Determination by the COA	1. Denied 2. Denied
278P24-2	State v. Gromoka J. Carmichael	1. Def's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Mecklenburg County (COA23-886) 2. Def's Pro Se Petition for Writ of Habeas Corpus 3. Def's Pro Se Motion for Temporary Stay 4. Def's Pro Se Petition for Writ of Supersedeas	1. Dismissed **01/07/2025** 2. Denied **01/07/2025** 3. Dismissed **01/07/2025** 4. Dismissed **01/07/2025**
281P06-20	Joseph E. Teague, Jr., P.E., C.M. v. NC Department of Transportation, J.E. Boyette, Secretary	1. Plt's Pro Se Motion of Complaint (COA05-522) 2. Plt's Pro Se Motion to Stay	1. Dismissed 2. Dismissed
282P23-2	State v. Linwood Duffie	Def's Pro Se Petition for Writ of Mandamus (COAP23-21)	Denied
283P24	In re Rebecca C. Spragins	Respondent's Petition for Writ of Certiorari to Review Order of the COA (COA24-300)	Denied
289P22-3	Keith Cureton, Jr. v. North Carolina Department of Public Safety, et al.	Petitioner's Pro Se Petition for Writ of Habeas Corpus	Denied **12/20/2024**

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289PA23	State v. Kaylore Fenner	Def's Conditional Petition for Writ of Certiorari to Review Decision of COA (COA23-6)	Denied
289P24	State v. Travis K. McCord a/k/a Shawn Lattimore	Def's PDR Under N.C.G.S. § 7A-31 (COA23-915)	Denied
291P24-2	State v. Donnie Lee Cherry, Jr.	1. Def's Pro Se Motion to Withdraw Counsel as Remedy for Ineffectiveness of Counsel 2. Def's Pro Se Motion to Dismiss 3. Def's Pro Se Motion to Suppress 4. Def's Pro Se Motion for Tort Claim	1. Dismissed 2. Dismissed 3. Dismissed 4. Dismissed
294A24	Howard, et al. v. MAXISIQ, Inc. et al.	1. Receiver's Motion to Dismiss Appeal 2. Def's (MAXISIQ, Inc.) Motion to Dismiss Appeal	1. Dismissed as moot **01/30/2025** 2. Allowed **01/30/2025**
295P24-2	State v. Rodney Eugene Jones	1. Def's Pro Se Petition for Writ of Habeas Corpus (COAP24-106) 2. Def's Pro Se Motion to Appoint Counsel 3. Def's Pro Se Motion to Reverse and Remand for the Dismissal of All Charges 4. Def's Pro Se Motion for Evidentiary Hearing Regarding Post Conviction DNA Violations	1. Denied **12/13/2024** 2. Dismissed as moot **12/13/2024** 3. Dismissed **12/13/2024** 4. Dismissed **12/13/2024**
300P24	State v. Terrel Dawayne Rowdy	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA24-64) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. --- 2. Special Order 3. Allowed
301P24	Guzman v. Triple P Roofing, et al.	Plt's PDR Under N.C.G.S. § 7A-31 (COA24-42)	Denied
305P24	State v. Codie Bruce Schiene	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA23-682) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. --- 2. Special Order 3. Allowed

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306P24	Lisa W. Lail v. William Edward Tuck, Jr.	Def's PDR Under N.C.G.S. § 7A-31 (COA24-179)	Denied
307A24	Andrea Pocoroba v. Phillip Gregor	1. Def's Pro Se Notice of Appeal Based Upon a Constitutional Question (COA24-219) 2. Plt's Motion to Dismiss Appeal	1. --- 2. Allowed
309P24	Robert Belcher, Jr. v. Gary, Williams, Parenti, Watson Gary & Gillespie, PLLC, Willie E. Gary, Esq., the Law Office of Faith Fox, PLLC, Faith Fox, Esq., the Cochran Firm Charlotte, PLLC, Faith Fox, Esq., Michael A. Jones & Associates, PLLC, and Michael A. Jones, Esq.	Plt's Pro Se Motion for Petition for Judicial Review (COA24-419)	Dismissed
310P24	Kelly Johnson Lee v. Richard Melvin Lee, Jr. and the Law Firm of Smith Debnam Narron Drake Saintsing & Myers	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA24-202) 2. Def's Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 2. Dismissed as moot
314P24	State v. Rasheed Teron Freeman	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA23-740) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed
316P24	Kayie Shaun Wright v. Todd Ishee, et al.	Plt's Pro Se Motion for Immediate Judgment	Dismissed
317P24	State v. Joe Wesley Carter	1. Def's Pro Se Petition for Writ of Habeas Corpus (COA12-248) 2. Def's Pro Se Motion to Proceed *In Forma Pauperis* 3. Def's Pro Se Motion to Appoint Counsel	1. Denied **12/19/2024** 2. Allowed **12/19/2024** 3. Dismissed as moot **12/19/2024**
318A24	Mauck v. Cherry Oil Co., Inc., et al.	Def.'s Motion for Extension of Time to File Brief	Special Order **03/06/2025** **Riggs, J. recused**

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319P24	State v. Jawaun Howard Hill	Def's PDR Under N.C.G.S. § 7A-31 (COA24-159)	Denied
320P24	Jefferson Griffin v. North Carolina Board of Elections	1. Petitioner's Motion for Temporary Stay 2. Petitioner's Petition for Writ of Prohibition 3. Petitioner's Emergency Motion for Stay 4. Restoring Integrity and Trust in Elections' Motion for Leave to File Amicus Brief 5. Intervenor-Respondent's (Allison Riggs) Motion for Peremptory Setting	1. Special Order **01/22/2025** 2. Special Order **01/22/2025** 3. Special Order **01/07/2025** 4. Allowed **01/22/2025** 5. Dismissed as moot **01/22/2025** **Riggs, J., recused**
320P24-2	Jefferson Griffin v. North Carolina State Board of Elections and Allison Riggs, Intervenor	1. Respondent's PDR Prior to a Determination by the COA (COAP25-104) 2. Respondent's Motion to Suspend Appellate Rules 3. Respondent's Motion to Expedite	1. Special Order **02/20/2025** 2. Special Order **02/20/2025** 3. Special Order **02/20/2025** **Riggs, J., recused**
323P24	State v. Melvin Howard Clark	1. State's Motion for Temporary Stay (COA23-1133) 2. State's Petition for Writ of Supersedeas 3. State's Notice of Appeal Based Upon a Constitutional Question 4. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **12/20/2024** 2. 3. 4.
325P24	Ruby Cashawn Brooks (now Price) v. David Jerome Brooks	1. Def's PDR Under N.C.G.S. § 7A-31 (COA23-1139) 2. Def's Petition in the Alternative for Writ of Certiorari to Review Decision of the COA	1. Denied 2. Denied
328P24	State v. Timothy Albright	Def's Pro Se Petition for Writ of Habeas Corpus	Denied **12/27/2024**

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329A24	State v. Charles Leon Garmon	1. State's Motion for Temporary Stay (COA23-544) 2. State's Petition for Writ of Supersedeas 3. State's PDR Under N.C.G.S. § 7A-31 4. Def's Notice of Appeal Based Upon a Dissent	1. Allowed **12/27/2024** 2. Allowed 3. Allowed 4. ---
331P24	State v. Christina Natasha Hutslar	Def's PDR Under N.C.G.S. § 7A-31 (COA24-14)	Denied
333P24	Kathleen K. Face v. S. Allen Face	1. Def's Motion for Temporary Stay (COA23-1126) 2. Def's Petition for Writ of Supersedeas 3. Def's PDR Under N.C.G.S. § 7A-31	1. Allowed **01/07/2025** 2. 3.
338PA23	NC Department of Environmental Quality v. N.C. Farm Bureau Federation Inc., et al.	1. Petitioners' (North Carolina Environmental Justice Network and North Carolina State Conference of the National Association for the Advancement of Colored People) Petition for Writ of Certiorari to Review Decision of the COA (COA22-1072) 2. Petitioners' (North Carolina Environmental Justice Network and North Carolina State Conference of the National Association for the Advancement of Colored People) Motion in the Alternative for Leave to Proceed as Appellants	1. Allowed **02/03/2025** 2. Dismissed as moot **02/03/2025**
362P18-2	State v. Douglas Nelson Edwards	1. Def's Pro Se Motion for Reconsideration 2. Def's Pro Se Motion for PDR	1. Dismissed 2. Dismissed
415P19-4	State v. Scott Randall Reich	1. Def's Pro Se Petition for Writ of Mandamus 2. Def's Pro Se Motion for Post Conviction Relief	1. Dismissed 2. Dismissed **Berger, J., recused** **Dietz, J., recused**
416P14-2	State v. Santonio Thurman Jenrette	Def's Pro Se Motion for Notice of Appeal	Dismissed

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441A98-5	State v. Kevin Salvador Golphin	1. Def's PDR Under N.C.G.S. § 7A-31 (COA22-713) 2. Def's Motion to Admit Brianna O. Gallo *Pro Hac Vice* 3. Def's Motion to Admit Eamon P. Joyce *Pro Hac Vice*	1. Denied 2. Allowed 3. Allowed
449P11-31	In re Charles Everette Hinton	1. Petitioner's Pro Se Motion for Petition Request to File Writ of Habeas Corpus 2. Petitioner's Pro Se Motion for Petition Request to File Writ of Certiorari	1. Denied **02/03/2025** 2. Dismissed **02/03/2025**
449P11-32	In re Charles Everette Hinton	1. Petitioner's Pro Se Motion for Demand for Final Judgment Under Public Law and Findings of Fact and Conclusions of Law in Writing by the Full Court (COAP11-256) 2. Petitioner's Pro Se Motion for Demand for Trial by Jury	1. Dismissed 2. Dismissed
457PA20-2	State v. Khalil Abdul Farook	1. State's Motion for Temporary Stay (COA23-1161) 2. State's Petition for Writ of Supersedeas 3. State's Petition for Discretionary Review Under N.C.G.S. § 7A-31	Allowed **01/24/2025** 2. 3.
505P96-5	State v. Melvin Lee White, Jr.	Def's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Craven County	Dismissed
580P05-33	In re David Lee Smith	Def's Pro Se Petition for Writ of Mandamus (COA04-1033)	Denied **Riggs, J., recused**

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR:

RULES GOVERNING DISCIPLINE

The following Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on November 1, 2024, and January 24, 2025.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar as set forth in 27 N.C.A.C. 01B, Section .0100, *Proposed Amendments to Rules Governing Discipline*, be amended as shown in the following attachments:

TAB #1: Proposed Amendments to Rules Governing Discipline

TAB #1A:	27 N.C.A.C. 01B, Section .0100, Rule .0108, *Chairperson of the Hearing Commission: Powers and Duties*
TAB #1B:	27 N.C.A.C. 01B, Section .0100, Rule .0111, *Grievances; Form and Filing*
TAB #1C:	27 N.C.A.C. 01B, Section .0100, Rule .0112, *Investigations: Initial Determination; Notice and Response; Committee Referrals*
TAB #1D:	27 N.C.A.C. 01B, Section .0100, Rule .0113, *Proceedings Before the Grievance Committee*
Tab #1E:	27 N.C.A.C. 01B, Section .0100, Rule .0136, *Expungement or Sealing of Discipline* [New Rule]
TAB #1F:	27 N.C.A.C. 01B, Section .0100, Rule .0137, *Vexatious Complainants* [New Rule]

NORTH CAROLINA
WAKE COUNTY

I, Peter Bolac, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on January 24, 2025.

Given over my hand and the Seal of the North Carolina State Bar, this the 29th day of January, 2025.

s/Peter Bolac
Peter Bolac, Secretary

After examining the foregoing amendments to the Rules and Regulations of the North Carolina State Bar as adopted 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 19th day of March, 2025.

s/Paul Newby
Paul Newby, Chief Justice

On this date, the foregoing amendment to the Rules and Regulations of the North Carolina State Bar 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 19th day of March, 2025.

s/Riggs, J.
For the Court

27 NCAC 01B .0108 is amended without notice pursuant to G.S. 84-23, 150B-21.21 as follows:

27 NCAC 01B .0108 CHAIRPERSON OF THE HEARING COMMISSION: POWERS AND DUTIES

(a) The chairperson of the Disciplinary Hearing Commission of the North Carolina State Bar will have the power and duty:

(1) to receive complaints alleging misconduct and petitions alleging the disability of a member filed by the counsel; petitions requesting reinstatement of license by members who have been involuntarily transferred to disability inactive status, suspended, or disbarred; motions seeking the activation of suspensions which have been stayed; and proposed consent orders of disbarment;

(2) to assign three members of the commission, consisting of two members of the North Carolina State Bar and one nonlawyer to hear complaints, petitions, motions, and post-hearing motions pursuant to Rule .0114(z)(2) of this subchapter. The chairperson will designate one of the attorney members as chairperson of the hearing panel. No panel member who hears a disciplinary matter may serve on the panel which hears the attorney's reinstatement petition. The chairperson of the commission may designate himself or herself to serve as one of the attorney members of any hearing panel and will be chairperson of any hearing panel on which he or she serves. Post-hearing motions filed pursuant to Rule .0114(z)(2) of this subchapter will be considered by the same hearing panel assigned to the original trial proceeding. Hearing panel members who are ineligible or unable to serve for any reason will be replaced with members selected by the commission chairperson;

(3) to set the time and place for the hearing on each complaint or petition;

(4) to subpoena witnesses and compel their attendance and to compel the production of books, papers, and other documents deemed necessary or material to any hearing. The chairperson may designate the secretary to issue such subpoenas;

(5) to consolidate, in his or her discretion for hearing, two or more cases in which a subsequent complaint or complaints have been served upon a defendant within ninety days of the date of service of the first or a preceding complaint;

(6) to enter orders disbarring members by consent;

(7) to enter an order suspending a member pending disposition of a disciplinary proceeding when the member has been convicted of a serious crime or has pled no contest to a serious crime and the court has accepted the ~~plea.~~plea;

(8) to review decisions by the Chair of the State Bar's Grievance Committee to designate a complainant as vexatious and to enter orders upholding or vacating the designation;

(9) to receive and rule upon petitions to expunge orders of the Commission that imposed admonition, reprimand, or censure;

(10) to receive and rule upon petitions to seal orders of the Commission that imposed a stayed suspension.

(b) The vice-chairperson of the Disciplinary Hearing Commission may perform the function of the chairperson in any matter when the chairperson is absent or disqualified.

History Note: *Authority G.S. 84-23;*
Readopted Eff. December 8, 1994;
Amendments Approved by the Supreme Court: September 7, 1995; October 8, 2009; March 19, 2025

27 NCAC 01B .0111 is amended without notice pursuant to G.S. 84-23, 150B-21.21 as follows:

27 NCAC 01B .0111 GRIEVANCES: FORM AND FILING

~~(a) A grievance may be filed by any person against a member of the North Carolina State Bar. Such grievance may be written or oral, verified or unverified, and may be made initially to the counsel. The counsel may require that a grievance be reduced to writing in affidavit form and may prepare and distribute standard forms for this purpose.~~

(a) Standing Requirements – To be considered by the State Bar, a grievance must

(1) allege conduct that, if true, constitutes attorney misconduct in violation of Chapter 84 of the North Carolina General Statutes and/or constitutes a violation of the North Carolina Rules of Professional Conduct; and

(2) be filed by a person with standing, defined as:

(A) An attorney or judge pursuant to the obligation to report misconduct in accordance with Rule of Professional Conduct 8.3;

(B) A judge, attorney, court employee, juror, party, or client in the legal matter that is the subject of the grievance; or

(C) A person who has a cognizable interest in or connection with the legal matter or facts alleged in the grievance, or that person's representative.

(3) The State Bar may open and investigate a grievance upon its own initiative if it discovers facts that, if true, would constitute attorney misconduct.

(4)If the counsel receives information that a member has used or is using illicit substances, the counsel will follow the provisions of Rule .0130 of this Subchapter.

~~(b) Upon the direction of the council or the Grievance Committee, the counsel will investigate such conduct of any member as may be specified by the council or Grievance Committee.~~

~~(c) The counsel may investigate any matter coming to the attention of the counsel involving alleged misconduct of a member upon receiving~~

~~authorization from the chairperson of the Grievance Committee. If the counsel receives information that a member has used or is using illicit drugs, the counsel will follow the provisions of Rule .0130 of this Subchapter.~~

(b) Grievance Filing Form. The counsel may require that a grievance be reduced to writing and may prepare and require use of standard forms for this purpose.

(c) The counsel may investigate any allegations of attorney misconduct coming to the counsel's attention.

(d) Confidential Reports of Attorney Misconduct - The ~~North Carolina~~ State Bar may keep confidential the identity of an attorney or judge who reports alleged misconduct ~~of another attorney~~ pursuant to ~~Rule 8.3 of the Revised~~ Rules of Professional Conduct 8.3 and who requests to remain anonymous. Notwithstanding the foregoing, the North Carolina State Bar will reveal the identity of a reporting attorney or judge to the respondent ~~attorney where~~ when such disclosure is required by law, or by considerations of due process or ~~where~~ when identification of the reporting attorney or judge is essential to preparation of the ~~attorney's~~ respondent's defense to the grievance ~~and/~~or defense to a formal disciplinary complaint.

(e) The counsel may decline to investigate the following allegations:

(1) that a member provided ineffective assistance of counsel in a criminal case, unless a court has granted a motion for appropriate relief based upon the member's conduct;

(2) that a plea entered in a criminal case was not made voluntarily and knowingly, unless a court granted a motion for appropriate relief based upon the member's conduct;

(3) that a member's advice or strategy in a civil or criminal matter was inadequate or ~~ineffective.~~ineffective; and

(4) that a criminal prosecutor improperly exercised discretion in declining to bring criminal charges.

(f) Limitation of Grievances.

(1) There is no time limitation for initiation of any grievance based upon a plea of guilty to a felony or upon conviction of a felony.

(2) There is no time limitation for initiation of any grievance based upon allegations of conduct that constitutes a felony, without regard to whether the lawyer is charged, prosecuted, or convicted of a crime for the conduct.

(3) There is no time limitation for initiation of any grievance based upon conduct that violates the Rules of Professional Conduct and has been found by a court to be intentional conduct by the lawyer. As used in this Rule, "court" means a state court of general jurisdiction of any state or of the District of Columbia or a federal court.

(4) All other grievances must be initiated within six years after the last act giving rise to the grievance.

History Note: *Authority G.S. 84-23;*
Readopted Eff. December 8, 1994;
Amendments Approved by the Supreme Court: February 20, 1995; December 30, 1998; October 1, 2003; October 8, 2009; March 19, 2025.

27 NCAC 01B .0112 is amended without notice pursuant to G.S. 84-23, 150B-21.21 as follows:

27 NCAC 01B .0112 INVESTIGATIONS: INITIAL DETERMINATION; NOTICE AND RESPONSE; COMMITTEE REFERRALS

(a) Investigation Authority - Subject to the policy supervision of the council and the supervision~~control~~ of the chair of the Grievance Committee, the counsel, or other personnel under the authority of the counsel, will review~~investigate~~ the grievance, conduct any investigation the counsel determines to be necessary and appropriate, and submit to the chair a report detailing the facts established by the investigation ~~counsel's findings~~ and a recommendation for disposition of the grievance~~of the investigation~~.

~~(b) Grievance Committee Action on Initial or Interim Reports - As soon as practicable after the receipt of the initial or any interim report of the counsel concerning any grievance, the chair of the Grievance Committee may~~

~~(1) treat the report as a final report;~~

~~(2) direct the counsel to conduct further investigation, including contacting the respondent in writing or otherwise; or~~

~~(3) direct the counsel to send a letter of notice to the respondent.~~

(~~c~~b) Letter of Notice, Respondent's Response, and Request for Copy of Grievance - If the counsel serves a letter of notice upon the respondent, it will be served by certified mail or by personal service. If the respondent consents to accept service of the letter of notice by email, the letter of notice may be served by ~~email~~ emailing the letter of notice to the respondent's email address of record with the State Bar membership department. The respondent's response to the letter of notice will be due ~~direct a response be provided~~ within 15 days of service of the letter of notice upon the respondent. The response to the letter of notice shall include a full and fair disclosure of all facts and circumstances pertaining to the alleged misconduct. The response must be in writing and signed by the respondent. ~~If the respondent requests it, the counsel will provide the respondent with a copy of the written grievance unless the complainant requests anonymity pursuant to Rule .0111(d) of this subchapter~~.

(c) Provision of Written Grievance and Supporting Materials to Respondent. Upon request of the respondent, the counsel will provide to the respondent a copy of the written grievance and any supporting

material the complainant submitted with the grievance; provided that, if the grievance was submitted by a judge or an attorney pursuant to the obligation to report professional misconduct in accordance with Rule of Professional Conduct 8.3, and if the judge or attorney requests anonymity pursuant to Rule .0111(f) of this subchapter, the State Bar may redact the judge's or attorney's identifying information.

(d) Request for Copy of Respondent's Response -- If the complainant requests it, and unless the respondent objects in writing, ~~The~~ the counsel may provide to the complainant a copy of the respondent's response to the letter of notice. ~~unless the respondent objects thereto in writing.~~

~~(e) Termination of Further Investigation - After the Grievance Committee receives the response to a letter of notice, the counsel may conduct further investigation or terminate the investigation, subject to the control of the chair of the Grievance Committee.~~

(~~f~~e) Subpoenas - For reasonable cause, the chair of the Grievance Committee may issue subpoenas to compel the attendance of witnesses, including the respondent, for examination concerning the grievance and to~~may~~ compel the production of documents, records, writings, communications, and other data of any kind that the chair determines are ~~books, papers, and other documents or writings which the chair deems~~ necessary or material to the inquiry. Each subpoena will be issued by the chair or by the secretary at the direction of the chair. The counsel, deputy counsel, investigator, or any members of the Grievance Committee designated by the chair may examine any such witness under oath or otherwise.

(~~g~~f) Grievance Committee Action on Final Reports – The Grievance Committee will consider the grievance as soon as practicable after it receives the final report of the counsel, except as otherwise provided in these rules.

(~~h~~g) ~~Failure of Complainant to Sign and~~ Dismissal Upon Request of Complainant - The investigation into alleged misconduct of the respondent will not be abated ~~by failure of the complainant to sign a grievance,~~ by settlement or compromise of a dispute between the complainant and the respondent, or by the respondent's payment of restitution. The chair of the Grievance Committee may dismiss a grievance upon request of the complainant and with consent of the counsel where it appears that there is no probable cause to believe that the respondent violated the Rules of Professional Conduct.

(~~i~~h) Referral to Law Office Management Training

(1) If, at any time before a finding of probable cause, the Grievance Committee determines that the alleged misconduct is primarily attributable to the respondent's failure to employ sound law office management techniques and procedures, the committee may offer the respondent an opportunity to voluntarily participate in a law office management training program approved by the State Bar before the committee considers discipline.

If the respondent accepts the committee's offer to participate in the program, the respondent will ~~then~~ be required to complete a course of training in law office management prescribed by the chair which may include a comprehensive site audit of the respondent's records and procedures as well as attendance at continuing legal education seminars. The respondent must participate personally in the program, must communicate directly with the program staff, and must provide required documentation directly to the program staff. If the respondent does not accept the committee's offer, the grievance will be returned to the committee's agenda for consideration of imposition of discipline.

(2) Completion of Law Office Management Training Program – If the respondent successfully completes the law office management training program, the committee may consider the respondent's successful completion of the ~~law office management training~~ program as a mitigating circumstance and may, but is not required to, dismiss the grievance for good cause shown. If the respondent fails to successfully complete the ~~law office management training~~ program as agreed, the grievance will be returned to the committee's agenda for consideration of imposition of discipline. The requirement that a respondent complete law office management training pursuant to this rule shall be in addition to the respondent's obligation to satisfy the minimum continuing legal education requirements contained in 27 NCAC 01D .1517.

(~~j~~i) Referral to Lawyer Assistance Program

(1) If, at any time before a finding of probable cause, the Grievance Committee determines that the alleged misconduct is primarily attributable to the respondent's substance use disorder~~abuse~~ or mental health condition~~problem~~, the committee may offer the respondent an opportunity to voluntarily participate in a rehabilitation program under the supervision of the Lawyer Assistance Program Board before the committee considers imposition of discipline.

If the respondent accepts the committee's offer to participate in a rehabilitation program, the respondent must provide the committee with a written acknowledgement of the referral on a form approved by the chair. The acknowledgement of the referral must include the respondent's waiver of any right of confidentiality that might otherwise exist to permit the Lawyer Assistance Program to provide the committee with the information necessary for the committee to determine whether the respondent is in compliance with the rehabilitation program. The respondent must participate personally in the program, must communicate directly with the program staff, and must provide required documentation directly to the program staff. If the respondent does not accept the committee's offer, the grievance will be returned to the committee's agenda for consideration of imposition of discipline.

(2) Completion of Rehabilitation Program – If the respondent successfully completes the rehabilitation program, the committee may consider successful completion of the program as a mitigating circumstance and may, but is not required to, dismiss the grievance for good cause shown. If the respondent fails to complete the rehabilitation program or fails to cooperate with the Lawyer Assistance Program Board, the Lawyer Assistance Program will report that failure to the counsel and the grievance will be returned to the committee's agenda for consideration of imposition of discipline.

(~~k~~j) Referral to Trust Accounting Compliance Program

(1) Voluntary Deferral to Trust Account Compliance Program. If, at any time before a finding of probable cause, the Grievance Committee determines that the alleged misconduct is primarily attributable to the respondent's failure to employ sound trust accounting techniques, the committee may offer the respondent an opportunity to participate voluntarily in the Trust Account Compliance Program of the State Bar's Trust Account Compliance Department (the program) for up to two years before the committee considers imposition of discipline.

Policies governing the criteria and procedures for eligibility to participate in the program, participation in, and completion of the program shall be established by the Council.

If the respondent accepts the committee's offer to participate in the compliance program, the respondent must fully cooperate with the staff of the Trust Account Compliance Department and must produce to the staff all documentation and proof of compliance requested by the staff. The respondent must participate personally

in the program, must communicate directly with the program staff, and must provide required documentation directly to the program staff. If the respondent does not accept the committee's offer, the grievance will be returned to the committee's agenda for consideration of imposition of discipline.

(2) Completion of Trust Account Compliance Program. If the respondent successfully completes the program, the committee may consider successful completion of the program as a mitigating circumstance and may, but is not required to, dismiss the grievance for good cause shown. If the respondent does not fully cooperate with the staff of the Trust Account Compliance Department and/or does not successfully complete the program, the grievance will be returned to the committee's agenda for consideration of imposition of discipline.

(3) Ineligible for Referral. The committee will not refer to the program:

(A) any respondent whose grievance file involves possible misappropriation of entrusted funds, criminal conduct, dishonesty, fraud, misrepresentation, or deceit, or any other alleged misconduct the committee determines to be inappropriate for referral;

(B) any respondent who has not cooperated fully and timely with the committee's investigation;

(C) any respondent who has already participated in the program as the result of the conduct in issue; or

(D) any respondent who declined an offer to participate in the program before the conduct at issue was referred to the Grievance Committee.

(4) Termination of Deferral Upon Discovery of Evidence of Serious Misconduct. If the Office of Counsel or the committee learns of evidence that a respondent who is participating in the program may have misappropriated entrusted funds, engaged in criminal conduct, or engaged in conduct involving dishonesty, fraud, misrepresentation, or deceit, the chair will terminate the respondent's participation in the program and the disciplinary process will proceed.

(5) Referral No Defense to Allegations of Professional Misconduct. Referral to the Trust Accounting Compliance Program is not a defense to allegations of professional misconduct and does not immunize a lawyer from the disciplinary consequences of such conduct.

~~If, at any time before a finding of probable cause, the Grievance Committee determines that the alleged misconduct~~

~~is primarily attributable to the respondent's failure to employ sound trust accounting techniques, the committee may offer the respondent an opportunity to voluntarily participate in the State Bar's Trust Account Compliance Program for up to two years before the committee considers discipline.~~

~~If the respondent accepts the committee's offer to participate in the compliance program, the respondent must fully cooperate with the Trust Account Compliance Counsel and must provide to the Office of Counsel quarterly proof of compliance with all provisions of Rule 1.15 of the Rules of Professional Conduct. Such proof shall be in a form satisfactory to the Office of Counsel. If the respondent does not accept the committee's offer, the grievance will be returned to the committee's agenda for consideration of imposition of discipline.~~

~~(2) Completion of Trust Account Compliance Program - If the respondent successfully completes the program, the committee may consider successful completion of the program as a mitigating circumstance and may, but is not required to, dismiss the grievance for good cause shown. If the respondent does not fully cooperate with the Trust Account Compliance Counsel and/or does not successfully complete the program, the grievance will be returned to the committee's agenda for consideration of imposition of discipline.~~

~~(3) The committee will not refer to the program any case involving possible misappropriation of entrusted funds, criminal conduct, dishonesty, fraud, misrepresentation, or deceit, or any other case the committee deems inappropriate for referral. The committee will not refer to the program any respondent who has not cooperated fully and timely with the committee's investigation. If the Office of Counsel or the committee discovers evidence that a respondent who is participating in the program may have misappropriated entrusted funds, engaged in criminal conduct, or engaged in conduct involving dishonesty, fraud, misrepresentation, or deceit, the chair will terminate the respondent's participation in the program and the disciplinary process will proceed. Referral to the Trust Accounting Compliance Program is not a defense to allegations that a lawyer misappropriated entrusted funds, engaged in criminal conduct, or engaged in conduct involving dishonesty, fraud, misrepresentation, or deceit, and it does not immunize a lawyer from the disciplinary consequences of such conduct.~~

(k) Individualized Deferrals Program

(1) If, at any time before a finding of probable cause, the Grievance Committee, the Chair of the Grievance Committee, or a representative of the Grievance Committee Chair appointed by the Chair determines that, due to the nature of the respondent's alleged misconduct, the respondent should be offered a deferral agreement as an alternative to discipline, the Grievance Committee may defer disposition of the grievance and offer the respondent an opportunity to comply voluntarily with a deferral agreement. If the respondent rejects the offer, the grievance shall proceed as otherwise provided in this chapter.

(2) The deferral agreement shall impose specific conditions the respondent must satisfy during a specified period not to exceed one year. For good cause shown, the committee may extend the time during which compliance with the conditions is required. The respondent shall collaborate with the Office of Counsel in development of conditions to include in the deferral agreement that address the underlying misconduct. However, the Grievance Committee shall determine all conditions to be included in the deferral agreement. Deferral agreement conditions may include, but are not limited to, the following:

(A) Appointment of a practice monitor for the respondent's practice;

(B) Successful completion of specified continuing legal education courses, or other courses of study;

(C) Successful completion of an educational or other consulting program including, but not limited to, a program offered by the respondent's malpractice insurance carrier;

(D) Attainment of a passing score on the Multistate Professional Responsibility Exam;

(E) Restitution, if practicable;

(F) Written statement of reconciliation or apology to the court, client, or other person or institution adversely affected by the respondent's conduct.

(3) If the respondent accepts the Grievance Committee's offer to enter into a deferral agreement, the terms of the deferral agreement shall be set forth in writing. The written deferral agreement shall include the following:

(A) The respondent's admission to the misconduct at issue in the grievance investigation;

(B) The respondent's agreement that, should the respondent fail to comply with the deferral agreement, the respondent's admission to the misconduct at issue in the grievance investigation may be considered by the Grievance Committee and/or offered into evidence without objection in any subsequent proceeding arising from the underlying grievance;

(C) A statement by the respondent that the respondent is participating in the deferral agreement freely and voluntarily and understands the nature and consequences of participation;

(D) A statement that the respondent accepts responsibility for the costs of the deferral conditions;

(E) An agreement by the respondent not to violate the Rules of Professional Conduct of this or any other jurisdiction while the deferral agreement is in effect;

(F) A statement specifying the general purpose of the deferral agreement;

(G) A specific and complete list of all conditions of the deferral agreement;

(H) A description of how the respondent's compliance with the deferral agreement's conditions will be monitored;

(I) The date by which the conditions of the deferral agreement must be completed;

(J) A description of how the respondent will provide evidence of the successful completion of the deferral agreement;

(K) The respondent's signature.

(4) A respondent is eligible to participate in a deferral agreement as an alternative to discipline when there is little likelihood of harm to the public, the respondent's participation in the deferral agreement is likely to benefit the respondent, and the deferral agreement conditions are likely to accomplish the goals of the deferral agreement. A respondent is not eligible for a deferral agreement as an alternative to discipline if any of the following circumstances are present:

(A) The respondent's alleged misconduct, standing alone, is likely to result in discipline that is more severe than a reprimand;

(B) The respondent's alleged misconduct is part of a pattern of misconduct that is unlikely to be changed by a deferral;

(C) The respondent's alleged misconduct is of the same nature as misconduct for which the respondent has been previously disciplined;

(D) The respondent's alleged misconduct involves dishonesty, fraud, deceit, or misrepresentation that reflects adversely on the lawyer's fitness as a lawyer;

(E) The respondent's alleged misconduct resulted in substantial harm to a client or other person or entity;

(F) The respondent's alleged misconduct involves misappropriation of funds or other property;

(G) The respondent's alleged misconduct involves a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

(H) The respondent's alleged misconduct involves sexual activity with a client, sexual communications with a client, or request, requirement, or demand for sexual activity or sexual communications with a client as a condition of any professional representation.

(5) The respondent shall pay all costs incurred in connection with completing the conditions of the deferral agreement.

(6) The respondent must participate personally in the deferral program, must communicate directly with the deferral program staff, and must provide required documentation directly to the deferral program staff.

(7) Upon the respondent's successful completion of the conditions in the deferral agreement, the Grievance Committee, the Chair of the Grievance Committee, or a representative of the Grievance Committee Chair appointed by the Chair shall dismiss the underlying grievance. If the grievance is dismissed, the respondent shall not be considered to have been disciplined; however, the respondent's participation in a deferral agreement as an alternative to discipline may be considered by the Grievance Committee in reviewing any subsequent grievance and offered into evidence without objection in any subsequent disciplinary proceeding within three years after the expiration of the deferral agreement.

(8) If the respondent fails to comply with the terms of the deferral agreement, the Office of Counsel shall notify the respondent of the apparent noncompliance and shall provide the respondent an opportunity to respond to those allegations. The respondent shall be given an opportunity to respond to the allegations in the same manner as prescribed by Rule .0112(b) of this subchapter. If the Grievance Committee determines

that the respondent has failed to comply with the deferral agreement, the Grievance Committee may modify the deferral agreement or terminate the deferral agreement and proceed with the matter as otherwise provided in this chapter.

History Note: *Authority G.S. 84-23;*
Readopted Eff. December 8, 1994;
Amendments Approved by the Supreme Court: February 20, 1995; March 6, 1997; December 30, 1998; December 20, 2000; March 6, 2002; March 10, 2011; August 25, 2011; August 23, 2012; March 5, 2015; March 19, 2025.

27 NCAC 01B .0113 is amended without notice pursuant to G.S. 84-23, 150B-21.21 as follows:

27 NCAC 01B .0113 PROCEEDINGS BEFORE THE GRIEVANCE COMMITTEE

(a) Probable Cause - The Grievance Committee or any of its subcommittees acting as the Grievance Committee with respect to grievances referred to it by the chair of the Grievance Committee will determine whether there is probable cause to believe that a respondent committed ~~is guilty of~~ misconduct justifying disciplinary action. In its discretion, the Grievance Committee or a panel thereof may find probable cause regardless of whether the respondent has been served with a written letter of notice. The respondent may waive the necessity of a finding of probable cause with the consent of the counsel and the chair of the Grievance Committee. A decision of a panel of the committee may not be appealed to the Grievance Committee as a whole or to another panel (except as provided in 27 N.C.A.C. 1A, .0701(a)(3)).

(b) Oaths and Affirmations - The chair of the Grievance Committee will have the power to administer oaths and affirmations.

(c) Record of Grievance Committee's Determination - The chair will keep a record of the Grievance Committee's determination concerning each grievance and file the record with the secretary.

~~(d) Subpoenas - The chair will have the power to subpoena witnesses, to compel their attendance, and compel the production of books, papers, and other documents deemed necessary or material to any preliminary hearing. The chair may designate the secretary to issue such subpoenas.~~

(~~e~~d) Closed Meetings - The counsel and deputy counsel, the witness under examination, interpreters when needed, and, if deemed necessary, a stenographer or operator of a recording device may be present while the committee is in session and deliberating, but no persons other than members may be present while the committee is voting.

(e) Procedure When Counsel Recommends Admonition, Reprimand, Censure, or Referral to the Disciplinary Hearing Commission. If the counsel recommends admonition, reprimand, censure, or referral to the Disciplinary Hearing Commission,

(1) At least thirty days before the committee's consideration of the counsel's recommendation, the counsel shall provide to the respondent:

(A) all financial audits and all other materials provided to the committee that are not privileged and are not work product; and

(B) any evidence in the possession of the State Bar that indicates the respondent did not engage in the alleged misconduct, or a certification that no such evidence is in the State Bar's possession.

(2) The respondent shall have the opportunity to hear the counsel's presentation of the factual basis for the recommendation and to address the subcommittee to which the grievance is assigned. The chair of the Grievance Committee shall have discretion to offer respondents the option of participating via video conference and to determine the amount of time the counsel and the respondent will have to address the subcommittee, ensuring the respondent is allowed at least the same amount of time as is granted to the counsel for its recitation of factual basis.

(f) Disclosure of Matters Before the Grievance Committee - The results of any deliberation by the Grievance Committee will be disclosed to the counsel and the secretary for use in the performance of their duties. Otherwise, a member of the committee, the staff of the North Carolina State Bar, any interpreter, stenographer, operator of a recording device, or any typist who transcribes recorded testimony may disclose matters occurring before the committee only when so directed by the committee or a court of record.

(g) Quorum Requirement - At any preliminary hearing held by the Grievance Committee, a quorum of one-half of the members will be required to conduct any business. Affirmative vote of a majority of members present will be necessary to find that probable cause exists. The chair will not be counted for quorum purposes and will be eligible to vote regarding the disposition of any grievance only in case of a tie among the regular voting members.

(h) Results of Grievance Committee Deliberations - If probable cause is found and the committee determines that a hearing is necessary, the chair will direct the counsel to prepare and file a complaint against the respondent. If the committee finds probable cause but determines that no hearing is necessary, it will direct the counsel to prepare for the chair's signature an admonition, reprimand, or censure. If no probable cause is found, the grievance will be dismissed or dismissed with a letter of warning or a letter of caution.

(i) Letters of Caution - If no probable cause is found but it is determined by the Grievance Committee that the conduct of the respondent is unprofessional or not in accord with accepted professional practice, the committee may issue a letter of caution to the respondent recommending that the respondent be more professional in his or her practice in one or more ways which are to be specifically identified.

(j) Letters of Warning

(1) If no probable cause is found but it is determined by the Grievance Committee that the conduct of the respondent is an unintentional, minor, or technical violation of the Rules of Professional Conduct, the committee may issue a letter of warning to the respondent. The letter of warning will advise the respondent that he or she may be subject to discipline if such conduct is continued or repeated. The letter will specify in one or more ways the conduct or practice for which the respondent is being warned. The letter of warning will not constitute discipline of the respondent.

(2) A copy of the letter of warning will be maintained in the office of the counsel for three years. If relevant, a copy of the letter of warning may be offered into evidence in any proceeding filed against the respondent before the commission within three years after the letter of warning is issued to the respondent. In every case filed against the respondent before the commission within three years after the letter of warning is issued to the respondent, the letter of warning may be introduced into evidence as an aggravating factor concerning the issue of what disciplinary sanction should be imposed. A copy of the letter of warning may be disclosed to the Grievance Committee if another grievance is filed against the respondent within three years after the letter of warning is issued to the respondent.

(3) Service of Process:

(A) If valid service upon the respondent has previously been accomplished by certified mail, personal service, publication, or acceptance of service by the respondent or the respondent's counsel, a copy of the letter of warning may be served upon the respondent by mailing a copy of the letter of warning to the respondent's last known address on file with the State Bar. Service shall be deemed complete upon deposit of the letter of warning in a postpaid, properly addressed wrapper in a post office or official depository under the exclusive care and custody of the United States Postal Service.

(B) If valid service upon the respondent has not previously been accomplished by certified mail, personal service, publication, or acceptance of service by the respondent or the respondent's counsel, a copy of the letter of warning shall be served upon the respondent by certified mail

or personal service. If diligent efforts to serve the respondent by certified mail and by personal service are unsuccessful, the letter of warning shall be served by mailing a copy of the letter of warning to the respondent's last known address on file with the State Bar. Service shall be deemed complete upon deposit of the letter of warning in a postpaid, properly addressed wrapper in a post office or official depository under the exclusive care and custody of the United States Postal Service.

(4) Within 15 days after service, the respondent may refuse the letter of warning and request a hearing before the commission to determine whether the respondent violated the Rules of Professional Conduct. Such refusal and request will be in writing, addressed to the Grievance Committee, and served on the secretary by certified mail, return receipt requested. The refusal will state that the letter of warning is refused. If the respondent does not serve a refusal and request within 15 days after service upon the respondent of the letter of warning, the letter of warning will be deemed accepted by the respondent. An extension of time may be granted by the chairperson of the Grievance Committee for good cause shown.

(5) In cases in which the respondent refuses the letter of warning, the counsel will prepare and file a complaint against the respondent at the commission.

(k) Admonitions, Reprimands, and Censures

(1) If probable cause is found but it is determined by the Grievance Committee that a complaint and hearing are not warranted, the committee shall issue an admonition in cases in which the respondent has committed a minor violation of the Rules of Professional Conduct, a reprimand in cases in which the respondent's conduct has violated one or more provisions of the Rules of Professional Conduct and caused harm or potential harm to a client, the administration of justice, the profession, or members of the public, or a censure in cases in which the respondent has violated one or more provisions of the Rules of Professional Conduct and the harm or potential harm caused by the respondent is significant and protection of the public requires more serious discipline. To determine whether more serious discipline is necessary to protect the public or whether the violation is minor and less serious discipline is sufficient to protect the public, the committee shall consider the factors delineated in subparagraphs (2) and (3) below.

(2) Factors that shall be considered in determining whether protection of the public requires a censure include, but are not limited to, the following:

(A) prior discipline for the same or similar conduct;

(B) prior notification by the North Carolina State Bar of the wrongfulness of the conduct;

(C) refusal to acknowledge wrongful nature of conduct;

(D) lack of indication of reformation;

(E) likelihood of repetition of misconduct;

(F) uncooperative attitude toward disciplinary process;

(G) pattern of similar conduct;

(H) violation of the Rules of Professional Conduct in more than one unrelated matter;

(I) lack of efforts to rectify consequences of conduct;

(J) imposition of lesser discipline would fail to acknowledge the seriousness of the misconduct and would send the wrong message to members of the Bar and the public regarding the conduct expected of members of the Bar;

(K) notification contemporaneous with the conduct at issue of the wrongful nature of the conduct and failure to take remedial action.

(3) Factors that shall be considered in determining whether the violation of the Rules is minor and warrants issuance of an admonition include, but are not limited to, the following:

(A) lack of prior discipline for same or similar conduct;

(B) recognition of wrongful nature of conduct;

(C) indication of reformation;

(D) indication that repetition of misconduct not likely;

(E) isolated incident;

(F) violation of the Rules of Professional Conduct in only one matter;

(G) lack of harm or potential harm to client, administration of justice, profession, or members of the public;

(H) efforts to rectify consequences of conduct;

(I) inexperience in the practice of law;

(J) imposition of admonition appropriately acknowledges the minor nature of the violation(s) of the Rules of Professional Conduct;

(K) notification contemporaneous with the conduct at issue of the wrongful nature of the conduct resulting in efforts to take remedial action;

(L) personal or emotional problems contributing to the conduct at issue;

(M) successful participation in and completion of contract with Lawyer's Assistance Program where mental health or substance abuse issues contributed to the conduct at issue.

(l) Procedures for Admonitions, Reprimands, and Censures

(1) A record of any admonition, reprimand, or censure issued by the Grievance Committee will be maintained in the office of the secretary.

(2)

(A) If valid service upon the respondent has previously been accomplished by certified mail, personal service, publication, or acceptance of service by the respondent or the respondent's counsel, a copy of the admonition, reprimand, or censure may be served upon the respondent by mailing a copy of the admonition, reprimand, or censure to the respondent's last known address on file with the State Bar. Service shall be deemed complete upon deposit of the admonition, reprimand, or censure in a postpaid, properly addressed wrapper in a post office or official depository under the exclusive care and custody of the United States Postal Service.

(B) If valid service upon the respondent has not previously been accomplished by certified mail, personal service, publication, or acceptance of service by the respondent or the respondent's counsel, a copy of the admonition, reprimand, or censure shall be served upon the respondent by certified mail or personal service. If diligent efforts to serve the respondent by certified mail and by personal service are unsuccessful, the respondent shall be served by mailing a copy of the admonition, reprimand, or censure to the respondent's last known address on file with the State Bar. Service shall be deemed complete upon deposit of the admonition, reprimand, or

censure in a postpaid, properly addressed wrapper in a post office or official depository under the exclusive care and custody of the United States Postal Service.

(3) Within 15 days after service the respondent may refuse the admonition, reprimand, or censure and request a hearing before the commission. Such refusal and request will be in writing, addressed to the Grievance Committee, and served upon the secretary by certified mail, return receipt requested. The refusal will state that the admonition, reprimand, or censure is refused.

(4) If a refusal and request are not served upon the secretary within 15 days after service upon the respondent of the admonition, reprimand, or censure, the admonition, reprimand, or censure will be deemed accepted by the respondent. An extension of time may be granted by the chair of the Grievance Committee for good cause shown. A censure that is deemed accepted by the respondent must be filed as provided by Rule .0127(a)(3) of this subchapter.

(5) In cases in which the respondent refuses an admonition, reprimand, or censure, the counsel will prepare and file a complaint against the respondent at the commission.

(m) There shall be a grievance review panel of the Grievance Committee. For each review conducted, the chair shall appoint a panel consisting of the chair, two vice-chairs, and two other members of the Grievance Committee, including one public member. The panel shall not include any member who serves on the subcommittee that was assigned to address the underlying grievance file. The chair shall serve as the chair of the panel. If the chair or either of the two vice-chairs from the other subcommittees served on the subcommittee that issued the discipline or are otherwise unable to serve on the review panel, the chair may appoint a substitute member or members of the committee to serve on the review panel in the place of the chair or in the place of such vice-chair or vice-chairs.

(1) The panel shall have the following powers and duties:

(A) Upon a timely-filed written request by a grievance respondent, to review an order of public discipline issued to the respondent by the Grievance Committee.

(i) A written request for review must be filed with the secretary of the State Bar within 15 days of service of the public discipline upon the respondent.

(ii) The written request shall contain the grounds upon which the respondent believes review is warranted and may include supporting documentary evidence that has not previously been submitted to the Grievance Committee.

(iii) The respondent shall be entitled to be represented by legal counsel at the respondent's expense. The respondent or the respondent's legal counsel and legal counsel for the State Bar shall be entitled to appear and to present oral arguments to the panel. The panel's review shall be conducted upon the written record and oral arguments. Neither the respondent nor the State Bar may present live testimony or compel the production of books, papers, and other writings and documents in connection with a request for review. The panel may, in its discretion, question the respondent, legal counsel for the respondent, and legal counsel for the State Bar.

(iv) The panel shall consider the request for review, any documentation submitted in support of the request for review, and all materials that were before the Grievance Committee when it made its decision. The respondent shall be entitled to receive all material considered by the panel other than attorney-client privileged communications of the Office of Counsel and work product of the Office of Counsel. The panel shall determine whether the public discipline issued by the Grievance Committee is appropriate in light of all material considered by the panel.

(a) After considering the request for review, oral arguments, and the documentary record, the panel may, by majority vote, either concur in the public discipline issued by the Grievance Committee or remand the grievance file to the Grievance Committee with its recommendation for a different disposition.

(b) The panel shall prepare a memorandum communicating its determination to the respondent and to the Office of Counsel. The memorandum will not constitute an order and will not contain findings of fact, conclusions of law, or the rationale for the panel's determination.

(c) The Grievance Committee shall act upon a remand at its next regularly scheduled meeting.

(d) Upon remand, the Grievance Committee may affirm the public discipline that it issued or may reach a different disposition of the grievance file.

(e) The decision of the Grievance Committee upon remand is final, and its decision is not subject to further consideration by the Grievance Committee.

(f) Within 15 days after service upon the respondent of (i) the panel's memorandum concurring in the original public discipline issued by the Grievance Committee, or (ii) the Grievance Committee's final decision upon remand after review, the respondent may refuse the public discipline imposed by the Grievance Committee and request a hearing before the commission. Such refusal and request shall be in writing, addressed to the Grievance Committee, and served upon the secretary of the State Bar by certified mail, return receipt requested.

(v) Second or subsequent requests for review of Grievance Committee action in the same file will not be considered.

(vi) A request for review is in addition to and not in derogation of all procedural and substantive rights contained in the Discipline and Disability Rules of the State Bar.

(2) All proceedings and deliberations of the panel shall be conducted in a manner and at a time and location to be determined by the chair of the Grievance Committee. Reviews may be conducted by videoconference in the discretion of the chair.

(3) All proceedings of the panel are closed to the public. Neither the respondent nor legal counsel for the respondent and the State Bar shall be privy to deliberations of the panel. All documents, papers, letters, recordings, electronic records, or other documentary materials, regardless of physical form or characteristic, in the possession of the panel are confidential and are not public records within the meaning of Chapter 132 of the General Statutes.

(n) Disciplinary Hearing Commission Complaints - Formal complaints will be issued in the name of the North Carolina State Bar as plaintiff and signed by the chair of the Grievance Committee. Amendments to complaints may be signed by the counsel alone, with the approval of the chair of the Grievance Committee.

History Note: *Authority G.S. 84-23; 84-28;*
Readopted Eff. December 8, 1994;
Amendments Approved by the Supreme Court: March 3, 1999; February 3, 2000; October 8, 2009; March 27, 2019; September 25, 2020; March 19, 2025
Amendments Approved by the Supreme Court October 18, 2023 and December 20, 2023 and re-entered into the Supreme Court's minutes March 20, 2024.

27 NCAC 01B .0136 is adopted without notice pursuant to G.S. 84-23, 150B-21.21 as follows:

27 NCAC 01B .0136 EXPUNGEMENT OR SEALING OF DISCIPLINE

(a) By the Chair of the Grievance Committee.

(1) Expungement of Admonition by the Grievance Committee. A lawyer who accepted an admonition from the Grievance Committee may petition the chair of the committee to expunge the admonition as set forth herein. The petition shall be served upon the State Bar Counsel. The petitioner shall show rehabilitation by executing and attaching to the petition an affidavit certifying the following requirements for expungement of an admonition:

(A) The admonition (i) did not involve violation of Rules of Professional Conduct 1.19, 3.3(a), 8.4(b), or 8.4(c) or attempted violation of Rule 1.19, or (ii) did involve violation of Rule 8.4(c) but the admonition was solely related to the contents of the lawyer's advertising or marketing materials;

(B) Five years have elapsed since the effective date of the admonition;

(C) The petitioner has not been the subject of any professional discipline since the effective date of the admonition;

(D) The petitioner has not been convicted of violating the laws of the United States or any state or local government other than minor traffic violations since the effective date of the admonition and no criminal charges other than minor traffic violations are currently pending against the petitioner;

(E) There are no grievances pending against the petitioner with the North Carolina State Bar and no allegations of professional misconduct against the petitioner are currently under investigation in any other jurisdiction;

(F) There are no disciplinary proceedings pending against the petitioner in the Disciplinary Hearing Commission, in any court, or in any other jurisdiction; and

(G) The petitioner has not previously been granted expungement or sealing of a disciplinary action.

(2) Expungement of Reprimand or Censure by the Grievance Committee. A lawyer who accepted a reprimand or a censure from the Grievance Committee may petition the chair of the committee to expunge the reprimand or the censure as set forth herein. The petition shall be served upon the State Bar Counsel. The petitioner shall show rehabilitation by executing and attaching to the petition an affidavit certifying the following requirements for expungement of a reprimand or censure:

(A) The reprimand or censure (i) did not involve violation of Rule of Professional Conduct 1.19, 3.3(a), 8.4(b), or 8.4(c) or attempted violation of Rule 1.19, or (ii) did involve violation of Rule 8.4(c) but the reprimand or censure was solely related to the contents of the lawyer's advertising or marketing materials;

(B) Ten years have elapsed since the effective date of the reprimand or censure;

(C) The petitioner has not been the subject of any professional discipline since the effective date of the reprimand or censure;

(D) The petitioner has not been convicted of violating the laws of the United States or any state or local government other than minor traffic violations since the effective date of the reprimand or censure and no criminal charges other than minor traffic violations are currently pending against the petitioner;

(E) There are no grievances pending against the petitioner with the North Carolina State Bar and no allegations of professional misconduct against the petitioner are currently under investigation in any other jurisdiction; and

(F) There are no disciplinary proceedings pending against the petitioner in the Disciplinary Hearing Commission, in any court, or in any other jurisdiction; and

(G) The petitioner has not previously been granted expungement or sealing of a disciplinary action.

(3) Determination by the Chair of the Grievance Committee.

(A) The Office of Counsel shall have 30 days from the date of service of the petition to produce any information or documentation concerning whether the requirements for expungement are satisfied. Such information shall be transmitted to the petitioner and the chair of the Committee.

(B) If the chair of the Grievance Committee concludes that the requirements in Rule .0136(a)(1) have been satisfied, the chair shall enter an order expunging the admonition. If the chair of the Grievance Committee concludes that the requirements in Rule .0136(a)(2) have been satisfied, the chair shall enter an order expunging the reprimand or censure.

(b) By the Chair of the Disciplinary Hearing Commission.

(1) Expungement of Admonition Entered by the Disciplinary Hearing Commission. A lawyer in whose case the Disciplinary Hearing Commission entered an order of discipline imposing an admonition may petition the chair of the commission to expunge the admonition as set forth herein. The petition shall be filed with the commission and served upon the State Bar Counsel. The petitioner shall show rehabilitation by executing and attaching to the petition an affidavit certifying the following requirements for expungement of an admonition:

(A) The admonition (i) did not involve violation of Rule of Professional Conduct 1.19, 3.3(a), 8.4(b), or 8.4(c) or attempted violation of Rule 1.19, or (ii) did involve violation of Rule 8.4(c) but the admonition was solely related to the contents of the lawyer's advertising or marketing materials;

(B) Five years have elapsed since the effective date of the admonition;

(C) The petitioner has not been the subject of any professional discipline since the effective date of the admonition;

(D) The petitioner has not been convicted of violating the laws of the United States or any state or local government other than minor traffic violations since the effective date of the admonition and no criminal charges other than minor traffic violations are currently pending against the petitioner;

(E) There are no grievances pending against the petitioner with the North Carolina State Bar and no allegations of professional misconduct against the petitioner are currently under investigation in any other jurisdiction;

(F) There are no disciplinary proceedings pending against the petitioner in the Disciplinary Hearing Commission, in any court, or in any other jurisdiction; and

(G) The petitioner has not previously been granted expungement or sealing of a disciplinary action.

(2) Expungement of Reprimand or Censure Entered by the Disciplinary Hearing Commission. A lawyer in whose case the Disciplinary Hearing Commission entered an order of discipline imposing a reprimand or a censure may petition the chair of the commission to expunge the reprimand or censure as set forth herein. The petition shall be filed with the commission and served upon the State Bar Counsel. The petitioner shall show rehabilitation by executing and attaching to the petition an affidavit certifying the following requirements for expungement of a reprimand or censure:

(A) The reprimand or censure (i) did not involve violation of Rule of Professional Conduct 1.19, 3.3(a), 8.4(b), or 8.4(c) or attempted violation of Rule 1.19 or (ii) did involve violation of Rule 8.4(c) but the reprimand or censure was solely related to the contents of the lawyer's advertising or marketing materials;

(B) Ten years have elapsed since the effective date of the reprimand or censure;

(C) The petitioner has not been the subject of any professional discipline since the effective date of the reprimand or censure;

(D) The petitioner has not been convicted of violating the laws of the United States or any state or local government other than minor traffic violations since the effective date of the reprimand or censure and no criminal charges other than minor traffic violations are currently pending against the petitioner;

(E) There are no grievances pending against the petitioner with the North Carolina State Bar and no allegations of professional misconduct against the petitioner are currently under investigation in any other jurisdiction;

(F) There are no disciplinary proceedings pending against the petitioner in the Disciplinary Hearing Commission, in any court, or in any other jurisdiction; and

(G) The petitioner has not previously been granted expungement or sealing of a disciplinary action.

(3) Determination by the Chair of the Disciplinary Hearing Commission.

(A) The Office of Counsel shall have 30 days from the date of service of the petition to file a response with information or documentation concerning whether the requirements for expungement are satisfied. The response shall be transmitted to the petitioner.

(B) If the chair of the commission concludes that the requirements in Rule .0136(b)(1) have been satisfied, the chair shall enter an order expunging the admonition. If the chair of the commission concludes that the requirements in Rule .0136(b)(2) have been satisfied, the chair shall enter an order expunging the reprimand or censure.

(c) Effect of Expungement of Admonition, Reprimand, or Censure.

(1) An admonition, reprimand, or censure that is expunged by the chair of the Grievance Committee or by the chair of the Disciplinary Hearing Commission shall be removed from the petitioner's disciplinary record and from the State Bar website. For disciplinary actions expunged by the Disciplinary Hearing Commission, all filings in the case shall be removed from the publicly accessible records of the commission.

(2) In determining the disposition of any future grievances against the petitioner, the State Bar's Grievance Committee will not consider expunged discipline.

(3) The State Bar shall maintain a confidential record of expunged discipline, including all filings in the Disciplinary Hearing Commission case that resulted in the discipline, which will not be available for public inspection and will not be disclosed except as provided in subsection (h) of this rule.

(4) The petitioner will not be held thereafter to have made a false statement by reason of failing to recite or acknowledge the expunged discipline. This subsection shall not apply in a DHC or judicial disciplinary proceeding in which the petitioner has been found to have engaged in misconduct and the tribunal is determining what discipline should be imposed.

(d) Sealing Order of Stayed Suspension Entered by the Disciplinary Hearing Commission.

(1) A lawyer in whose case the Disciplinary Hearing Commission entered an order imposing a stayed suspension of the lawyer's law license may petition the chair of the commission to seal the order of discipline as set forth herein. The petition shall be filed with the

commission and served upon the State Bar Counsel. The petitioner shall show rehabilitation by executing and attaching to the petition an affidavit certifying the following requirements for sealing an order of discipline:

(A) The order of discipline imposing the stayed suspension (i) did not involve violation of Rule of Professional Conduct 1.19, 3.3(a), 8.4(b), or 8.4(c) or attempted violation of Rule 1.19, or (ii) the stayed suspension did involve violation of Rule 8.4(b) and/or Rule 8.4(c) but the order of discipline was related solely to the lawyer's failure to file and/or pay personal income taxes;

(B) Ten years have elapsed since the effective date of the stayed suspension;

(C) The petitioner has not been the subject of any professional discipline since the effective date of the stayed suspension;

(D) The petitioner has not been convicted of violating the laws of the United States or any state or local government other than minor traffic violations since the effective date of the order of discipline and no criminal charges other than minor traffic violations are currently pending against the petitioner;

(E) There are no grievances pending against the petitioner with the North Carolina State Bar and no allegations of professional misconduct against the petitioner are currently under investigation in any other jurisdiction;

(F) There are no disciplinary proceedings pending against the petitioner in the Disciplinary Hearing Commission, in any court, or in any other jurisdiction;

(G) The suspension imposed in the order of discipline was entirely stayed, no portion of the suspension was activated by the commission, and the period of the stay was not extended by the commission due to noncompliance with conditions; and

(H) The petitioner has not previously been granted expungement or sealing of a disciplinary action.

(2) Determination by Chair of the Commission.

(A) The Office of Counsel shall have 30 days from the date of service of the petition to file a response with information

or documentation concerning whether the requirements for sealing a disciplinary order are satisfied. The response shall be transmitted to the petitioner.

(B) If the chair of the commission concludes that the requirements of Rule .0136(d)(1) have been satisfied by the petitioner, the chair shall enter an order sealing the order of stayed suspension and all other filings in the case, including the filings related to the petition to seal the disciplinary order.

(3) Effect of Sealing an Order of Stayed Suspension.

(A) An order of stayed suspension that has been sealed by the chair of the Disciplinary Hearing Commission shall be removed from the State Bar website and all filings in the case shall be removed from the publicly accessible records of the commission.

(B) The State Bar will maintain a confidential record of the sealed order of stayed suspension and other filings in the case, which shall not be available for public inspection. The sealed order of stayed suspension may be introduced into evidence and considered in any future disciplinary action against the petitioner. Otherwise, the sealed order of stayed suspension shall not be disclosed except as provided in subsection (h) of this rule.

(e) Orders of Active Suspension, Activated or Extended Orders of Stayed Suspension, and Orders of Disbarment Shall Not Be Expunged or Sealed. An order of discipline imposing an active suspension, imposing a stayed suspension that was activated or extended due to noncompliance, or imposing disbarment shall not be expunged or sealed.

(f) Eligibility Limited to Single Disciplinary Action. A lawyer who is granted expungement or sealing of professional discipline pursuant to this rule is not eligible for expungement or sealing of additional professional discipline.

(g) Rescission of Expungement or Sealing of Discipline. Upon receipt of information indicating that a certification in the affidavit supporting a petition to expunge or seal a disciplinary action was false, the Office of Counsel may submit a written request to the chair of the Grievance Committee or file a motion in the Disciplinary Hearing Commission requesting that the expungement or sealing of the disciplinary action be rescinded. The request or motion shall be served upon the lawyer who made the certification and the lawyer shall have 30 days from the date

of service to submit a written response. If the chair of the Grievance Committee or the Disciplinary Hearing Commission concludes that the expungement or sealing of the disciplinary action was based upon a false certification by the petitioner, the order of expungement or order sealing the disciplinary order shall be rescinded.

(h) Confidential State Bar Records. The State Bar shall maintain confidential records of expunged discipline, sealed disciplinary orders, petitions to expunge or seal, and orders granting expungement or sealing pursuant to this rule. These confidential records may be disclosed only as follows:

(1) Upon request of a judge of the North Carolina General Court of Justice for the purpose of ascertaining whether a lawyer has previously been granted an expungement or sealing of professional discipline.

(2) Upon request of a lawyer seeking confirmation that disciplinary action against the requesting lawyer has been expunged or sealed.

(3) Pursuant to a search warrant, grand jury subpoena, or court order directing or authorizing the State Bar to provide records to any law enforcement or national security agency.

(4) In response to a petition for expungement by a lawyer to whom expungement or sealing was previously granted and who is therefore ineligible for expungement or sealing of additional disciplinary actions pursuant to section (f) of this rule.

(5) In a request to rescind the order of expungement pursuant to section (g) of this rule.

(6) In a DHC or judicial disciplinary proceeding in which the petitioner has been found to have engaged in misconduct and the tribunal is determining what discipline should be imposed.

(i) Removal of Disciplinary Record of Deceased Lawyer from State Bar Website. One year after the State Bar is notified of a lawyer's death, the State Bar shall remove from the State Bar website any orders of discipline entered against the lawyer.

(j) Removal of Orders of Dismissal from State Bar Website. Three years after the entry of an order by the Disciplinary Hearing Commission dismissing all charges of misconduct against a lawyer, the lawyer against whom the dismissed charges were filed may request that the order of dismissal be removed from the State Bar website. Requests for removal under this section shall be directed to the State Bar Counsel, who shall

direct that the order be removed from the website if the order dismissed all charges of misconduct against the lawyer and three years have elapsed since entry of the order.

History Note: *Authority G.S. 84-23; 84-28*
Amendments Approved by the Supreme Court: March 19, 2025

27 NCAC 01B .0137 is adopted without notice pursuant to G.S. 84-23, 150B-21.21 as follows:

27 NCAC 01B .0137 VEXATIOUS COMPLAINANTS

(a) Designation as a Vexatious Complainant.

(1) A person who submits to the State Bar grievances asserting allegations that, even if proven, would not constitute violations of the Rules of Professional Conduct or asserting allegations that are conclusively disproven by available evidence, and does so in a manner or in a volume amounting to abuse of the State Bar disciplinary process, may be designated by the chair of the Grievance Committee to be a vexatious complainant. Abuse of the State Bar disciplinary process includes repetitive, abusive, or frivolous allegations or communications by the complainant. Allegations that are contentious or are found to be without merit are not, standing alone, an abuse of the State Bar disciplinary process.

(2) The Office of Counsel shall mail a notice of the designation to the complainant at the complainant's last known address. The notice shall contain a statement describing the factual basis for the designation. If the complainant does not request review of the designation pursuant to paragraph (a)(3) of this rule, the designation by the chair of the Grievance Committee shall be final and not subject to further review or reversal.

(3) A complainant designated as vexatious may seek review of the designation by filing a request for review with the clerk of the Disciplinary Hearing Commission and addressed to the chair of the commission. The complainant shall serve a copy of the request upon the State Bar Counsel. The request for review must be filed within thirty days after the Office of Counsel mailed the notice issued under paragraph (a)(2) of this rule.

(4) The Office of Counsel may file a response to the request for review within fifteen days of the State Bar's receipt of the request for review.

(5) Based upon the written submissions by the complainant and the Office of Counsel, the chair of the commission may either uphold or vacate the designation.

(6) Pursuant to NCGS 84-28.3(b), designation of a complainant as vexatious under this rule shall be final and conclusive and not subject to further review.

(b) Consequences of Designation as Vexatious Complainant.

(1) The State Bar may decline to review and process any grievance initiated by a person who has been designated a vexatious complainant, unless

(A) the grievance is submitted with a verification signed by the complainant under penalty of perjury that the allegations are true; and

(B) the grievance is submitted on the complainant's behalf by a member of the North Carolina State Bar who

(i) has an active North Carolina law license;

(ii) is not currently designated as a vexatious complainant; and

(iii) is not currently the respondent in a pending grievance investigation or the defendant in a pending attorney disciplinary proceeding.

History Note: *Authority G.S. 84-23; 84-28*
Approved by the Supreme Court: March 19, 2025

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR:

RULES GOVERNING CONTINUING LEGAL EDUCATION

The following Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meetings on January 24, 2025.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar as set forth in 27 N.C.A.C. 01D, Section .1500, Rule 1523, *Credit for Non-Traditional Programs and Activities* be amended as shown in the following attachments:

Tab 2: 27 N.C.A.C. 01D, Section .1500, Rule .1523, *Credit for Non-Traditional Programs and Activities*

NORTH CAROLINA
WAKE COUNTY

I, Peter Bolac, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on January 24, 2025.

Given over my hand and the Seal of the North Carolina State Bar, this the 29th day of January, 2025.

s/Peter Bolac
Peter Bolac, Secretary

After examining the foregoing amendments to the Rules and Regulations of the North Carolina State Bar as adopted 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 19th day of March, 2025.

s/Paul Newby
Paul Newby, Chief Justice

On this date, the foregoing amendment to the Rules and Regulations of the North Carolina State Bar 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 19th day of March, 2025.

s/Riggs, J.
For the Court

27 NCAC 01D .1523 is amended without notice pursuant to G.S. 84-23, 150B-21.21 as follows:

27 NCAC 01D .1523 CREDIT FOR NON-TRADITIONAL PROGRAMS AND ACTIVITIES

(a) Law School Courses. Courses offered by an ABA accredited law school with respect to which academic credit may be earned may be approved programs. Computation of CLE credit for such courses shall be as prescribed in Rule .1524 of this subchapter. No credit is available for law school courses attended prior to becoming an active member of the North Carolina State Bar.

(b) Service to the Profession Training. A program or segment of a program presented by a bar organization may be granted up to three hours of credit if the bar organization's program trains volunteer lawyers in service to the profession.

(c) Teaching Law Courses.

(1) Law School Courses. If a member is not a full-time teacher at a law school in North Carolina who is eligible for the exemption in Rule .1517(e) of this subchapter, the member may earn CLE credit for teaching a course or a class in a quarter or semester-long course at an ABA accredited law school.

(2) Graduate School Courses. A member may earn CLE credit by teaching a course on substantive law or a class on substantive law in a quarter or semester-long course at a graduate school of an accredited university.

(3) Courses at Paralegal Schools or Programs. A member may earn CLE credit by teaching a paralegal or substantive law course or a class in a quarter or semester-long course at an ABA approved paralegal school or program.

(4) Other Law Courses. The Board, in its discretion, may give CLE credit to a member for teaching law courses at other schools or programs.

(5) Credit Hours. Credit for teaching described in this paragraph may be earned without regard to whether the course is taught online or in a classroom. Credit will be calculated according to the following formula:

(A) Teaching a Course. 3.5 Hours of CLE credit for every quarter hour of credit assigned to the course by the educational institution, or 5.0 Hours of CLE credit for every

semester hour of credit assigned to the course by the educational institution. (For example: a 3-semester hour course will qualify for 15 hours of CLE credit.)

(B) Teaching a Class. 1.0 Hour of CLE credit for every 50 – 60 minutes of teaching.

(d) In-House CLE and Self-Study. No approval will be provided for in-house CLE or self-study by lawyers, except, in the discretion of the Board, as follows:

(1) programs to be conducted by public or quasi-public organizations or associations for the education of their employees or members;

(2) programs to be concerned with areas of legal education not generally offered by sponsors of programs attended by lawyers engaged in the private practice of law; or

(3) live ~~ethics~~ethics, professional well-being, or technology training programs presented by a person or organization that is not affiliated with the lawyers attending the program or their law firms and that has demonstrated qualification to present such programs through experience and knowledge.

(e) Bar Review/Refresher Course. Programs designed to review or refresh recent law school graduates or lawyers in preparation for any bar exam shall not be approved for CLE credit.

(f) CLE credit will not be given for (i) general and personal educational activities; (ii) courses designed primarily to sell services; or (iii) courses designed to generate greater revenue.

History Note: *Authority - Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711;*
Readopted Eff. December 8, 1994;
Amendments Approved by the Supreme Court: March 6, 1997; March 5, 1998; March 3, 1999; March 1, 2001; June 7, 2001; March 3, 2005; March 2, 2006; March 8, 2007; October 9, 2008; March 6, 2014; June 9, 2016; September 20, 2018; September 25, 2019; March 19, 2025
Rule transferred from 27 NCAC 01D .1602 on June 14, 2023;
Amendments Approved by the Supreme Court June 14, 2023 and re-entered into the Supreme Court's minutes March 20, 2024.

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