NORTH CAROLINA REPORTS

VOLUME 380

SUPREME COURT OF NORTH CAROLINA

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THE SUPREME COURT
OF
NORTH CAROLINA

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MICHAEL R. MORGAN
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TAMARA PATTERSON BARRINGER

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Librarian

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WILLIAM BOWMAN

[1]Resigned 18 February 2022.
[2]Sworn in 18 February 2022.

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ALYSSA M. CHEN
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SUPERIOR COURT DIVISION

DISTRICT	JUDGES	ADDRESS
	First Division	
1	Jerry R. Tillett	Manteo
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2	Wayland Sermons	Washington
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	Jeffery B. Foster	Greenville
6A	Norlan Graves	Roanoke Rapids
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7A	Quentin T. Sumner	Rocky Mount
7BC	Lamont Wiggins	Rocky Mount
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9	John Dunlow	Oxford
	Cindy Sturges	Louisburg
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	Michael O'Foghludha	Durham
	Josephine Kerr Davis	Durham
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	Clinton D. Rowe	New Bern
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	Henry L. Stevens[2]	Wallace
5	Phyllis M. Gorham	Wilmington
	R. Kent Harrell	Burgaw
	Frank Jones	Wilmington
8A	Imelda J. Pate	Kinston
8B	William W. Bland	Goldsboro
13A	Douglas B. Sasser	Whiteville
13B	Jason C. Disbrow	Southport
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	Tiffany P. Powers	Lumberton
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	A. Graham Shirley	Raleigh
	Rebecca W. Holt	Raleigh
	Vinston M. Rozier	Raleigh
	Keith O. Gregory	Raleigh

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11A	C. Winston Gilchrist	Lillington
11B	Thomas H. Lock	Smithfield
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	Gale M. Adams	Fayetteville
	Mark A. Sternlicht	Fayetteville
15A	D. Thomas Lambeth	Burlington
	Andy Hanford	Graham
16A	Stephan R. Futrell	Rockingham
	Dawn Layton	Rockingham
19B	James P. Hill	Asheboro
	Lee W. Gavin[3]	Asheboro
19D	James M. Webb	Southern Pines
	Michael A. Stone	Laurinburg
20A	Kevin M. Bridges	Oakboro
	Patrick Nadolski	Mount Gilead
20B	Jonathan Perry	Monroe
	N. Hunt Gwyn	Monroe
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15B	R. Allen Baddour	Chapel Hill
	Alyson A. Grine	Chapel Hill
17A	Edwin Graves Wilson, Jr.	Eden
	Stanley L. Allen	Sandy Ridge
17B	Angela B. Puckett	Westfield
18	John O. Craig, III	High Point
	R. Stuart Albright	Greensboro
	Susan Bray	Greensboro
	William Wood	Greensboro
	Lora C. Cubbage	Greensboro
19A	Martin B. McGee	Concord
19C	Timothy Gould	Salisbury
21	L. Todd Burke	Winston-Salem
	David L. Hall	Winston-Salem
	Eric C. Morgan	Kernersville
	Richard S. Gottlieb	Winston-Salem
22A	Joseph Crosswhite	Statesville
	William Long	Statesville
22B	Mark E. Klass	Lexington
	Lori Hamilton	Mocksville
23	Michael Duncan	Wilkesboro
	Fifth Division	
24	Gary Gavenus	Burnsville
	R. Gregory Horne	Boone
25A	Robert C. Ervin	Morganton
	Daniel A. Kuehnert	Morganton
25B	Nathaniel J. Poovey	Newton
	Gregory R. Hayes	Hickory

DISTRICT	JUDGES	ADDRESS
26	Carla Archie	Charlotte
	Lisa C. Bell	Charlotte
	Karen Eady-Williams	Charlotte
	Louis A. Trosch	Charlotte
	George Bell	Charlotte
	Casey Viser[4]	Charlotte
	Kimberly Best	Charlotte
	Reggie McKnight	Charlotte
27A	David Phillips	Gastonia
	Jesse B. Caldwell, IV	Gastonia
27B	Forrest Donald Bridges	Shelby
	W. Todd Pomeroy	Lincolnton
28	Alan Z. Thornburg	Asheville
29A	J. Thomas Davis	Forest City
29B	Peter B. Knight	Hendersonville
30A	William H. Coward	Highlands
30B	Bradley B. Letts	Hazelwood

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J. Stanley Carmical	Lumberton
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Mark A. Davis	Raleigh
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Michael L. Robinson	Winston-Salem
Steven R. Warren	Asheville

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Michael E. Beale	Rockingham
W. Robert Bell	Charlotte
Christopher W. Bragg	Monroe
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Julia Lynn Gullett	Statesville
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Jack Hooks	Whiteville
Jeffrey P. Hunt	Brevard
Robert F. Johnson	Burlington
Paul L. Jones	Kinston
Timothy S. Kincaid	Newton

JUDGES	ADDRESS
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Hugh Lewis	Charlotte
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J. Douglas McCullough	Raleigh
James W. Morgan	Shelby
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J. Richard Parker	Manteo
William R. Pittman	Raleigh
Mark Powell	Hendersonville
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Tanya T. Wallace	Rockingham

RETIRED/RECALLED JUDGES

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Anthony M. Brannon	Durham
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Jesse B. Caldwell, III	Gastonia
J. Carlton Cole	Hertford
H. William Constangy	Charlotte
C. Preston Cornelius	Mooresville
Lindsay R. Davis	Greensboro
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B. Craig Ellis	Laurinburg
Larry G. Ford	Salisbury
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Beecher R. Gray	Durham
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William Z. Wood, Jr.	Lewisville

[1] Retired 30 June 2022. [2]Became Senior Resident Judge 1 July 2022. [3]Sworn in 1 April 2022. [4]Resigned 1 July 2022.
[5] Sworn in 29 March 2022. [6]Sworn in 16 June 2022. [7]Appointed 1 July 2022. [8]Resigned 31 July 2022. [9]Died 15 September 2020.

DISTRICT COURT DIVISION

DISTRICT	JUDGES	ADDRESS
1	Edgar L. Barnes (Chief)	Manteo
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	Meader W. Harris, III	Edenton
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	Lee F. Teague	Greenville
	Wendy S. Hazelton	Greenville
	Daniel H. Entzminger	Greenville
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	Mario M. White	Clinton
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	Robert H. Gilmore	Clinton
	William Shanahan	Jacksonville
	Morgan H. Swinson[2]	Jacksonville
5	J. H. Corpening, II (Chief)	Wilmington
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	Richard Russell Davis	Wilmington
	Melinda Haynie Crouch	Wrightsville Beach
	Jeffrey Evan Noecker	Wilmington
	Chad Hogston	Wilmington
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	Lindsey L. McKee	Wilmington
6	Brenda G. Branch (Chief)	Roanoke Rapids
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	Teresa R. Freeman	Roanoke Rapids
	Vershenia B. Moody	Windsor
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	Wayne S. Boyette	Tarboro
	Elizabeth Freshwater Smith	Wilson

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	Annette W. Turik	Kinston
	Jonathon Sergeant	Kinston
	Justin L. Minshew	Goldsboro
	Christopher A. Rogerson[3]	Goldsboro
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	John H. Stultz, III	Roxboro
	Adam S. Keith	Louisburg
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	Benjamin S. Hunter	Louisburg
	Sarah K. Burnette	Oxford
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	Debra Ann Smith Sasser	Raleigh
	Kris D. Bailey[4]	Cary
	Lori G. Christian[5]	Raleigh
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	Eric Craig Chasse	Raleigh
	Anna Elena Worley	Raleigh
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	Michael J. Denning	Raleigh
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	Rashad Hunter	Raleigh
	Damion McCullers	Raleigh
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	O. Henry Willis, Jr.	Dunn
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	Mary H. Wells	Smithfield
	Joy A. Jones	Smithfield
	Jerry F. Wood	Selma
	Jason H. Coats	Smithfield
	Terry F. Rose	Smithfield
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	Craig James[8]	Smithfield
12	Toni S. King (Chief)	Fayetteville
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	Lou Oliveria	Fayetteville

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	Tiffany M. Whitfield	Fayetteville
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	Francis M. McDuffie	Fayetteville
	Cull Jordan, III	Fayetteville
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	Clayton Jones	Durham
	Dave Hall	Durham
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15B	Samantha Cabe (Chief)	Chapel Hill
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16A	Amanda L. Wilson (Chief)	Rockingham
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	Angela C. Foster	Greensboro
	Angela B. Fox	Greensboro

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	Tonia A. Cutchin	Greensboro
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	Larry L. Archie	Greensboro
	Brian K. Tomlin	Greensboro
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	Kevin D. Smith	Greensboro
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19A	Christy E. Wilhelm (Chief)	Concord
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	Nathaniel E. Knust	Concord
	Juanita Boger-Allen	Concord
	Steve Grossman	Concord
	Michael G. Knox	Concord
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	Robert M. Wilkins	Asheboro
	Sarah N. Lanier	Asheboro
	Barron Thompson	Asheboro
19C	Charles E. Brown (Chief)	Salisbury
	Beth Spencer Dixon	Salisbury
	Kevin G. Eddinger	Salisbury
	Roy Marshall Bickett, Jr.	Salisbury
	James Randolph	Salisbury
19D	Donald W. Creed, Jr. (Chief)	Asheboro
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	Warren McSweeney	Carthage
	Steve Bibey	Carthage
20A	John R. Nance (Chief)	Albemarle
	Thai Vang	Montgomery
	Phillip Cornett	Norwood
20B	Erin S. Hucks (Chief)	Monroe
	William F. Helms, III	Matthews
	Joseph J. Williams	Monroe
	Stephen V. Higdon	Monroe
	Matthew B. Smith	Monroe
21	Victoria Lane Roemer (Chief)	Winston-Salem
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	Denise S. Hartsfield[12]	Winston-Salem
	Camille D. Banks-Payne	Winston-Salem
	David Sipprell	Winston-Salem
	Gordon A. Miller[13]	Winston-Salem
	Theodore Kazakos	Winston-Salem
	Carrie F. Vickery	Winston-Salem
	George M. Cleland	Winston-Salem
	Whit Davis	Winston-Salem
	Valene K. McMasters	Winston-Salem
	Frederick B. Adams, II	Winston-Salem
	Kristen Kelly Broyles[14]	Winston-Salem

DISTRICT	JUDGES	ADDRESS
22A	L. Dale Graham (Chief)	Taylorsville
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	Christine Underwood	Olin
	Carole A. Hicks	Statesville
	Bryan A. Corbett	Statesville
	Thomas R. Young	Statesville
22B	Jimmy L. Myers (Chief)	Advance
	Mary C. Paul	Thomasville
	Carlton Terry	Advance
	Carlos Jané	Lexington
	Rosalind Baker	Lexington
	Jon Wade Myers	Lexington
23	David V. Byrd (Chief)	Wilkesboro
	William Finley Brooks	Wilkesboro
	Robert Crumpton	Wilkesboro
	Donna L. Shumate	Sparta
24	Theodore Wright McEntire (Chief)	Spruce Pine
	Hal Gene Harrison	Spruce Pine
	Rebecca E. Eggers-Gryder	Boone
	Larry B. Leake[15]	Marshall
	Matthew J. Rupp[16]	Boone
25	Burford A. Cherry (Chief)[17]	Hickory
	Sherrie Wilson Elliott (Chief)[18]	Newton
	Amy Sigmon Walker	Newton
	Robert A. Mullinax, Jr.	Newton
	Mark L. Killian	Hickory
	Clifton H. Smith	Hickory
	David W. Aycock	Hickory
	Wesley W. Barkley	Newton
	Richard S. Holloway	Lenoir
	Andrea C. Plyler	Hudson
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	Rickye McKoy Mitchell	Charlotte
	Christy Townley Mann	Charlotte
	Paige B. McThenia	Charlotte
	Jena P. Culler	Charlotte
	Tyyawdi M. Hands	Charlotte
	Sean Smith	Charlotte
	Matt Osman	Charlotte
	Gary Henderson	Charlotte
	Aretha V. Blake	Charlotte
	Tracy H. Hewett	Charlotte
	Faith Fickling	Charlotte
	Roy H. Wiggins	Charlotte
	Karen D. McCallum	Charlotte
	Michael J. Standing	Charlotte
	Paulina N. Havelka	Charlotte
	Jonathon R. Marvel	Charlotte
	C. Renee Little	Charlotte
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	Cecilia Oseguera[20]	Charlotte

DISTRICT	JUDGES	ADDRESS
27A	John K. Greenlee (Chief)	Gastonia
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	James A. Jackson	Gastonia
	Michael K. Lands	Gastonia
	Pennie M. Thrower	Gastonia
	Craig R. Collins	Gastonia
	Donald Rice	Cramerton
27B	Jeanette R. Reeves (Chief)	Shelby
	K. Dean Black	Denver
	Justin K. Brackett	Shelby
	Micah J. Sanderson	Denver
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	Jamie Hodges	Lincolnton
28	J. Calvin Hill (Chief)	Asheville
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	Julie M. Kepple	Asheville
	Andrea Dray	Asheville
	Ward D. Scott	Asheville
	Edwin D. Clontz	Candler
	Susan Marie Dotson-Smith	Asheville
29A	Robert K. Martelle (Chief)	Rutherfordton
	Ellen Shelley	Marion
	Michelle McEntire	Graham
	Corey J. MacKinnon	Marion
29B	Thomas M. Brittain, Jr. (Chief)	Mills River
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	Kimberly Gasperson-Justice	Hendersonville
	Gene B. Johnson	Hendersonville
30	Roy T. Wijewickrama (Chief)	Waynesville
	Monica Hayes Leslie	Waynesville
	Donna Forga	Clyde
	Kristina L. Earwood	Waynesville
	Tessa S. Sellers	Murphy
	Kaleb Wingate	Waynesville

EMERGENCY JUDGES

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Kris D. Bailey[22]	Cary
C. Christopher Bean	Edenton
Rebecca W. Blackmore	Wilmington
Joseph A. Blick	Greenville
Monica M. Bousman[23]	Garner
Jacqueline L. Brewer	Apex
Deborah P. Brown	Mooresville
Joseph M. Buckner	Chapel Hill
Susan R. Burch	Greensboro
William M. Cameron	Richlands
Lori G. Christian[24]	Raleigh
William F. Fairley	Southport
Nancy E. Gordon	Durham

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Paul A. Hardison	Jacksonville
P. Gwynnett Hilburn[25]	Greenville
James T. Hill	Durham
Richlyn D. Holt	Waynesville
Shelly S. Holt	Wilmington
Jeanie Houston	Yadkinville
F. Warren Hughes	Burnsville
Laurie L. Hutchins	Winston-Salem
Ericka Y. James[26]	Goldsboro
Carol A. Jones[27]	Kenansville
A. Elizabeth Keever	Fayetteville
David A. Leech	Greenville
Harold Paul McCoy, Jr.	Halifax
Lawrence McSwain	Greensboro
Wayne L. Michael[28]	Lexington
Gordon Miller[29]	Winston-Salem
Regan A. Miller	Charlotte
Charles M. Neaves	Elkin
Thomas R.J. Newbern	Aulander
Ali B. Paksoy	Shelby
Addie H. Rawls[30]	Clayton
Dennis J. Redwing	Gastonia
Sarah C. Seaton[31]	Jacksonville
Joseph E. Setzer, Jr.	Franklinton
Caron Stewart[32]	Erwin
Robert J. Stiehl, III[33]	Fayetteville
Jerry Waddell	Bryson City
Fredrick B. Wilkins, Jr.	Reidsville
Larry J. Wilson	Shelby

RETIRED/RECALLED JUDGES

Claude W. Allen, Jr.[34]	Oxford
J. Henry Banks	Henderson
George A. Bedsworth	Winston-Salem
Robert M. Brady	Lenoir
David B. Brantley	Goldsboro
Samuel Cathey	Charlotte
Ronald L. Chapman	Charlotte
H. Thomas Church	Statesville
Albert A. Corbett, Jr.	Smithfield
Linda Falls	Durham
Daniel Fredrick Finch	Oxford
Louis F. Foy, Jr.	Pollocksville
James R. Fullwood	Raleigh
Mark E. Galloway	Roxboro
Charles P. Gaylor, III[35]	Goldsboro
Lloyd M. Gentry	Pelham
Samuel G. Grimes	Washington
Joyce A. Hamilton[36]	Raleigh
John H. Horne, Jr.	Laurinburg

JUDGES	ADDRESS
William K. Hunter[37]	High Point
Jerry A. Jolly	Tabor City
William C. Lawton	Raleigh
Jacquelyn L. Lee	Four Oaks
William L. Long	Chapel Hill
James E. Martin	Greenville
Fritz Y. Mercer, Jr.	Summerfield
William M. Neely[38]	Asheboro
Nancy C. Phillips	Elizabethtown
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Jan H. Samet	Greensboro
J. Larry Senter	Raleigh
Margaret L. Sharpe	Greensboro
Leonard W. Thagard	Clinton
Charles M. Vincent	Greenville
Richard K. Walker[39]	Hayesville

[1]Resigned 3 June 2020. [2]Sworn in 11 March 2022. [3]Sworn in 13 April 2022. [4]Retired 31 January 2022. [5]Retired 29 April 2022. [6]Sworn in 17 June 2022. [7]Sworn in 19 August 2022. [8]Sworn in 29 April 2022. [9]Retired 31 January 2022. [10]Sworn in 23 March 2022. [11]Resigned 31 March 2022. [12]Retired 30 November 2021. [13]Retired 28 February 2022. [14]Sworn in 1 March 2022. [15]Retired 31 March 2022. [16]Sworn in 30 June 2022. [17]Retired 31 July 2022. [18]Became Chief District Court Judge 1 August 2022. [19]Sworn in 16 June 2022. [20]Sworn in 22 July 2022. [21]Sworn in 22 March 2022. [22]Sworn in 9 June 2022. [23]Sworn in 3 June 2021. [24]Sworn in 16 August 2022. [25]Resigned 25 January 2022. [26]Sworn in 27 June 2022. [27]Sworn in 15 March 2022. [28]Sworn in 11 March 2022. [29]Sworn in 21 March 2022. [30]Sworn in 20 June 2022. [31]Sworn in 28 April 2022. [32]Sworn in 18 March 2022. [33]Sworn in 20 May 2020. [34]Died 27 July 2022. [35]Appointed 14 January 2022. [36]Appointed 13 November 2021. [37]Resigned 17 January 2022. [38]Appointed 2 February 2022. [39]Appointed 11 April 2022.

ATTORNEY GENERAL OF NORTH CAROLINA

Attorney General
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Chief of Staff
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SWAIN WOOD

Civil Bureau Chief
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CASES REPORTED

ORDERS

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

CROSS-REFERENCE TABLE[1]

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1. Effective 1 January 2021, the Supreme Court of North Carolina adopted a universal parallel citation form. *Administrative Order Concerning the Formatting of Opinions and the Adoption of a Universal Citation Form*, 373 N.C. 605 (2019).

CROSS-REFERENCE TABLE

Case	N.C. Reports citation	Universal parallel citation
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CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

GIFT SURPLUS, LLC, AND SANDHILL AMUSEMENTS, INC., PLAINTIFFS

v.

STATE OF NORTH CAROLINA, EX REL. ROY COOPER, GOVERNOR, IN HIS OFFICIAL CAPACITY, BRANCH HEAD OF THE ALCOHOL LAW ENFORCEMENT BRANCH OF THE STATE BUREAU OF INVESTIGATION, MARK J. SENTER, IN HIS OFFICIAL CAPACITY, SECRETARY OF THE NORTH CAROLINA DEPARTMENT OF PUBLIC SAFETY, ERIK A. HOOKS, IN HIS OFFICIAL CAPACITY, AND DIRECTOR OF THE NORTH CAROLINA STATE BUREAU OF INVESTIGATION, BOB SCHURMEIER, IN HIS OFFICIAL CAPACITY

No. 363A14-4

Filed 11 February 2022

1. Gambling—electronic sweepstakes—game of chance versus game of skill—predominant factor test

The Supreme Court reaffirmed its prior holding that in order to determine whether a video gaming machine is prohibited by N.C.G.S. § 14-306.4 (banning electronic sweepstakes games), courts must utilize the predominant factor test to evaluate whether the game is one of chance or of skill, since a sweepstakes conducted by use of an entertaining display is prohibited only if it is not dependent on skill or dexterity.

2. Gambling—electronic sweepstakes—predominant factor test—mixed question of fact and law—standard of review

A trial court's determination of whether a video gaming machine is prohibited by N.C.G.S. § 14-306.4 under the predominant factor test (i.e., whether the outcome of the game depends on chance or on skill and dexterity) involves a mixed question of law and fact, and is reviewed de novo when there is no factual dispute about how the game is played.

3. Gambling—electronic sweepstakes—game of chance versus game of skill—predominant factor test—viewed in entirety

Plaintiffs' video-game kiosks violated the ban on electronic sweepstakes in N.C.G.S. § 14-306.4 under the predominant factor test where the outcome of the game in question depended on chance and not on skill or dexterity. Although the game included a nominal "winner-every-time" feature, chance determined which prizes a player was eligible to win, since the top prize was not available for 75% of player turns. Further, the "double-nudge" modification (allowing a player to nudge two symbols up or down to align three spinning slots) involved no more than de minimis skill and dexterity, as evidenced by data of error rates, and chance could override any exercise of skill with regard to the outcome.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 268 N.C. App. 1 (2019), reversing an order entered on 2 February 2018 by Judge Ebern T. Watson III, in the Superior Court, Onslow County. Heard in the Supreme Court on 23 March 2021.

Fox Rothschild LLP, by Elizabeth Brooks Scherer, Troy D. Shelton and Kip D. Nelson; Hyler & Agan PLLC, by George B. Hyler, Jr.; and Grace, Tisdale, Clifton, P.A., by Michael A. Grace for plaintiff-appellants.

Joshua Stein, Attorney General, by James W. Doggett, Deputy Solicitor General, Olga Vysotskaya de Brito, Special Deputy Attorney General, and Ryan Y. Park, Solicitor General, for the State.

Edmond W. Caldwell, Jr. and Matthew L. Boyatt, for North Carolina Sheriffs' Association; Fred P. Baggett for North Carolina Association of Chiefs of Police; and Jim O'Neill for North Carolina Conference of District Attorneys, amici curiae.

HUDSON, Justice.

¶ 1 Gift Surplus, LLC, and Sandhill Amusements, Inc., (plaintiffs) sued Governor Roy Cooper and several state law enforcement officials (defendants) seeking a declaratory judgment that their operation of a sweepstakes through video game kiosks does not violate N.C.G.S. § 14-306.4, North Carolina's criminal prohibition on certain video sweepstakes. This case presents the third time plaintiffs have appeared before

this Court seeking to avoid liability under North Carolina's ban on video sweepstakes. The question presented here is whether plaintiffs' new game, as modified since plaintiffs last appeared before this Court, is not "dependent on skill or chance" and is thus criminalized by N.C.G.S. § 14-306.4 (2021), which prohibits the operation of sweepstakes conducted through video games of chance. As we held over one hundred years ago and reaffirmed when plaintiffs appeared before this Court challenging the video sweepstakes ban twelve years ago,

> [n]o sooner is a lottery defined, and the definition applied to a given state of facts, than ingenuity is at work to evolve some scheme of evasion which is within the mischief, but not quite within the letter of the definition. But, in this way, it is not possible to escape the law's condemnation, for it will strip the transaction of all its thin and false apparel and consider it in its very nakedness. It will look to the substance and not to the form of it, in order to disclose its real elements and the pernicious tendencies which the law is seeking to prevent. The Court will inquire, not into the name, but into the game, however skillfully disguised, in order to ascertain if it is prohibited. It is the one playing at the game who is influenced by the hope enticingly held out, which is often false or disappointing, that he will, perhaps and by good luck, get something for nothing, or a great deal for a very little outlay. This is the lure that draws the credulous and unsuspecting into the deceptive scheme, and it is what the law denounces as wrong and demoralizing.

Hest Techs., Inc. v. State ex rel. Perdue, 366 N.C. 289, 289 (2012) (quoting *State v. Lipkin*, 169 N.C. 265, 271 (1915)). After "inquir[ing], not into the name, but into the game, however skillfully disguised" of plaintiffs, we hold that chance predominates over skill in plaintiffs' new game and, accordingly, that this game is a game of chance that violates the sweepstakes statute. Accordingly, we modify and affirm the decision of the Court of Appeals.

I. Background

¶ 2 This case follows from the North Carolina General Assembly's repeated efforts since 2006 to ban all video-gaming machines, including video poker and other video card games. Act of June 6, 2006, N.C. Sess. Law 2006-6, §§ 4, 12, 2006 N.C. Sess. Laws 4, 4–5, 7 (codified as amended

at N.C.G.S. § 14-306.1A (2021)). Since this first prohibition was enacted, owners of video-gaming machines have developed machines with various interactive operations, in apparent efforts to circumvent the ban. *See Hest*, 366 N.C. at 291. In response to these perceived loopholes, the General Assembly enacted Session Law 2010-103, "An Act to Ban the Use of Electronic Machines and Devices for Sweepstakes Purposes," codified at N.C.G.S. § 14-306.4. 2010 N.C. Sess. Laws Ch. 408. N.C.G.S. § 14-306.4 makes it illegal to "[c]onduct a sweepstakes through the use of an entertaining display." N.C.G.S. § 14-306.4(b).[1]

¶ 3 Following enactment of the law, purveyors of video-game kiosks that were purportedly for sweepstakes challenged the law on First Amendment grounds. In *Hest*, this Court held that N.C.G.S. § 14-306.4 regulated conduct, with only incidental burdens on speech, and that the law was supported by a rational basis. 366 N.C. at 303. One of the plaintiffs here, Sandhill Amusements, was among a group of vendor-plaintiffs in a related case making the same First Amendment argument, which was rejected by this Court for the reasons stated in *Hest. Sandhill Amusements, Inc. v. State*, 366 N.C. 323, 324 (2012) (per curiam). Although the record shows Sandhill has a long history as a video-gaming company, in that lawsuit it argued it was a business that sold long-distance phone time, merely using video sweepstakes to promote its service.

¶ 4 In 2013, shortly after our decision in *Hest*, Sandhill began operating and distributing video-gaming kiosks for sweepstakes for plaintiff Gift Surplus. Gift Surplus operates an e-commerce website, www.giftsurplus.com, but does not maintain an inventory of the products it advertises and instead buys products as necessary to fill orders as a drop shipping business.

¶ 5 In its business arrangement with Sandhill, Gift Surplus designs sweepstakes kiosks that it licenses to third-party operators like Sandhill. Sandhill places the kiosks into operation in convenience stores and retail establishments across North Carolina. The establishments are predominantly patronized by low-income customers, who Gift Surplus has identified as its target demographic.

¶ 6 Gift Surplus's kiosks appear like large video-game machines that look akin to video slot machines. When players put money into the kiosks, they receive what appear to be paper receipts called "e-credits"

1. A fuller history of the General Assembly's efforts to combat the circumvention of gambling laws is provided in *Hest*, 366 N.C. at 289–92.

that can be exchanged either for products on Gift Surplus's drop shipping website or to play Gift Surplus's phone games. Players also receive sweepstakes entries which can be used to immediately play games on the kiosks. The kiosks offer five similar games, all featuring reel-spinning video resembling a slot machine. When the game begins, the reels spin, but the three slots never come to a stop in a complete line. Instead, players always have to "nudge" the slots up or down so that three symbols align on the middle line. In the initial iteration of these games, players only had to nudge one symbol into place to win.

¶ 7 The game also limits the number of players who can win meaningful prizes. On 75% of turns, the player will never be able to play for the largest prize of $2400 and, under the original setup, could win nothing.

¶ 8 Gift Surplus and Sandhill subsequently filed the present lawsuit, seeking a declaratory judgment and preliminary and permanent injunctive relief initially against the Sheriff of Onslow County and then against the Governor and the present state defendants. A trial court judge issued a preliminary injunction for plaintiffs, which defendants appealed.

¶ 9 A divided panel of the Court of Appeals dismissed the appeal in *Sandhill Amusements, Inc. v. Sheriff of Onslow Cty.*, 236 N.C. App. 340 (2014), *rev'd per curiam*, *Sandhill Amusements, Inc. v. Miller*, 368 N.C. 91 (2015). Then-Judge Ervin dissented from the Court of Appeals majority, reasoning that plaintiffs could not show a likelihood of success on the merits at trial because chance predominated over skill in plaintiffs' game and, accordingly, it violated N.C.G.S. § 14-306.4, so the preliminary injunction should have been denied. *Id.* at 369–70 (Ervin, J., dissenting). On appeal, this Court reversed the decision of the Court of Appeals and adopted the reasoning of Judge Ervin's dissenting opinion. *Sandhill Amusements, Inc. v. Miller*, 368 N.C. 91 (2015).

¶ 10 On remand to the trial court, Gift Surplus made two changes to its games. First, they added a "winner-every-time" modification, so that, on the 75% of turns on which users originally could not win any prize, retailers can set up the machine to award a token prize of a few cents. Second, Gift Surplus added a "double nudge" modification, so that instead of nudging one symbol to win, retailers could set up the machines to require players to nudge two symbols into place.

¶ 11 After a bench trial, the trial court held that the sweepstakes game is lawful, relying on the new modifications made since remand to conclude that, based on the amended complaint and with the modifications, skill predominates over chance in plaintiffs' new game, unlike the game in *Sandhill*.

¶ 12 The trial court further concluded that the sale of Gift Surplus's "e-credits" was not a pretext for gambling. At trial, defendants presented evidence that the receipt-like e-credits are often thrown away rather than being redeemed in the online store or phone games. An officer in the Brunswick County Sheriff's Office testified that he visited an establishment and observed players at the kiosks throw e-credits away and, after searching the trash, found over $10,000 of unused e-credit receipts.

¶ 13 Defendants appealed the trial court's judgment to the Court of Appeals. At the Court of Appeals, the panel unanimously reversed the trial court judgment but issued three separate opinions. *See Gift Surplus, LLC v. State ex rel. Cooper*, 268 N.C. App. 1 (2019). First, Judge Murphy, in an opinion joined by Judge Collins, held that, since plaintiffs' new game was "visual information, capable of being seen by a sweepstakes entrant, that takes the form of actual game play, or simulated game play," the sweepstakes was conducted through an "entertaining display," regardless of whether the game was a game of chance or not. *Id.* at 4–5. Judge Bryant concurred in the result and would have required that the game not depend on skill or dexterity and held that "the games at issue do not amount to games whose outcomes are determined by skill and dexterity, but rather, chance." *Id.* at 13 (Bryant, J., concurring in the result). Judge Collins joined fully with Judge Murphy's opinion, but wrote a separate opinion reasoning that "[t]o the extent our Supreme Court's adoption of Judge Ervin's dissent in *Sandhill* signals the Court's determination that a sweepstakes game falls within [N.C.G.S.] § 14-306.4's "entertaining display" prohibition *only* when the video game is not dependent on skill or dexterity, I agree with Judge Bryant's concurring opinion in this case . . ." *Id.* at 6–7 (Collins, J., concurring). Since the Court of Appeals held plaintiffs' new game violated N.C.G.S. § 14-306.4, it declined to reach the separate question of whether it also violated North Carolina's prohibition on gambling. *Id.* at 5.

¶ 14 Plaintiffs filed a notice of appeal based on a constitutional question, which this Court dismissed, and a petition for discretionary review, which was allowed. Defendants filed a conditional petition for discretionary review, which was also allowed.

II. Analysis

¶ 15 On appeal, plaintiffs first argue the Court of Appeals erred by applying a new legal standard for claims under the video sweepstakes statute rather than the predominant-factor test. Second, plaintiffs argue the application of the predominant-factor test is reviewed deferentially rather than de novo. Third, plaintiffs argue that, under the predominant-factor test, the trial court correctly determined that chance did not predominate

over skill in plaintiffs' new game and Judge Collins in her concurring opinion at the Court of Appeals erred in stating otherwise., plaintiffs argue that their new game does not constitute gambling. We consider plaintiffs' arguments in turn.

A. The Predominant-Factor Test Under N.C.G.S. § 14-306.4

¶ 16 **[1]** Plaintiffs first argue the majority opinion below erred in failing to apply the predominant-factor test under N.C.G.S. § 14-306.4 as applied in then-Judge Ervin's dissent in *Sandhill* and as adopted by this Court. Defendants do not argue for the majority's holding that it is not necessary to decide whether games "are chance or skill-based." *Gift Surplus*, 268 N.C. App. at 4. We agree and hold that the majority opinion erred in failing to consider whether skill or chance predominates in the game under the sweepstakes statute as interpreted by this Court's prior decision in *Sandhill*.[2]

¶ 17 North Carolina's criminal code prohibits sweepstakes conducted through electronic machines using video games of chance. This prohibition was codified at N.C.G.S. § 14-306.4, entitled "Electronic machines and devices for sweepstakes prohibited." Under this statute, a sweepstakes is defined as "any game, advertising scheme or plan, or other promotion, which, with or without payment of any consideration, a person may enter to win or become eligible to receive any prize, the determination of which is based upon chance." N.C.G.S. § 14-306.4(a)(5). N.C.G.S. § 14-306.4(b) provides that "it shall be unlawful for any person to operate, or place into operation, an electronic machine or device to . . . [c]onduct a sweepstakes through the use of an entertaining display, including the entry process or the reveal of a prize." N.C.G.S. § 14-306(b), (b)(1) (2019). The statute defines "entertaining display" as follows:

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2. Plaintiffs argue the majority erred in failing to apply the predominant-factor test for a myriad of procedural reasons, including that the Court of Appeals "swapped horses on appeal" for the appellant, that it violated the law-of-the-case doctrine, that defendants failed to make that argument before the trial court and so abandoned it under North Carolina Rule of Appellate Procedure 10, that even if properly raised defendants abandoned the argument on appeal under Appellate Rule 28(b)(6), that adopting a theory not argued offends notions of equity and fundamental fairness, and, taken together, violation of these doctrines contravenes the "principle of party presentation" recently enunciated by the Supreme Court of the United States. *See United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1578–89 (2020). While the majority opinion's discarding of the predominant-factor test in interpreting N.C.G.S. § 14-306.4 in favor of a theory not advanced by any party was doubtless procedurally improper, we need not reach these issues to hold that the majority below erred because it contravened binding precedent of this Court in *Sandhill*. *See Cannon v. Miller*, 313 N.C. 324, 324 (1985) (holding the Court of Appeals has no authority to overrule decisions of this Court).

> [V]isual information, capable of being seen by a sweepstakes entrant, that takes the form of actual game play, or simulated game play, such as, by way of illustration and not exclusion:
>
> a. A video poker game or any other kind of video playing card game.
> b. A video bingo game.
> c. A video craps game.
> d. A video keno game.
> e. A video lotto game.
> f. Eight liner.
> g. Pot-of-gold.
> h. A video game based on or involving the random or chance matching of different pictures, words, numbers, or symbols not dependent on the skill or dexterity of the player.
> i. Any other video game not dependent on skill or dexterity that is played while revealing a prize as the result of an entry into a sweepstakes.

N.C.G.S. § 14-306.4(a)(3).

¶ 18 In *Sandhill*, this Court adopted then-Judge Ervin's opinion dissenting from the majority opinion of the Court of Appeals. *Sandhill Amusements, Inc. v. Miller*, 368 N.C. 91 (2015). In his dissenting opinion, Judge Ervin reasoned that "given that [plaintiffs'] equipment and activities . . . clearly involve the use of electronic devices to engage in or simulate game play based upon which a participant may win or become eligible to win a prize, the only basis upon which [p]laintiffs' equipment and activities can avoid running afoul of [N.C.G.S.] § 14-306.4(b) is in the event that the game or simulated game involved is 'dependent on skill or dexterity.' " *Sandhill*, 236 N.C. App. at 365 (Ervin, J., dissenting). In adopting the dissenting opinion, therefore, this Court necessarily held that sweepstakes conducted through an "entertaining display" under the statute is only prohibited when the game or simulated game is not "dependent on skill or dexterity."

¶ 19 The majority opinion below, however, held that it "need not decide whether these sweepstakes are chance or skill-based in order to hold that they violate N.C.G.S. § 14-306.4," noting that "[*r*]*egardless of whether it is dependent on skill or dexterity*, a video sweepstakes falls within the entertaining display prohibition simply if it is 'visual information,

capable of being seen by a sweepstakes entrant, that takes the form of actual game play, or simulated game play[.]' " *Gift Surplus*, 268 N.C. App. at 4–5 (emphasis added) (quoting N.C.G.S. § 14-306.4(a)(3)). It based its interpretation on the fact that the list of prohibited games in the definition of "entertaining display" in N.C.G.S. § 14-306.4(a)(3) was set out "by way of illustration and not exclusion."

¶ 20 We conclude that the majority erred in this interpretation of the sweepstakes statute. Although the list in question was not intended to be exhaustive, the list of types of game play included in the statute, including poker and other card games, bingo, and craps, contemplates only games of chance. Any doubt about whether the statute is only concerned with games of chance is resolved by subsection (i), the statute's "catch-all provision," *see Hest*, 366 N.C. at 292, which prohibits sweepstakes through "[a]ny other video game not dependent on skill or dexterity . . . ." The canon of construction *ejusdem generis* provides that "where general words follow a designation of particular subjects or things, the meaning of the general words should be construed as including only things of the same kind, character, and nature as those specifically enumerated." *Smith v. Smith*, 314 N.C. 80, 87 (1985). Applying this principle to the catch-all provision, the logical implication of this provision is that the other games listed are also games "not dependent on skill or dexterity" and that only sweepstakes conducted through video games of chance are prohibited under N.C.G.S. § 14-306.4. In other words, the majority erred in concluding that the non-exhaustiveness of the list meant that the only limitation on other games being included was that they must be video games and not that they must be *games of chance*. In doing so, the majority directly contravened the dissenting opinion in Sandhill that this Court adopted as its own, which held that a sweepstakes is not conducted through an electronic display when it involves a game or simulated game "dependent on skill or dexterity." *Sandhill*, 236 N.C. App. at 365. Accordingly, we reaffirm our prior holding that N.C.G.S. § 14-306.4 prohibits sweepstakes conducted "through the use of an entertaining display," but only when the electronic display "takes the form of actual game play, or simulated game play" where the game in question is "not dependent on skill or dexterity." N.C.G.S. § 14-306.4(a)(3); *see Sandhill*, 236 N.C. App. at 365.

¶ 21 The question, then, is not whether plaintiffs' new game is conducted through an electronic display, but whether the video game is "not dependent on skill or dexterity." In *Sandhill*, by adopting the dissenting opinion, we held that this reference to skill and dexterity incorporates "the traditional distinction between a game of skill and a game

of chance pursuant to state law" such that it prohibits sweepstakes conducted through video games in which "chance predominates over skill." *Sandhill*, 236 N.C. App. at 368. In *Sandhill*, relying on the Court of Appeals' prior decision in *Collins Coin*, Judge Ervin reasoned that "[a] game of chance is such a game as is determined entirely or in part by lot or mere luck, and in which judgment, practice, skill or adroitness have honestly no office at all, or are thwarted by chance"; that "[a] game of skill, on the other hand, is one in which nothing is left to chance, but superior knowledge and attention, or superior strength, agility and practice gain the victory"; and, accordingly, that "[i]t would seem that the test of the character of any kind of a game . . . as to whether it is a game of chance or a game of skill is not whether it contains an element of chance or an element of skill, but which of these is the dominating element that determines the result of the game, to be found from the facts of each kind of game," or, "to speak alternatively, whether or not the element of chance is present in such a manner as to thwart the exercise of skill or judgment." *Sandhill*, 236 N.C. App. at 368 (quoting *Collins Coin Music Co.*, 117 N.C. App. 405, 408 (1994)) (cleaned up). In *Crazie Overstock Promotions, LLC v. State*, argued the same day as this case, we summarized the predominant-factor test under N.C.G.S. § 14-306.4 based on this caselaw as follows:

> [T]he relevant test for use in determining whether the operation of an electronic gaming device does or does not violate N.C.G.S. § 14-306.4(a) is whether, viewed in its entirety, the results produced by that equipment in terms of whether the player wins or loses and the relative amount of the player's winnings or losses varies primarily with the vagaries of chance or the extent of the player's skill and dexterity.

377 N.C. 391, 2021-NCSC-57, ¶ 23. We reaffirm that the predominant-factor test is the applicable test for determining whether a video sweepstakes is conducted through a game of chance as prohibited under N.C.G.S. § 14-306.4.

B. The Standard of Review for the Predominant-Factor Test

¶ 22 **[2]** Plaintiffs argue that defendants and Judge Collins's concurring opinion propose the wrong standard of review in applying the predominant-factor test under N.C.G.S. § 14-306.4. Specifically, plaintiffs argue that "[a] factfinder's determination as to whether a game complies with the predominant-factor test is reviewed deferentially." Plaintiffs contend "the proper standard of review of a trial court's predominance

analysis in a bench trial would be whether competent evidence supports the factfinder's determination that skill or dexterity predominate over chance in a particular game." Plaintiffs argue that "because the factfinder, whether judge or jury, is in the best position to conduct the balance or 'weighing' required by the predominant-factor test, the *application* of that legal standard is a factual issue entitled to deference."

¶ 23 Defendants in turn argue, citing *State v. Gupton*, 30 N.C. 271 (1848), that the question of whether a game is a game of skill or a game of chance—that is, the question of whether chance or skill predominates under the predominant-factor test—is a mixed question of law and fact, and, citing *Gupton* and *Best v. Duke University*, 337 N.C. 742, 750 (1994), that "mixed questions like these are reviewed de novo where, as here, there is no factual dispute about how a game is played." Moreover, defendants note that while findings of fact from a bench trial are reviewed for substantial evidence, an appellate court conducts "de novo review of a conclusion of law that the trial court [has] mislabeled as a finding of fact." *Farm Bureau v. Cully's Motorcross Park*, 366 N.C. 505, 512 (2013).

¶ 24 In neither *Sandhill* nor *Crazie Overstock*, our Court's recent cases applying N.C.G.S. § 14-306.4, did we expressly state the standard of review exercised by appellate courts in evaluating a trial court's determination of whether chance or skill predominates in a game under that statute. However, in both cases, our Court did not defer to the trial court's conclusion as to whether chance or skill predominated in the game but freely substituted its own judgment based on the undisputed evidence. *See Sandhill*, 236 N.C. App. at 370 ("As a result, . . . I am compelled by the undisputed evidence to conclude that the element of chance dominates the element of skill in the operation of Plaintiffs' machines." (cleaned up)); *Crazie Overstock, LLC*, 2021-NCSC-57 ¶ 25 (holding based on the undisputed evidence that "chance necessarily predominates over the exercise of skill or dexterity" in the plaintiff's game). Accordingly, we hold that whether chance or skill predominates in a given game is a mixed question of fact and law and is therefore reviewed de novo when there is no factual dispute about how a game is played. *See Best*, 337 N.C. at 750. This approach is consistent with *Gupton*, our first decision enunciating and applying the predominant-factor test to a game of "ten pins," or modern-day bowling, where Chief Justice Ruffin, speaking for the Court, reviewed de novo the trial court's determination that the indictment adequately alleged a "game of chance" prohibited by our criminal laws and held that skill predominated over chance in the game. *See Gupton*, 30 N.C. at 275.

C. Application of the Predominant-Factor Test

¶ 25 **[3]** Having determined that the predominant-factor test will properly determine whether plaintiffs' video sweepstakes is conducted through a game of chance as prohibited by N.C.G.S. § 14-306.4 and that the question of whether chance or skill predominates in plaintiffs' new game is a mixed question of fact and law, we must now apply the predominant-factor test to the undisputed facts of plaintiffs' new game to determine whether plaintiffs' game is a game of chance. The question is "whether, viewed in its entirety, the results produced by [plaintiffs'] equipment in terms of whether the player wins or loses and the relative amount of the player's winnings or losses varies primarily with the vagaries of chance or the extent of the player's skill and dexterity." *Crazie Overstock, LLC*, 377 N.C. 391, 2021-NCSC-57, ¶ 23.

¶ 26 In *Sandhill*, the dissenting opinion adopted by this Court held that chance predominated over skill and dexterity in plaintiffs' game as then constituted because (1) "the machine and equipment at issue . . . only permitted a predetermined number of winners," (2) "use of the equipment . . . will result in the playing of certain games in which the player will be unable to win anything of value regardless of the skill or dexterity that he or she displays," (3) "the extent to which the opportunity arises for the 'nudging' activity . . . appears to be purely chance-based," and (4) even assuming "nudging" a symbol in one direction or another involves skill or dexterity, "this isolated opportunity for such consideration to affect the outcome [does not] override[] the impact of the other features" of plaintiffs' game. *Sandhill*, 236 N.C. App. at 369.

¶ 27 Since our reversal of the preliminary injunction in *Sandhill*, plaintiffs contend that they have modified their game in two ways that support the trial court's determination that chance does not predominate over skill or dexterity such that plaintiffs' new game is not a game of chance and avoids the reach of N.C.G.S. § 14-306.4. First, plaintiffs argue its new game "contains a 'winner-every-time' feature" allowing every player who "nudges" the slot "to claim a monetary prize of some amount." Second, plaintiffs argue "the 'double nudge' feature increases the amount of skill and dexterity required in the redesigned sweepstakes games."

¶ 28 Defendants, in contrast, argue that plaintiffs' new game, like its original game, is "similar to traditional reel-spinning slot machines," and, like the role of chance in slot machines and poker, "chance controls the symbols that appear for players to nudge." Defendants contend that plaintiffs' two new modifications do not fundamentally alter the character of plaintiffs' game and cause skill or dexterity to predominate over

chance such that our holding in *Sandhill* as to plaintiffs' original game no longer applies.

¶ 29 We first consider the change plaintiffs call a " 'winner-every-time' feature." In the original game, in 75% of turns a player took, the reels did not align so that a nudge could nudge them into place and no prize could be won at all. In plaintiffs' new game, on 75% of turns a "¢" symbol appears one "nudge" from the middle row. If the player nudges the ¢ symbol to the middle row, they now receive a nominal prize of some cents.

¶ 30 We hold the purported "winner-every-time" feature does not alter plaintiffs' game such that chance does not predominate over skill or dexterity. On 75% of turns players of plaintiffs' games will still have no opportunity to compete for the largest possible prize of $2400. Plaintiffs argue that "the sweepstakes statute does not discriminate among different cash prizes," and "money has value" irrespective of how little it is. N.C.G.S. § 14-306.4(a)(4) defines a "prize" as "any gift, award, gratuity, good, service, credit, or anything else of value. . ." But this definition has no bearing on whether the game in which the putative prize is awarded is "not dependent on skill or dexterity." N.C.G.S. § 14-306.4(a)(3). If chance determines the prizes for which players may play, then, as in the case of traditional slot machines, "the return to the player is . . . dependent on . . . chance." *State v. Abbott*, 218 N.C. 470, 479 (1940).

¶ 31 We next consider the "double-nudge" modification which, plaintiffs argue, "increases the amount of skill and dexterity required in the redesigned sweepstakes games." In the original games, two of the reels would automatically align and the third reel would show a symbol one tick out of alignment such that the player had to press a button to "nudge" the symbol once up or down into alignment to win a prize.

¶ 32 In *Sandhill*, Judge Ervin assumed arguendo that "nudging" a symbol up or down into alignment involved skill or dexterity. On remand, the trial court concluded nudging involved skill because "data from actual game play in the field and data from lab tests, both regarding the single-nudge-only games, reveal error rates that show the games are dependent on skill." The trial court also concluded the game involved dexterity because the games required both "fine motor control of the hands and visual accuracy" and "the ability to recognize and implement winning patterns" based on playing the game and the lab data. Finally, the trial court concluded the double-nudge modification increased the amount of skill and dexterity "[b]ecause the [player] must evaluate the game to determine the number of nudges required and then take the required action (one nudge or two separate nudges)."

¶ 33 Contrary to the trial court's conclusion that plaintiffs' games involve skill and dexterity, we cannot conclude based on the undisputed record evidence that skill and dexterity have any more than a *de minimis* role in plaintiffs' new games, whether they are required to make one or two "nudges" of the reels. Plaintiffs' own expert, whose testimony concerning error data from lab tests is the basis for the trial court's conclusion that nudging involved skill and dexterity, testified that, for the single-nudge game, players correctly nudged the reel into place between 86% and 90% of the time. While the trial court infers that the error rate for double nudging involves more skill and dexterity, that inference is by no means warranted. A game need not be won 100% of the time for there to be nothing more than a minimal level of skill or dexterity involved, and undisputed evidence shows that the skill and dexterity involved is essentially *de minimis*.

¶ 34 In applying the predominant-factor test, we view plaintiffs' game in the entirety. In *Hest*, we observed that "the Court will inquire, not into the name, but into the game, however skillfully disguised, in order to ascertain if it is prohibited." *Hest*, 366 N.C. at 289. This approach is confirmed by N.C.G.S. § 14-306.4, which clarifies that "[i]t is the intent of this section to prohibit any mechanism that seeks to avoid application of this section through the use of any subterfuge or pretense whatsoever." N.C.G.S. § 14-306.4(c).

¶ 35 Here, chance controls plaintiffs' game by determining that in 75% of turns, players will not be eligible to play for the top prize and, indeed, cannot play for anything more than mere cents. Accordingly, just as is the case with a traditional slot machine, the return to the player in plaintiffs' game is dependent on chance. *Abbott*, 218 N.C. at 479. Nothing about the "nudge" (or even a "double nudge") obviates this fundamental aspect of plaintiffs' game. First, the skill and dexterity required to "nudge" a reel up or down is *de minimis*. More fundamentally, even assuming there was a meaningful level of skill or dexterity involved in the game, chance would always predominate because, when chance determines the relative winnings for which a player is able to play, chance "can override or thwart the exercise of skill." *Sandhill*, 236 N.C. App. at 369. As in *Crazie Overstock, LLC*, "the extent to which a customer is able to win more than a minimal amount of money is controlled by the outcome of [Plaintiffs' games' initial reel spin] regardless of the level of skill and dexterity that the player displays while participating in [nudging the reels]. *Crazie Overstock, LLC*, 2021-NCSC-57, ¶25. This situation is also analogous to the game of poker, which, despite involving a much greater level of skill, the Court of Appeals has held

to be a game of chance because the drawing of "cards . . . at random" causes chance to predominate over skill. *Collins Coin*, 117 N.C. App. at 409; *accord Joker Club, L.L.C. v. Hardin*, 183 N.C. App. 92, 99 (2007) ("No amount of skill can change a deuce into an ace."). Here, the "winner-every-time" modification to permit a nominal award of a few cents and the "double-nudge" modification are nothing more than "thin and false apparel" over the plaintiffs' games that the law "will strip . . . [to] consider [the game] in its very nakedness."[3] *Hest*, 366 N.C. at 289 (citation omitted). After considering plaintiffs' game when "viewed in its entirety," we hold that "the results produced by [plaintiffs'] equipment in terms of whether the player wins or loses and the relative amount of the player's winnings or losses varies primarily with the vagaries of chance [and not] the extent of the player's skill and dexterity." *Crazie Overstock, LLC*, 2021-NCSC-57, ¶ 23. Accordingly, we hold that plaintiffs' game violates N.C.G.S. § 14-306.4(a)'s prohibition on sweepstakes conducted through video games of chance.

D. Gambling

¶ 36 Plaintiff further argues its game does not constitute illegal gambling under North Carolina's criminal code, while the State contends that it does. Since this Court holds that plaintiffs' conduct violates one aspect of our State's criminal code, we decline to reach this issue, which was also not reached by the Court of Appeals.

III. Conclusion

¶ 37 We conclude that in plaintiffs' new game, as in their game addressed in *Sandhill*, chance predominates over skill and, accordingly, it is a video game of chance prohibited by N.C.G.S. § 14-306.4. Because this holding is dispositive of the case, we need not address the other issues raised by the parties. Accordingly, we modify and affirm the opinion of the Court of Appeals.

MODIFIED AND AFFIRMED.

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

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3. Indeed, as defendants note, there is no guarantee that the "double-nudge" and "winner-every-time" modifications on which plaintiffs rely would even be available in actual game play since operators of kiosks may disable them or not stock the machine with coins. In such cases, the games are the same ones we held to be illegal in *Sandhill*.

IN RE A.K.

[380 N.C. 16, 2022-NCSC-2]

IN THE MATTER OF A.K.

No. 342A21

Filed 11 February 2022

Termination of Parental Rights—no-merit brief—dependency—sexual abuse

The orders ceasing reunification efforts and terminating the parental rights of a father—who had been arrested for dozens of sexual offense charges against minors, including his own young daughter—were affirmed where his counsel filed a no-merit brief, there was no error in the trial court's decision to discontinue reunification efforts, the evidence and findings supported the determination that the grounds of dependency existed to support termination, and there was no abuse of discretion in the conclusion that termination would be in the child's best interests.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from an order entered on 18 May 2021 by Judge Scott Etheridge in District Court, Randolph County. This matter was calendared for argument in the Supreme Court on 22 December 2021 but determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

Chrystal Kay for petitioner-appellee Randolph County Department of Social Services.

Hill Law, PLLC, by Lindsey Reedy, for appellee Guardian ad Litem.

Leslie Rawls for respondent-appellant father.

MORGAN, Justice.

¶ 1 Respondent-father appeals from the trial court's order terminating his parental rights to "Alice,"[1] a minor child born on 13 December 2017. After careful review, we conclude that the issues identified by counsel for respondent-father as arguably supporting an appeal are meritless and therefore hold that there was no error in the trial court's decision

1. We use a pseudonym to protect the identity of the juvenile and for ease of reading.

to discontinue reunification efforts, that the evidence and resulting findings of fact support the trial court's determination that grounds existed to substantiate the termination of respondent-father's parental rights to Alice, and that there was no abuse of discretion in the trial court's conclusion that it would be in Alice's best interests for respondent-father's parental rights to be terminated. Accordingly, we affirm the trial court's order terminating respondent-father's parental rights to Alice.

I. Factual and Procedural Background

¶ 2 On 18 December 2017, the Randolph County Department of Social Services (DSS) filed a juvenile petition in the District Court, Randolph County, alleging that Alice, who was born five days prior to the filing of the petition, was a dependent juvenile. Alice's mother, who was seventeen years of age at the time that the petition was filed, was the named respondent; the identity of Alice's father was unknown at the time of the filing. The petition alleged, *inter alia*, that the mother was not providing proper care to Alice in the hospital after the child's birth and that at the time of Alice's birth, the mother was living with her own father in a home which DSS found to be inappropriate for Alice. Accordingly, DSS sought nonsecure custody of Alice on the grounds of dependency. The trial court thereupon granted nonsecure custody of Alice to DSS.

¶ 3 Subsequent to the initiation of this case, DNA testing established that respondent-father was Alice's biological father, and he was then joined as a respondent in the action. Respondent-father had been living in Brunswick County, but upon learning that he was the biological father of Alice, respondent-father moved in with his sister and brother-in-law in Randolph County in order to be closer to Alice. Following a March 2018 adjudication hearing, the trial court entered an order in which it determined that Alice was a dependent juvenile and directed that Alice remain in DSS custody with a case plan of reunification. In June 2018, the mother relinquished her parental rights to Alice. Consequently, the mother did not participate in any further proceedings regarding Alice at the trial court level, and the mother is not a party to this appeal.

¶ 4 Respondent-father worked on a case plan with DSS regarding Alice, and by January 2019, he had "completed most of his services and seem[ed] committed to the minor child and meeting her needs." In an August 2019 order, the trial court permitted respondent-father to have one overnight visit per week with Alice. In an order entered in October 2019 following an August 2019 hearing, the trial court approved a trial home placement of Alice with respondent-father, with DSS retaining legal custody of the juvenile.

¶ 5 Later in October 2019, however, respondent-father was arrested and charged with twenty-seven counts of third-degree sexual exploitation of a minor involving children spanning the ages of two years to ten years. Upon respondent-father's arrest, Alice was removed from his home and returned to her previous foster home placement. In November 2019, respondent-father was also criminally charged with taking indecent liberties with the child, Alice. He was also charged with the criminal offense of statutory rape of a child under fifteen years old with a different alleged victim. As a result of these charges, sexual abuse by respondent-father upon Alice and an injurious environment for her was subsequently substantiated. After a permanency planning review hearing in December 2019, the trial court ordered reunification efforts to cease. Respondent-father preserved his right to appeal the cease reunification order.

¶ 6 On 16 July 2020, DSS filed a motion to terminate respondent-father's parental rights in which it represented that grounds existed to terminate his parental rights on the grounds of abuse, neglect, willfully leaving the child in foster care without making reasonable progress, and dependency. Respondent-father filed an "Answer/Reply and Motion to Dismiss" on 14 August 2020. The motion to terminate respondent-father's parental rights was heard on 18 February 2021 during the Juvenile Session of District Court, Randolph County. Although the trial court determined that DSS had not met its burden to establish abuse as a basis for the termination of the parental rights of respondent-father, nonetheless the trial court determined that DSS had established grounds to terminate his parental rights based upon neglect, willfully leaving the child in foster care without making reasonable progress, and dependency. The trial court thereafter found that Alice's best interests would be served by termination of respondent-father's parental rights. The termination order was entered on 18 May 2021. Respondent-father appealed both the cease reunification order and the termination order on 16 June 2021.

¶ 7 On 19 October 2021, appellate counsel for respondent-father filed a brief, stating that "[a]fter thoroughly reviewing the court record and the transcripts, the undersigned attorney for [respondent-f]ather can find no issues of merit on which to base an argument for relief. Therefore, she submits this no-merit brief and asks this Honorable Court to independently review the record," citing *In re L.E.M.*, 372 N.C. 396, 401–02 (2019).

¶ 8 Pursuant to N.C. R. App. P. 3.1(e), appellate counsel for respondent-father has identified three general issues for this Court's review which might arguably support relief on appeal: (1) whether the trial court erred by ceasing reunification efforts; (2) whether the trial court erred by

making findings of fact in the termination order that were not supported by clear, cogent, and convincing evidence and by concluding as law that termination grounds existed; and (3) whether the trial court erred and abused its discretion by finding that termination of parental rights was in Alice's best interests. Appellate counsel for respondent-father also sent a copy of counsel's no-merit brief, the record on appeal, and the transcript to respondent-father, along with a letter explaining respondent-father's right to file his own pro se brief and instructions on how to do so. Respondent-father has not submitted his own brief or any other filing to the Court, and a reasonable period of time in which he could have done so has elapsed.

¶ 9 The no-merit brief filed in this Court by appellate counsel on behalf of respondent-father first analyzes the trial court's decision to cease reunification efforts. A trial court order ceasing reunification efforts is reviewed to determine "whether there is competent evidence in the record to support the findings [of fact] and whether the findings support the conclusions of law" as well as "whether the trial court abused its discretion with respect to disposition." *In re J.H.*, 373 N.C. 264, 267 (2020) (alteration in original) (quoting *In re L.M.T.*, 367 N.C. 165, 168 (2013)). After the 4 December 2019 permanency planning hearing, the trial court rendered an order for DSS to cease reunification efforts with respondent-father. Consequently, Alice's permanent plan was changed to a primary plan of adoption and a secondary plan of guardianship. An order ceasing reunification must include "written findings that reunification efforts clearly would be unsuccessful or would be inconsistent with the juvenile's health or safety." N.C.G.S. § 7B-906.2(b) (2021). The trial court's order need not recite the statutory language verbatim as long as the order makes clear that the trial court considered the evidence in light of whether reunification would be futile or could be inconsistent with the juvenile's health, safety, and need for a safe, permanent home within a reasonable period of time. *In re L.E.W.*, 375 N.C. 124, 129–30 (2020). Here, the cease reunification order included findings of fact that "[b]ased on the [respondent-f]ather's lack of progress and current circumstances, ongoing reunification efforts are not likely to lead to successful reunification in the next six month[s] and [are] inconsistent with the juvenile's health, safety and need for a safe, permanent home within a reasonable period of time"; that "[f]urther reunification efforts with the [respondent-f]ather would be contrary to the minor child's best interests, health, safety, and welfare"; and that "[i]t is contrary to the minor child's health, safety, welfare, and best interests to return to the home, care, or custody of any parent today."

¶ 10 The trial court must also make written findings of fact to show the parent's progress toward reunification regarding whether the parent: (1) is making adequate progress within a reasonable period of time under the plan; (2) is actively participating in or cooperating with the plan, the department, and the guardian ad litem for the juvenile; (3) remains available to the court, the department, and the guardian ad litem for the juvenile; and (4) is acting in a manner inconsistent with the health or safety of the juvenile. N.C.G.S. § 7B-906.2(d) (2021). Here, the trial court made appropriate findings of fact which addressed the statutory considerations. For example, while respondent-father's completion of all of his court-ordered services prior to the trial home placement was expressly recognized by the trial court with regard to respondent-father's case plan in its findings of fact, the trial court also made findings of fact regarding respondent-father's subsequent arrest on more than twenty-seven sex offense charges involving juveniles, the discovery of photographs of naked children on his cellular phone, and the substantiation of his sexual abuse of Alice and his exposure of Alice to an injurious environment. In addition, the trial court found that respondent-father was incarcerated with no scheduled trial date and with a substantial bond, and that respondent-father lacked an adequate source of income to support Alice. The trial court also made multiple findings of fact regarding possible relative placements for Alice and problems regarding these potential placements which prevented them from being approved as homes for the juvenile. In light of such factual findings, we conclude that the trial court's conclusions of law were supported and it did not abuse its discretion by ceasing reunification efforts.

¶ 11 Likewise, we conclude that the evidence and findings of fact support the trial court's conclusion of law that a ground existed to terminate parental rights on the basis of dependency.[2] *See* N.C.G.S. § 7B-1111(a)(6) (2021). In a termination of parental rights proceeding, dependency is shown, *inter alia*, when a "parent is incapable of providing for the proper care and supervision of the juvenile . . . and that there is a reasonable probability that the incapability will continue for the foreseeable future . . . and the parent lacks an appropriate alternative child care arrangement." *Id.* Upon review on the appellate level, we consider "whether

2. The trial court found that clear, cogent, and convincing evidence supported three grounds to terminate respondent-father's parental rights: (1) neglect, (2) willfully leaving the juvenile in foster care for more than twelve months without showing to the satisfaction of the court that reasonable progress under the circumstances had been made in correcting the conditions that led to her removal, and (3) dependency. The "adjudication of any single ground . . . is sufficient to support a termination of parental rights." *In re D.C.*, 378 N.C. 556, 2021-NCSC-104, ¶ 13 (quoting *In re E.H.P.*, 372 N.C. 388, 395 (2019)).

the trial court's findings of fact are supported by clear, cogent, and convincing evidence and whether those findings support the trial court's conclusions of law." *In re D.W.P.*, 373 N.C. 327, 338 (2020) (quoting *In re B.O.A.*, 372 N.C. 372, 379 (2019)). Unchallenged findings of fact are "deemed supported by competent evidence and are binding on appeal." *In re T.N.H.*, 372 N.C. 403, 407 (2019). The trial court's conclusions of law are reviewed de novo. *In re C.B.C.*, 373 N.C. 16, 19 (2019).

¶ 12 As noted above, the trial court made extensive findings of fact indicating the following: (1) that respondent-father had been arrested and had remained incarcerated on dozens of pending sexual offense charges involving juveniles, including Alice; (2) that DSS had substantiated respondent-father's sexual abuse of Alice, as shown by physical and behavioral evidence regarding the juvenile, along with testimony from respondent-father's sister and brother-in-law, among others; and (3) that respondent-father's suggested alternative placements for Alice had all been found to be unsuitable for the juvenile. In light of these unchallenged findings of fact which were fully supported by the evidence, we affirm the trial court's determination that the ground of dependency existed for the termination of the parental rights of respondent-father, in that respondent-father was incapable of providing for Alice's care and well-being, that there was "a reasonable probability that the incapacity would continue for the foreseeable future," and that respondent-father lacked any alternative childcare for the juvenile. N.C.G.S. § 7B-1111(a)(6).

¶ 13 As a final potential basis for relief, appellate counsel for respondent-father identifies the trial court's conclusion that termination of respondent-father's parental rights was in the juvenile's best interests. We review a trial court's best interests determination for an abuse of discretion. *In re A.M.*, 377 N.C. 220, 2021-NCSC-42, ¶ 18. Under such review, a trial court's decision will remain undisturbed unless we determine that it is "manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *In re A.U.D.*, 373 N.C. 3, 6–7 (2019) (quoting *In re T.L.H.*, 368 N.C. 101, 107 (2015)).

¶ 14 In determining the child's best interests, the trial court is required to consider and make findings of fact regarding specific statutory factors:

> (1) The age of the juvenile.
>
> (2) The likelihood of adoption of the juvenile.
>
> (3) Whether the termination of parental rights will aid in the accomplishment of the permanent plan for the juvenile.

(4) The bond between the juvenile and the parent.

(5) The quality of the relationship between the juvenile and the proposed adoptive parent, guardian, custodian, or other permanent placement.

(6) Any relevant consideration.

N.C.G.S. § 7B-1110(a) (2021). The trial court made factual findings encompassing each of the statutory factors: (1) that Alice was three years old; (2) that adoption was "the most likely plan to achieve [a] safe, permanent home" for Alice, that the foster family wanted to adopt her, and that adoption was "very likely"; (3) that termination was likely to aid in accomplishing the permanent plan of adoption; (4) that Alice had a bond with respondent-father but had not seen him since his arrest; and (5) that Alice was significantly bonded with her foster family and her potential sibling in the foster family. None of these findings of fact have been challenged by respondent-father and each of them is supported by evidence introduced during the trial court proceedings. In light of these unchallenged findings of fact which are contained in the termination order and are fully supported by the evidence, we perceive no abuse of the trial court's discretion in its decision that termination of respondent-father's parental rights was in the juvenile's best interests.

¶ 15 After a careful review of the record on appeal and the briefs submitted by the parties in this matter, we agree with respondent-father's appellate counsel that there are no meritorious arguments supporting relief for respondent-father. We therefore affirm the trial court's order ceasing reunification efforts and the trial court's order terminating the parental rights of respondent-father to the juvenile Alice.

AFFIRMED.

IN RE C.C.G.

[380 N.C. 23, 2022-NCSC-3]

IN THE MATTER OF C.C.G.

No. 59A21

Filed 11 February 2022

1. Termination of Parental Rights—denial of motion to continue—no-show by parent—abuse of discretion analysis

The trial court did not abuse its discretion by denying respondent-mother's motion to continue a termination of parental rights hearing where, although respondent did not appear at the hearing, no arguments were advanced by her counsel or guardian ad litem that would justify allowing the continuance and information given to the trial court from respondent's representatives and a social worker tended to show that respondent was aware of the hearing date. Further, respondent did not demonstrate prejudice where there was nothing to show she would have testified or that her testimony would have impacted the outcome of the hearing.

2. Native Americans—Indian Child Welfare Act—termination of parental rights—reason to know status as Indian—statutory inquiry

In a termination of parental rights hearing, the trial court did not fail to comply with the Indian Child Welfare Act (ICWA) where, although respondent-mother told the department of social services that she might have a possible distant Cherokee relation on her mother's side of the family, there was insufficient information presented to the trial court for it to have reason to know that the child was an Indian child pursuant to 25 C.F.R. § 23.107(c). Although the trial court did not conduct the necessary statutory inquiry into the status of the child after the termination petition was filed, there was no reversible error where the court properly conducted the inquiry at earlier stages in the proceedings and there was no information in the record to show that the child might be an Indian child.

3. Child Abuse, Dependency, and Neglect—permanent plan—ceasing reunification efforts—sufficiency of findings

In a permanency planning matter, the trial court did not err by ceasing respondent's visitation with her teenage daughter and eliminating reunification from the permanent plan based on evidence that respondent behaved inappropriately during visits and was not in compliance with her case plan and that the daughter showed improved behavior after no longer seeing her mother. A social

worker's testimony and reports from the department of social services (DSS) supported the challenged findings of fact as well as the court's determination that DSS's efforts to finalize the permanent plan were reasonable.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1)–(2) from orders entered on 3 April 2020 by Judge Jeanie Houston and on 16 November 2020 by Judge David V. Byrd in District Court, Ashe County. This matter was calendared for argument in the Supreme Court on 22 December 2021 but determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

Grier J. Hurley for petitioner-appellee Ashe County Department of Social Services.

Paul W. Freeman Jr. for appellee Guardian ad Litem.

Wendy C. Sotolongo, Parent Defender, by Jacky Brammer, Assistant Parent Defender, for respondent-appellant mother.

BARRINGER, Justice.

¶ 1 Respondent appeals from the trial court's order terminating her parental rights to her daughter C.C.G. (Carrie)[1] and from the trial court's earlier permanency-planning order which eliminated reunification from Carrie's permanent plan. *See* N.C.G.S. § 7B-1001(a1) (2019). Respondent has not challenged on appeal the trial court's conclusions that grounds existed to terminate her parental rights or that termination was in Carrie's best interests. Instead, respondent argues the trial court erred by denying her motion to continue the termination hearing, by failing to comply with the requirements of the Indian Child Welfare Act (ICWA), and by eliminating respondent's visitation with Carrie in a permanency-planning order. After careful review, we find no reversible error.

I. Factual and Procedural Background

¶ 2 On 15 March 2019, the Ashe County Department of Social Services (DSS) filed a petition alleging that Carrie was a neglected juvenile. The petition alleged that respondent had a long history with DSS dating back

1. A pseudonym is used in this opinion to protect the juvenile's identity and for ease of reading.

to 2006 due to issues of domestic violence, substance abuse, mental health difficulties, and improper supervision and that DSS recently became involved with the family when it received a report in December 2018 alleging substance abuse, medical neglect, and improper care and supervision.

¶ 3 In an order entered 3 May 2019, the trial court adjudicated Carrie to be a neglected juvenile. The trial court agreed with DSS's recommendation that it was in Carrie's best interests to continue Carrie in respondent's custody with conditions that respondent comply with her Family Service Case Plan and that Carrie attend school regularly and without tardiness.

¶ 4 On 13 May 2019, DSS filed a motion for review due to respondent's noncompliance with both the adjudication order and her Family Service Case Plan. DSS alleged that Carrie continued to have unexcused absences and tardies from school. DSS also alleged that respondent had not complied with her Family Services Case Plan in that she did not attend the scheduled assessment for Carrie at Youth Villages; had not consistently attended her substance abuse sessions at Daymark; had a positive drug screen; and had been arrested for possession of schedule IV substances, schedule II substances, marijuana, and methamphetamine.

¶ 5 Following a review hearing on 15 May 2019, the trial court entered an order on 28 June 2019 granting DSS nonsecure custody of Carrie with placement in DSS's discretion. Respondent was granted a minimum of two hours of supervised visitation twice per month. The trial court concluded that the best primary plan of care for Carrie was reunification with a secondary plan of guardianship with an approved caregiver.

¶ 6 Pursuant to N.C.G.S. § 7B-906.1(a), the trial court conducted regular permanency-planning hearings. After the permanency hearing on 14 February 2020, the trial court concluded that supervised visitation between respondent and Carrie was not in Carrie's best interest and inconsistent with her health and safety. Therefore, the trial court suspended visitation and contact between respondent and Carrie. Further, the trial court changed the permanent plan to adoption with a secondary plan of custody or guardianship with an approved caregiver.

¶ 7 On 2 June 2020, DSS filed a petition to terminate respondent's parental rights alleging grounds for termination pursuant to N.C.G.S. § 7B-1111(a)(1)–(3), (6). When respondent did not appear at the termination hearing on 16 October 2020, respondent's counsel made an oral motion to continue. The trial court denied the motion to continue. Following the hearing and presentation of evidence, the trial court

entered an order concluding that grounds existed to terminate respondent's parental rights pursuant to N.C.G.S. § 7B-1111(a)(1)–(3) and that it was in Carrie's best interests that respondent's parental rights be terminated. Accordingly, the trial court terminated respondent's parental rights. Respondent appealed.

II. Analysis

A. Motion to Continue

¶ 8 **[1]** "[A] denial of a motion to continue is only grounds for a new [termination-of-parental-rights hearing] when [the respondent] shows both that the denial was erroneous, and that he [or she] suffered prejudice as a result of the error." *In re A.L.S.*, 374 N.C. 515, 517 (2020) (quoting *State v. Walls*, 342 N.C. 1, 24–25 (1995)). Unless the motion to continue raises a constitutional issue, "a motion to continue is addressed to the discretion of the trial court." *Id.* at 516–17 (quoting *Walls*, 342 N.C. at 24). Therefore, to show error on a motion to continue that does not raise a constitutional issue, the respondent must show that the trial court abused its discretion. *Id.* at 517. "Abuse of discretion results where the [trial] court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *Id.* at 517 (quoting *State v. Hennis*, 323 N.C. 279, 285 (1988)).

¶ 9 In this matter, respondent has not advanced a constitutional argument before the trial court or this Court. Instead, respondent asserts that the trial court abused its discretion because there was no evidence she received notice of the hearing, a guardian ad litem had been appointed for her, the trial court was deprived of her testimony, and the trial court had previously allowed continuances.

¶ 10 Based on the record before us, respondent has failed to show an abuse of discretion by the trial court. "[C]ontinuances are not favored and the party seeking a continuance has the burden of showing sufficient grounds for it." *In re J.E.*, 377 N.C. 285, 2021-NCSC-47, ¶ 15 (quoting *In re S.M.*, 375 N.C. 673, 680 (2020)). "Continuances that extend beyond 90 days after the initial petition shall be granted only in extraordinary circumstances when necessary for the proper administration of justice." N.C.G.S. § 7B-1109(d) (2021).

¶ 11 In this matter, the record reflects that the notice of hearing was sent to respondent's counsel and respondent's guardian ad litem. Both respondent's counsel and respondent's guardian ad litem were present at the termination-of-parental-rights hearing. Neither tendered an affidavit or evidence in support of the motion to continue. Instead, they made

unsworn statements in support of the motion to continue. Neither argued that respondent intended to testify, that the preexisting appointment of a guardian ad litem entitled respondent to a continuance, or that the previously allowed continuances justified allowance of this continuance. Respondent's counsel and respondent's guardian ad litem instead represented that they believed respondent was aware of the hearing date and had made efforts to contact her but had not spoken to respondent. However, they had corresponded about the hearing date with respondent's mother, who had respondent's contact information and often provided a home for respondent.

¶ 12 After hearing from respondent's counsel and guardian ad litem, the trial court asked DSS's counsel if DSS had spoken to respondent. DSS's counsel replied that the social worker had spoken to her last week. The social worker then informed the trial court that she had spoken with respondent twice the week prior and that respondent "knows when the court date is." The social worker explained that respondent knew that the court date was today as she had spoken to respondent last week about the date and respondent was upset that the hearing was on her birthday.

¶ 13 Given the representations to the trial court and the record before us, we cannot conclude that the trial court's denial of the motion to continue was manifestly unsupported by reason or arbitrary. The burden falls to the party seeking the continuance to show sufficient grounds for granting the motion. *In re J.E.*, ¶ 15. It does not shift to another party or the trial court. *See id.* Thus, in the context of this case, where among other things the moving party has only offered unsworn statements and argument, we find no error by the trial court. *See State v. Beck*, 346 N.C. 750, 756–57 (1997) (finding trial court did not err by denying motion to continue where unsworn statements of defendant's trial counsel were not sufficient to justify delaying the trial).

¶ 14 Respondent has also failed to show any prejudice arising from the trial court's denial of her motion to continue. Respondent argues she was materially prejudiced because her testimony was a vital source of information regarding the nature of the parent/child relationship and integral to any consideration of her parental rights. However, when making the oral motion, respondent's counsel neither indicated respondent intended to testify nor provided an affidavit or offer of proof of respondent's potential testimony. Thus, as in other cases the Court has decided recently, there is nothing before this Court to show that respondent would have testified and that such testimony would have impacted the outcome of the proceeding. *See, e.g.*, *In re D.J.*, 378 N.C.

565, 2021-NCSC-105, ¶ 14; *In re H.A.J.*, 377 N.C. 43, 2021-NCSC-26, ¶ 13; *In re A.L.S.*, 374 N.C. at 518. Therefore, we hold that the trial court did not err by denying the request for a continuance.

B. Indian Child Welfare Act

¶ 15 **[2]** Respondent argues the trial court failed to comply with its duties under the ICWA because the trial court had reason to know that Carrie was an Indian child. DSS and the guardian ad litem for Carrie (GAL) disagree, arguing that respondent conflates the existence of or possibility of a distant relation with an Indian with reason to know that a child is an Indian child.

¶ 16 Paragraph (c) of 25 C.F.R. § 23.107 specifies when a trial court has reason to know a child is an Indian child. It states:

> (c) A court, upon conducting the inquiry required in paragraph (a) of this section, has reason to know that a child involved in an emergency or child-custody proceeding is an Indian child if:
>
> (1) Any participant in the proceeding, officer of the court involved in the proceeding, Indian Tribe, Indian organization, or agency informs the court that the child is an Indian child;
>
> (2) Any participant in the proceeding, officer of the court involved in the proceeding, Indian Tribe, Indian organization, or agency informs the court that it has discovered information indicating that the child is an Indian child;
>
> (3) The child who is the subject of the proceeding gives the court reason to know he or she is an Indian child;
>
> (4) The court is informed that the domicile or residence of the child, the child's parent, or the child's Indian custodian is on a reservation or in an Alaska Native village;
>
> (5) The court is informed that the child is or has been a ward of a Tribal court; or
>
> (6) The court is informed that either parent or the child possesses an identification card indicating membership in an Indian Tribe.

25 C.F.R. § 23.107(c) (2020).

¶ 17 "Indian child" is defined as "any unmarried person who is under age eighteen and is either (a) *a member of an Indian tribe* or (b) is eligible for membership in an Indian tribe *and* is the biological child of *a member of an Indian tribe*." 25 U.S.C. § 1903(4) (emphasis added). Thus, as we have previously explained,

> "The inquiry into whether a child is an 'Indian child' under ICWA is focused on only two circumstances: (1) Whether the child is a citizen of a Tribe; or (2) whether the child's parent is a citizen of the Tribe and the child is also eligible for citizenship." Indian Child Welfare Act Proceedings; Final Rule, 81 Fed. Reg. at 38,804. The inquiry "is not based on the race of the child, but rather indications that the child and her parent(s) may have a political affiliation with a Tribe [as defined in 25 U.S.C. § 1903]." Indian Child Welfare Act Proceedings; Final Rule, 81 Fed. Reg. at 38,806; *see also* Indian Child Welfare Act Proceedings; Final Rule, 81 Fed. Reg. at 38,801 (" 'Indian child' is defined based on the child's political affiliation with a federally recognized Indian Tribe.").

In re M.L.B., 377 N.C. 335, 2021-NCSC-51, ¶ 16 (alteration in original).

¶ 18 Here, respondent relies on three documents in the record to support her argument that there is reason to know Carrie is an Indian child. First, respondent relies on a DSS court report reflecting an answer of "no" to the inquiry whether there is "any information to indicate that [Carrie] may be subject to the [ICWA]" and explaining, "[respondent] reported there is [a] possible distant Cherokee relation on her mother's side of the family." Second, respondent relies on an in-home family services agreement stating, "[respondent] reports Cherokee Indian Heritage." Third, respondent relies on another DSS court report reflecting an answer of "no" to the inquiry whether there is "any information to indicate that [Carrie] may be subject to the [ICWA]" and explaining, "[respondent] reported there is [a] possible distant Cherokee relation on her mother's side of the family but no further specifics are known."

¶ 19 None of these documents state Carrie is an "Indian child" and none contain information indicating that Carrie or her biological parents are members or citizens of an Indian tribe.[2] *See* 25 C.F.R. § 23.107(c)(1)–(2).

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2. At the termination-of-parental-rights hearing, the social worker also testified that there was no information that Carrie is a member of an Indian tribe and that there were

Indian heritage, which is racial, cultural, or hereditary does not indicate Indian tribe membership, which is political. *See* 25 U.S.C. § 1903(4); *In re M.L.B.*, ¶ 16. Thus, these statements do not provide reason to know that Carrie is an Indian child under 25 C.F.R. § 23.107(c).

¶ 20 However, respondent also contends the trial court erred by not asking at the termination-of-parental-rights hearing whether the participants had reason to know if Carrie was an Indian child.

¶ 21 Subsection 23.107(a) of Title 25 of the Code of Federal Regulations provides that "State courts must ask each participant in an emergency or voluntary or involuntary child-custody proceeding whether the participant knows or has reason to know that the child is an Indian child" and that "[such] inquiry is made at the commencement of the proceeding and all responses should be on the record."

¶ 22 Child-custody proceeding is defined as follows:

> *Child-custody proceeding*. (1) "Child-custody proceeding" means and includes any action, other than an emergency proceeding, that may culminate in one of the following outcomes:
>
> (i) *Foster-care placement*, which is any action removing an Indian child from his or her parent or Indian custodian for temporary placement in a foster home or institution or the home of a guardian or conservator where the parent or Indian custodian cannot have the child returned upon demand, but where parental rights have not been terminated;
>
> (ii) *Termination of parental rights*, which is any action resulting in the termination of the parent-child relationship;
>
> (iii) *Preadoptive placement*, which is the temporary placement of an Indian child in a foster home or institution after the termination of parental rights, but prior to or in lieu of adoptive placement; or
>
> (iv) *Adoptive placement*, which is the permanent placement of an Indian child for adoption, including any action resulting in a final decree of adoption.

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no reports from family members that Carrie was possibly an Indian child. Therefore, there was no reason on the basis of the information that was available to the trial court at the time of the termination hearing for the trial court to know that Carrie was an Indian child.

> (2) *An action that may culminate in one of these four outcomes is considered a separate child-custody proceeding from an action that may culminate in a different one of these four outcomes.* There may be several child-custody proceedings involving any given Indian child. Within each child-custody proceeding, there may be several hearings.

25 C.F.R. § 23.2 (2020) (last emphasis added).

¶ 23 The trial court's orders in the trial court's adjudication and disposition order entered on 3 May 2019 and order transferring custody to DSS entered on 28 June 2019 both specifically state "[t]he [c]ourt inquired of the parties and none of the parties know or have reason to know the child is an Indian child as defined at 25 U.S.C. [§] 1902(4); 25 C.F.R. [§] 23.2." Thus, the record[3] before us reflects that the trial court made the inquiry required by 25 C.F.R. § 23.107(a) at the hearing addressing and ultimately resulting in the removal of Carrie from respondent and rendering respondent without the right to have Carrie returned upon demand. However, the record does not reflect that the trial court made the inquiry required by 25 C.F.R. § 23.107(a) at a hearing after DSS moved for termination of the parent-child relationship. Nevertheless, as the determination of whether there is reason to know that Carrie is an Indian child can be made on the record and as discussed previously there is no reason to know that Carrie is an Indian child, we conclude that there is no reversible error. *See In re A.L.*, 378 N.C. 396, 2021-NCSC-92, ¶ 28 (remanding the case to the trial court because the determination of whether there is reason to know the juvenile is an Indian child could not be made on the record).

C. Visitation

¶ 24 **[3]** Respondent asks this Court to reverse the 3 April 2020 permanency-planning order which eliminated reunification from Carrie's permanent plan because the determination to cease visitation was either legal error or abuse of discretion.

¶ 25 In cases arising under the juvenile code, "to obtain relief on appeal, an appellant must not only show error, but that the error was material

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3. While respondent disputes the determination by the trial court that there is neither information that Carrie is an "Indian child" or reason to know that Carrie is an "Indian child," respondent does not dispute and does not offer any record support contrary to the trial court's finding that it inquired of the parties whether they had reason to know that Carrie is an "Indian child" at hearings prior to the termination-of-parental-rights hearing.

and prejudicial, amounting to denial of a substantial right that will likely affect the outcome of an action." *In re L.E.W.*, 375 N.C. 124, 128 (2020) (cleaned up). To show error by the trial court concerning visitation in a permanency-planning order which eliminated reunification, we review for an abuse of discretion "with an abuse of discretion having occurred only upon a showing that the trial court's actions are manifestly unsupported by reason." *In re L.E.W.*, 375 N.C. at 134 (cleaned up). We also "review the order eliminating reunification together with an appeal of the order terminating parental rights." N.C.G.S. § 7B-1001(a2).

1. Challenge to reconsideration of visitation plan

¶ 26 According to respondent, the determination to cease visitation was legal error or abuse of discretion because the trial court at the February 2020 hearing had "substantially the same" information and facts before it that the trial court had at the 22 November 2019 hearing, where it found visitation was still in Carrie's best interests. However, respondent concedes that additional information was in the DSS court report and that the GAL court report and a social worker provided new testimony. In other words, the trial court received new information at the February 2020 hearing. Pursuant to N.C.G.S. § 7B-906.1(d)(2), at review and permanency-planning hearings, the trial court shall consider "whether there is a need to create, modify, or enforce an appropriate visitation plan in accordance with [N.C.]G.S. [§] 7B-905.1." N.C.G.S. § 7B-906.1(d)(2) (2021). As N.C.G.S. § 7B-906.1(d)(2) instructs the trial court to consider the visitation plan and the trial court received new information, we find no merit in respondent's argument.

2. Challenge to findings of fact 18 and 34

¶ 27 Respondent also challenges findings of fact 18 and 34, arguing that the social worker's testimony that supports these findings was not reliable. The trial court found in findings of fact 18 and 34 that:

> 18. [Carrie] had behavioral setbacks until September 2019. Since she has not seen [respondent] and is in the group home [Carrie] has made improvements. Prior to September 2019 [Carrie] had superficial self-harming behaviors and was aggressive with her peers. She has attended a day treatment program as referred through Youth Villages and is in therapy. [Carrie] has asked about [respondent] one time since September 2019.
>
> . . . .

> 34. Supervised visitation with [respondent] at this time is not in [Carrie's] best interest and is not consistent with her health and safety.

¶ 28 We review the trial court's challenged findings of fact in a permanency-planning order that ceases reunification to determine whether they are supported by the evidence received before the trial court. *In re L.M.T.*, 367 N.C. 165, 168 (2013).[4] At a review or permanency-planning hearing, "[t]he [trial] court may consider any evidence, including hearsay evidence as defined in [N.C.]G.S. [§] 8C-1, Rule 801, or testimony or evidence from any person that is not a party, that the [trial] court finds to be relevant, reliable, and necessary to determine the needs of the juvenile and the most appropriate disposition." N.C.G.S. § 7B-906.1(c). Appellate courts may not reweigh the underlying evidence presented at Subchapter I of the Juvenile Code hearings. *See*, *e.g.*, *In re J.A.M.*, 372 N.C. 1, 11 (2019). It is the role of the trial court in these matters to assess the reliability of the testimony and make a credibility determination. *See id.*

¶ 29 DSS and the GAL contend that the two challenged findings of fact are supported by the social worker's unobjected-to testimony. We agree. The social worker testified at the hearing that respondent's last visit with Carrie was 6 September 2019, that Carrie had some substantial behavior setbacks "up until about September," including self-harming and aggressive behaviors with some of her peers, and that "she just really turned it around," including improving her grade in math, ceasing talking like a baby, and being more compliant. The social worker testified that Youth Villages recommended day treatment, which was not available at her current placement. Thus, DSS transferred Carrie to a new placement in August with what they described as "an amazing program." The social worker further testified that she believed there was a correlation between Carrie's improvement in behavior and her not

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4. In past cases, we have used the term "competent evidence" when describing the standard of review applicable to the findings of fact in a permanency planning order. *See*, *e.g.*, *In re L.M.T.*, 367 N.C. 165, 168 (2013). In some contexts, competent evidence means admissible evidence pursuant to the rules of evidence. *See Evidence*, *Black's Law Dictionary* (11th ed. 2019). However, N.C.G.S. § 7B-906.1(c) makes clear that the evidence that the trial court receives and considers in a review or permanency planning hearing need not be admissible under the North Carolina Rules of Evidence. Further, our precedent and Rules of Appellate Procedure dictate when we can review the admissibility of evidence admitted by the trial court. Accordingly, for clarity, we are avoiding the phrase "competent evidence" in the context of permanency planning orders in favor of using the language the statute itself employs: "evidence."

having seen respondent since September. The social worker explained that Carrie wanted to be adopted and asked about respondent only once since September. The social worker testified that she thinks it would be detrimental to have respondent visiting and contacting Carrie. Since the foregoing testimony from the social worker supports findings of fact 18 and 34, they are conclusive on appeal. We, therefore, reject respondent's challenge to findings of fact 18 and 34.

3. Challenge to cessation of visitation

¶ 30 We next address respondent's challenge to the trial court's determination to cease visitation. Visitation shall be provided "that is in the best interests of the juvenile consistent with the juvenile's health and safety, including no visitation." N.C.G.S. § 7B-905.1(a) (2021). In this matter, we are bound to challenged findings of fact 18 and 34, which are supported by the evidence before the trial court, and the unchallenged findings of fact from the 3 April 2020 permanency-planning order and the termination-of-parental-rights order.

¶ 31 Pursuant to the binding findings, "[u]pon entering foster care, [Carrie] exhibited behaviors such as walking on her tippy toes, talking in a baby voice, being noncompliant and throwing tantrums as well as self-harming behaviors." Carrie received medical evaluations and was diagnosed with post-traumatic stress disorder. Carrie was a teenager at the time. "During the period of time [Carrie] did not have contact with her [respondent,] these behaviors would improve." "When visits or contact with [respondent] occurred, [Carrie's] behaviors would regress." Carrie desired to be adopted and did not see her mother as part of her future.

¶ 32 Respondent only attended six visits with Carrie, and she "appeared at a visit impaired, fell asleep at a visit, made false promises to [Carrie,] and told [Carrie] to not comply with Ashe County DSS." Respondent's calls with Carrie were at times not appropriate and sometimes involved intensely questioning Carrie, making irrational comments, or giving Carrie false hope. Respondent continued to have positive drug screens, refused some drug screenings, did not attend a referred parenting class, and never completed her psychological evaluation. Respondent also absconded from the facility at which she was required to undergo treatment as a condition of her probation and refused to meet with the social worker in January 2020. Given the foregoing findings of fact, we are unable to say that the trial court abused its discretion by ceasing visitation with Carrie.

4. Challenge to finding of reasonable efforts by DSS

¶ 33 In the alternative, respondent argues that DSS failed to provide reasonable efforts to implement the child's permanent plan by not providing respondent with any visits with Carrie between late September 2019 and February 2020. Respondent contends that "because visitation is an essential part of reunification, there can be no reasonable efforts toward reunification or preventing foster care when DSS is not providing visitation with the child's mother, even though it is still in the child's best interests." We disagree.

¶ 34 Subsections 7B-906.1(e)(5) and 7B-906.2(c) direct the trial courts to consider and make written findings of fact regarding whether the county department of social services has exercised reasonable efforts since the initial permanency plan hearing to implement the permanent plan for the juvenile. The juvenile code defines "reasonable efforts" as

> The diligent use of preventive or reunification services by a department of social services when a juvenile's remaining at home or returning home is consistent with achieving a safe, permanent home for the juvenile within a reasonable period of time. If a court of competent jurisdiction determines that the juvenile is not to be returned home, then reasonable efforts means the diligent and timely use of permanency- planning services by a department of social services to develop and implement a permanent plan for the juvenile.

N.C.G.S. § 7B-101(18) (2021).

¶ 35 Respondent thus challenges the trial court's determination "[t]hat Ashe County DSS has made reasonable efforts to finalize the permanent plan to timely achieve permanence for the juvenile and eliminate placement in foster care, reunify this family, and implement a permanent plan for the child."[5] The trial court's other findings and the DSS report incorporated by reference into its order support this determination. The trial court found that reunification efforts were made to finalize permanency, including contacting respondent, attempting to contact respondent, maintaining contact with Carrie and the placement providers, and

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5. Respondent also challenges the trial court's finding that respondent "has not provided emotional support for [Carrie]" and "[v]isitation and contact is detrimental to [Carrie]." This finding is supported by the testimony of the social worker as previously summarized.

facilitating an updated psychological evaluation for Carrie. The social worker also went to meet respondent in jail in January 2020 to discuss her family service agreement. Respondent, however, refused to meet with her. The DSS report further shows that, among other things, DSS had coordinated supervised visits between respondent and Carrie prior to late September 2019, scheduled a supervised visitation in late September that respondent cancelled, offered to provide respondent transportation assistance that respondent rejected, held Child and Family Team Meetings, and made multiple attempts to meet with and contact respondent, through phone calls and home and jail visits. Collectively, these findings show that DSS was diligently using and providing preventive or reunification services. N.C.G.S. § 7B-101(18). Therefore, respondent's argument is overruled.

¶ 36 Having considered respondent's arguments, we conclude that respondent has not shown any error by the trial court in ceasing respondent's visitation. Respondent also has not shown that even if an error occurred, such error was material and prejudicial. *See In re L.E.W.*, 375 N.C. at 128. Accordingly, we affirm the 3 April 2020 permanency-planning order eliminating reunification from the permanent plan.

III. Conclusion

¶ 37 For the reasons set forth above, we affirm the 3 April 2020 permanency-planning order eliminating reunification as a permanent plan and the 16 November 2020 termination-of-parental-rights order.

AFFIRMED.

IN RE G.D.C.C.

[380 N.C. 37, 2022-NCSC-4]

IN THE MATTER OF G.D.C.C.

No. 504A20

Filed 11 February 2022

Termination of Parental Rights—grounds for termination—neglect—likelihood of future neglect

The trial court properly terminated a mother's parental rights to her daughter based on neglect where, after an older sibling was sexually abused by the children's father, respondent-mother refused to believe that abuse had occurred and actively tried to discredit the sibling. Despite completing a case plan, respondent-mother failed to accept responsibility for her actions and to demonstrate any ability to protect her daughter from threats. The unchallenged findings of fact supported the court's determination that there was a likelihood of future neglect if the child were returned to her mother's care.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from an order entered on 29 September 2020 by Judge Resson O. Faircloth in District Court, Johnston County. This matter was calendared for argument in the Supreme Court on 22 December 2021 but determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

Holland & O'Connor, PLLC, by Jennifer S. O'Connor, for petitioner-appellee Johnston County Department of Social Services; and Mobley Law Office, P.A., by Marie H. Mobley, for appellee Guardian ad Litem.

J. Thomas Diepenbrock for respondent-appellant mother.

BARRINGER, Justice.

¶ 1 Respondent appeals from an order terminating her parental rights in her minor child G.D.C.C. (Galena).[1] After careful review, we hold that the trial court's determination that there was a likelihood of future neglect if Galena was returned to respondent's care was supported by the findings of fact. Accordingly, we affirm the trial court's order terminating respondent's parental rights.

1. Pseudonyms are used in this opinion to protect the juveniles' identities and for ease of reading.

I. Factual and Procedural Background

¶ 2 On 20 June 2016, the Johnston County Department of Social Services (DSS) obtained nonsecure custody of five-year-old Galena and filed a juvenile petition alleging that she was a neglected and dependent juvenile, which included the following factual allegations. Galena's older sister, Nadina,[2] had disclosed multiple accounts of sexual abuse by Galena's father.[3] Respondent, after learning of the allegations, still took Galena to spend the night at her father's house, disregarding Nadina's claims of sexual abuse. Respondent directed Nadina not to say anything during a child medical exam and tried to have Nadina call her father to apologize to him because he was upset. A child medical exam indicated Nadina was probably sexually abused, and her father failed a polygraph test. Respondent attempted to discredit Nadina by calling her a liar and accusing her of making up the allegations. Nadina was hospitalized on several occasions due to suicidal and homicidal ideations.

¶ 3 Following a hearing, the trial court entered an order on 13 December 2016 adjudicating Galena to be a neglected and dependent juvenile. In a separate disposition order entered the same day, the trial court ordered that Galena remain in DSS custody and that respondent cooperate with DSS and follow all recommendations.

¶ 4 DSS developed an Out-of-Home Family Services Agreement with respondent to address parenting education, individual counseling services, nonoffender services, and maintaining a safe and appropriate home. In a 4 January 2017 order, following a permanency-planning hearing, the trial court found that respondent had started but failed to follow through with individual counseling, had not begun parenting classes, and had not completed a psychological evaluation. By October 2017, respondent had completed parenting classes, but she continued to lack an understanding of her children's mental health and behavioral issues as well as the sexual abuse Nadina had suffered. On 11 May 2018, the trial court entered a permanency-planning order finding that respondent had participated in individual counseling on only a sporadic basis and "continue[d] to lack an understanding of her role and responsibility as to the juveniles' current situation and removal from her care."

¶ 5 On 17 April 2019, the trial court entered an amended permanency-planning order finding that respondent had completed an updated

2. Nadina is not part of this appeal.

3. Galena's father is not a party to this appeal.

psychological evaluation in April 2018. The doctor who evaluated respondent reported that despite months of therapy and psychoeducation regarding how a nonoffending parent should respond to a child victim, respondent continued to fail to believe Nadina's report of sexual abuse. Further, the trial court found that respondent failed to take responsibility for the emotional and psychological damage that her actions—such as trying to discredit Nadina and calling her a liar—had caused Nadina. The trial court found that although respondent had cooperated in part with her case plan, she had not demonstrated an ability to apply what she learned in her classes and would be unable to protect her children.

¶ 6 The trial court's findings in the next permanency-planning order entered on 31 May 2019 were consistent with those in the 17 April 2019 order. The trial court also found that respondent had stopped attending therapy. The trial court, therefore, changed the primary permanent plan to adoption, with a secondary permanent plan of custody/guardianship with a court-approved caretaker.

¶ 7 On 11 July 2019, DSS filed a petition to terminate respondent's parental rights in Galena alleging that grounds existed pursuant to N.C.G.S. § 7B-1111(a)(1), (2), and (6). Following a termination-of-parental-rights hearing that occurred over the course of several days, the trial court entered an order on 29 September 2020 concluding that grounds existed to terminate respondent's parental rights in Galena pursuant to each of the grounds DSS had alleged. The trial court also concluded that it was in Galena's best interests that respondent's parental rights be terminated. As a result, the trial court terminated respondent's parental rights. Respondent timely appealed.[4]

II. Analysis

¶ 8 On appeal, respondent challenges the trial court's adjudication of the existence of grounds to terminate her parental rights pursuant to

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4. Respondent's notice of appeal may have been defective as it cited N.C.G.S. § 7B-1001(a1)(2), the statutory provision regarding appeals of orders eliminating reunification as a permanent plan; stated that respondent "hereby gives Notice of Appeal to the North Carolina Supreme Court of the Order eliminating reunification;" and was titled "NOTICE OF APPEAL Order Eliminating Reunification [TPR]." However, the notice did reference the termination-of-parental-rights order, stating that it was appealing "[t]he order terminating [respondent's] rights [that] was filed on September 29, 2020." Since neither the guardian ad litem nor DSS has challenged respondent's notice of appeal as defective, "we elect, in the exercise of our discretion, to treat the record on appeal as a petition seeking the issuance of a writ of certiorari and to allow that petition . . . in order to reach the merits of [respondent's] challenge to the trial court's termination orders." *In re S.G.S.*, 2021-NCSC-156, ¶ 8 n.6.

N.C.G.S. § 7B-1111(a)(1), (2), and (6). The North Carolina Juvenile Code sets out a two-step process for termination of parental rights: an adjudicatory stage and a dispositional stage. N.C.G.S. §§ 7B-1109 to -1110 (2021). At the adjudicatory stage, the trial court takes evidence, finds facts, and adjudicates the existence or nonexistence of the grounds for termination set forth in N.C.G.S. § 7B-1111. N.C.G.S. § 7B-1109(e). If the trial court adjudicates that one or more grounds exist, the trial court then proceeds to the dispositional stage where it determines whether termination of parental rights is in the juvenile's best interests. N.C.G.S. § 7B-1110(a).

A. Standard of Review

¶ 9 We review a trial court's adjudication pursuant to N.C.G.S. § 7B-1111 to determine whether the findings are supported by clear, cogent, and convincing evidence and whether the findings support the conclusions of law. *In re E.H.P.*, 372 N.C. 388, 392 (2019). On appeal, this Court reviews "only those findings necessary to support the trial court's determination that grounds existed to terminate respondent's parental rights." *In re T.N.H.*, 372 N.C. 403, 407 (2019). "A trial court's finding of fact that is supported by clear, cogent, and convincing evidence is deemed conclusive even if the record contains evidence that would support a contrary finding." *In re B.O.A.*, 372 N.C. 372, 379 (2019). Further, "[f]indings of fact not challenged by respondent are deemed supported by competent evidence and are binding on appeal." *In re T.N.H.*, 372 N.C. at 407. We review the trial court's conclusions of law de novo. *In re C.B.C.*, 373 N.C. 16, 19 (2019).

B. Neglect

¶ 10 A trial court may terminate parental rights if it concludes the parent has neglected the juvenile within the meaning of N.C.G.S. § 7B-101. N.C.G.S. § 7B-1111(a)(1) (2021). As defined in pertinent part by N.C.G.S. § 7B-101, a neglected juvenile is one "whose parent . . . [d]oes not provide proper care, supervision, or discipline . . . [or c]reates or allows to be created a living environment that is injurious to the juvenile's welfare." N.C.G.S. § 7B-101(15) (2021).

> In some circumstances, the trial court may terminate a parent's rights based on neglect that is currently occurring at the time of the termination hearing. However, such a showing is not required if, as in this case, the child is not in the parent's custody at the time of the termination hearing. Instead, the trial court looks to evidence of neglect by a parent prior

> to losing custody of a child—including an adjudication of such neglect[—]as well as any evidence of changed conditions in light of the evidence of prior neglect and the probability of a repetition of neglect. The determinative factors must be the best interests of the child and the fitness of the parent to care for the child at the time of the termination proceeding. After weighing this evidence, the trial court may find that neglect exists as a ground for termination if it concludes the evidence demonstrates a likelihood of future neglect by the parent.

In re M.J.B. III, 377 N.C. 328, 2021-NCSC-50, ¶ 9 (cleaned up) (emphasis omitted).

¶ 11 In the present case, DSS obtained nonsecure custody of Galena on 20 June 2016, and Galena remained outside of respondent's custody for the entirety of the case. Thus, at the termination hearing, DSS needed to demonstrate both past neglect and a likelihood of future neglect by respondent. *See id.*

¶ 12 On appeal, respondent challenges the trial court's determination that there was a likelihood of future neglect if Galena was returned to respondent's care. Respondent does not contest the trial court's finding that Galena was neglected in the past and does not challenge any factual findings in the termination order. Instead, respondent argues that the findings of fact do not support a determination that there was likelihood of future neglect because many, if not most, of the findings do not address respondent's fitness to care for Galena at the time of the termination hearing. While respondent acknowledges that some of the findings do relate to her, she contends that they simply note her completion of the case plan and do not support a determination that there was a likelihood of future neglect. We disagree.

¶ 13 In the termination-of-parental-rights order, the trial court made the following findings, none of which respondent challenges: Nadina was sexually abused by her father; respondent has refused to believe Nadina's claims of sexual abuse by her father; respondent, by not believing Nadina's claims, has caused emotional and psychological damage to Nadina; respondent continued to contend that Nadina's self-harming behavior of cutting herself was only to get attention; throughout the entirety of the case, respondent attempted to discredit Nadina by calling her a liar and indicating that Nadina was making up the sexual-abuse allegations; respondent consistently failed to acknowledge her children's

special needs; respondent indicated she would not provide her children their prescribed medications if she felt that they did not need them; respondent had expressed at past hearings that she did not know whether or not Galena should be around her father; respondent stopped attending therapy in September 2018; and respondent lacked insight into the issues that led to DSS involvement and her role and responsibility in contributing to the situation.

¶ 14 Further, respondent failed to demonstrate any ability to recognize threats to Galena or an ability to protect Galena despite completing the case plan. While respondent had received training on how to respond to sexual abuse, she still testified that she "did not know" whether or not Galena should be around her father. Even after years of involvement by DSS, the trial court, and numerous professionals, respondent failed to acknowledge any concern with her ability to parent and protect the children, failed to accept any responsibility for her actions, and continued to deny that she had done anything wrong. Accordingly, the trial court found that respondent had not demonstrated that she had gained knowledge from her case plan about how to resolve the issues at home, had showed no changes in the positive, and was not able to protect Galena from her father or any other male.

¶ 15 These unchallenged findings, which are binding on appeal, support the trial court's determination that there was a likelihood of future neglect if Galena were returned to respondent's care. Respondent's completion of her case plan does not preclude a determination that neglect is likely to reoccur. *See In re D.W.P.*, 373 N.C. 327, 339–40 (2020) (noting that the completion of a case plan did not contradict a determination that there was a likelihood of future neglect when respondent consistently failed to recognize the pattern of abuse her child had suffered). After years of professional, court, and DSS involvement, the issues that led to Galena's removal remained: respondent still could not protect her children from threats and thus could not provide them an environment that was not injurious to their welfare. Therefore, we hold that the trial court's determination that there was a probability of future neglect was supported by the findings of fact. As respondent has made no other challenges to the trial court's adjudication of grounds to terminate respondent's parental rights pursuant to N.C.G.S. § 7B-1111(a)(1), we find no error by the trial court as to this ground.

III. Conclusion

¶ 16 Since only one of the grounds outlined in N.C.G.S. § 7B-1111(a) is necessary to support a termination of parental rights, we decline to

address respondent's arguments challenging the trial court's conclusion that grounds existed to terminate her parental rights under N.C.G.S. § 7B-1111(a)(2) and (6). Here, the trial court's determination that grounds existed to terminate respondent's parental rights for neglect pursuant to N.C.G.S. § 7B-1111(a)(1) was supported by the unchallenged findings of fact. Further, respondent does not challenge the trial court's determination that it was in Galena's best interests to terminate respondent's parental rights. Accordingly, we affirm the order terminating respondent's parental rights.

AFFIRMED.

IN THE MATTER OF J.R.F.

No. 36A21

Filed 11 February 2022

1. Termination of Parental Rights—grounds for termination—neglect—some progress—right before termination hearing

The trial court did not err by determining that a father's parental rights were subject to termination on the grounds of neglect where the child had previously been adjudicated as neglected and the unchallenged findings supported the conclusion that repetition of neglect was highly likely given the father's lack of stability, unaddressed substance abuse issues, and domestic violence issues. Although the father had made some progress in the month or two before the termination hearing, it was insufficient to outweigh his long history with these issues.

2. Termination of Parental Rights—best interests of the child—dispositional findings of fact—abuse of discretion analysis

The trial court did not abuse its discretion by determining that termination of a father's parental rights was in his child's best interests where the court made appropriate findings regarding each of the dispositional factors in N.C.G.S. § 7B-1110, the findings were based on a reasonable interpretation of competent evidence, and the findings specifically challenged by the father—regarding the father's bond with the child and the child's likelihood of adoption—were also supported by competent evidence.

IN RE J.R.F.

[380 N.C. 43, 2022-NCSC-5]

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from an order entered on 16 November 2020 by Judge J. H. Corpening, II in District Court, New Hanover County. This matter was calendared for argument in the Supreme Court on 22 December 2021 but determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

Jane R. Thompson for petitioner-appellee New Hanover County Department of Social Services.

Sophie Goodman, for appellee Guardian ad Litem.

Christopher M. Watford for respondent-appellant father.

MORGAN, Justice.

¶ 1 Respondent-father appeals from a trial court's order terminating his parental rights to J.R.F. (Ronnie[1]), a minor child born in February 2014. Respondent-father challenges the two grounds for termination found by the trial court, as well as the trial court's conclusion that termination of respondent-father's parental rights was in Ronnie's best interests. We conclude that at least one of the grounds found by the trial court for the termination of respondent-father's parental rights was supported by clear, cogent, and convincing evidence. We further conclude that the trial court did not abuse its discretion in deciding that Ronnie's best interests would be served by the termination of respondent-father's parental rights. Accordingly, we affirm the order of the trial court entered on 16 November 2020 which terminated the parental rights of respondent-father.

I. Factual Background and Procedural History

¶ 2 Petitioner New Hanover County Department of Social Services (DSS) began working with Ronnie's family in May 2018[2] by addressing his parents' issues with substance abuse, domestic violence, mental health, parenting, and housing stability. These issues continued without improvement despite DSS's involvement, prompting DSS to file a juvenile petition on 12 October 2018 which alleged that Ronnie was a

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

2. Although the family lives in Brunswick County, New Hanover County DSS provided services to them due to a conflict of interest on the part of Brunswick County DSS.

neglected juvenile. The petition averred that respondent-father had violated multiple safety plans and displayed a deficit of basic parenting skills. The petition also alleged that respondent-father tested positive for cocaine and methamphetamines, continued to engage in mutual domestic violence incidents with Ronnie's mother, and suffered from untreated bipolar disorder. At the time that the petition was filed, Ronnie was living with his mother and half-siblings on a boat, which DSS described as "cluttered and unsafe for children." Ronnie had not received his recommended vaccinations since 2016, which prevented him from being placed in daycare or preschool. Instead, he was left unattended in the boatyard garage, where he had "access to multiple dangerous chemicals and tools" while his mother worked. The trial court awarded nonsecure custody to DSS on the same day that the agency filed the neglect petition.

¶ 3 The petition came on for hearing on 28 November 2018 during which the parents, represented by counsel, stipulated to the facts asserted by DSS in the agency's neglect petition. Based on these stipulations, the trial court adjudicated Ronnie as a neglected juvenile by way of an order entered on 27 December 2018. In the dispositional portion of its order, the trial court ordered respondent-father to: (1) comply with the terms of his Family Services Agreement; (2) complete a Comprehensive Clinical Assessment and comply with any recommendations; (3) execute a release with his service providers on behalf of DSS and Ronnie's guardian ad litem; (4) submit to random drug screens; (5) complete a domestic violence assessment and comply with any recommendations; (6) complete an anger management program; and (7) maintain stable housing and verifiable income.

¶ 4 The first permanency planning hearing occurred on 11 September 2019. In its resultant order from that hearing, the trial court made findings reflecting mixed progress on the part of respondent-father. While respondent-father participated in two Family Services Agreement meetings, participated in mental health and parenting classes, and completed an intake assessment with the Domestic Violence Offender Program, he also admitted that he had slapped Ronnie's mother and poked her with a broom, ingested Suboxone and methamphetamines, missed three drug screens, and tested positive for buprenorphine and buprenorphine metabolite after another drug screen, and that he was unemployed and living with friends. The trial court set the primary permanent plan as reunification with a secondary plan of guardianship, and directed respondent-father to begin or continue the tasks ordered in its 27 December 2018 order.

¶ 5 The next permanency planning hearing occurred on 8 January 2020, after which the trial court changed the primary plan to adoption with a secondary plan of reunification in an order entered two weeks later. In that order, the trial court found that respondent-father was not making adequate progress on his case plan within a reasonable amount of time. Respondent-father had not verified his employment and was only periodically attending therapy that was recommended pursuant to a Comprehensive Clinical Assessment during which respondent-father displayed a lack of candor. Although respondent-father had obtained negative results on several drug screens since September of 2019, he had refused two drug screens in October and November 2019 and had admitted on 22 November 2019 to using illicit substances. Respondent-father had obtained independent housing, but the house was in need of repairs and was unsafe for children.

¶ 6 On 4 February 2020, DSS filed a petition to terminate respondent-father's parental rights to Ronnie, asserting two grounds for termination: (1) respondent-father had neglected Ronnie and there was a substantial likelihood of repetition of neglect if Ronnie was returned to respondent-father's custody pursuant to N.C.G.S. § 7B-1111(a)(1); and (2) respondent-father had willfully left Ronnie in a placement outside the home for more than twelve months without making reasonable progress to correct the conditions leading to the child's removal pursuant to N.C.G.S. § 7B-1111(a)(2).

¶ 7 The termination petition was heard over the course of five separate sessions during September and October 2020 where the trial court received testimony from social workers, treatment providers, character witnesses, and respondent-father himself. On 16 November 2020, the trial court entered an order terminating the parental rights of respondent-father. The trial court concluded that both grounds for termination alleged by DSS existed and that termination of respondent-father's parental rights was in Ronnie's best interests. Respondent-father appeals the trial court's order terminating his parental rights to this Court.[3] N.C.G.S. § 7B-1001(a1) (2019) (*repealed by* S.L. 2021-18, § 2 (eff. 1 July 2021)).

II. Standard of Review

¶ 8 North Carolina trial courts employ a two-step process to adjudicate and dispose of actions filed to terminate the parental rights of a respondent-parent. First, once a petition has been filed to terminate the parental rights of a respondent-parent,

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3. The trial court's order also terminated the parental rights of Ronnie's mother and any potential unknown father. Only respondent-father appealed from that order.

> a trial court conducts a hearing to adjudicate the existence or nonexistence of any grounds alleged in the petition as set forth under N.C.G.S. § 7B-1111. N.C.G.S. § 7B-1109(e) (2019). Then, following an adjudication that at least one ground exists to terminate the parental rights of a respondent-parent, the trial court will determine whether terminating the parental rights of the respondent-parent is in the child's best interests. N.C.G.S. § 7B-1110(a) [(2019)].

In re A.M., 377 N.C. 220, 2021-NCSC-42, ¶ 13. In reviewing a trial court's actions at the adjudicatory stage, this Court must "determine whether the findings are supported by clear, cogent and convincing evidence and the findings support the conclusions of law" that one or more grounds for termination exist. *In re E.H.P.*, 372 N.C. 388, 392 (2019). If clear, cogent, and convincing evidence supports a trial court's findings which support its determination as to the existence of a particular ground for termination of a respondent's parental rights, the resulting adjudication of the ground for termination will be affirmed. *Id.* Unchallenged findings are "deemed supported by competent evidence and are binding on appeal." *In re T.N.H.*, 372 N.C. 403, 407 (2019). The trial court's conclusions of law are reviewed de novo. *In re C.B.C.*, 373 N.C. 16, 19 (2019).

¶ 9 In our consideration of the dispositional stage, we review the trial court's assessment of a child's best interests for an abuse of discretion. The court's determination is subject to reversal only if it is "manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *In re T.L.H.*, 368 N.C. 101, 107 (2015) (quoting *State v. Hennis*, 323 N.C. 279, 285 (1988)).

III. Adjudication

¶ 10 **[1]** Respondent-father first challenges the two grounds for termination which were found to exist by the trial court. We begin by examining whether the trial court erred in deciding that respondent-father's rights were subject to termination based on neglect by evaluating whether that conclusion was supported by findings of fact based on clear, cogent, and convincing evidence as reflected in the trial court's order.

¶ 11 The North Carolina General Statutes provide that a respondent-parent's rights to a child may be terminated if the respondent-parent neglects the child such that the child meets the statutory definition of a "neglected juvenile." N.C.G.S. § 7B-1111(a)(1) (2019). A neglected juvenile, in relevant part, is one "whose parent, guardian, custodian, or caretaker does not provide proper care, supervision, or discipline; . . .

or who lives in an environment injurious to the juvenile's welfare." N.C.G.S. § 7B-101(15) (2019).

> Termination of parental rights based upon this statutory ground requires a showing of neglect at the time of the termination hearing or, if the child has been separated from the parent for a long period of time, there must be a showing of a likelihood of future neglect by the parent. When determining whether such future neglect is likely, the district court must consider evidence of changed circumstances occurring between the period of past neglect and the time of the termination hearing.

In re R.L.D., 375 N.C. 838, 841 (2020) (extraneity omitted). "[E]vidence of neglect by a parent prior to losing custody of a child — including an adjudication of such neglect — is admissible in subsequent proceedings to terminate parental rights," but "[t]he trial court must also consider any evidence of changed conditions in light of the evidence of prior neglect and the probability of a repetition of neglect." *In re Ballard*, 311 N.C. 708, 715 (1984). "The determinative factors must be the best interests of the child and the fitness of the parent to care for the child *at the time of the termination proceeding*." *Id.*

¶ 12 In this case, respondent-father does not dispute the trial court's previous adjudication that Ronnie was a neglected juvenile, and instead focuses his challenge on the trial court's determination that "[r]epetition of neglect is highly likely given Respondent-[father's] lack of stability, unaddressed substance abuse issues and domestic violence issues." We note that respondent-father does not challenge any of the trial court's other findings of fact, thus rendering those unchallenged findings binding on appeal. *In re T.N.H.*, 372 N.C. at 407. We utilize these unchallenged findings to examine each of the three issues identified by the trial court as the basis for its finding that respondent-father's repetition of neglect was highly likely.

A. Lack of Stability

¶ 13 As respondent-father correctly notes, the trial court found that he "has maintained employment throughout the Department's case," and therefore, he met his case plan's goal of obtaining stable employment. However, he was unsuccessful in obtaining stable housing suitable for habitation for Ronnie, which was also a component of respondent-father's case plan. The trial court's unchallenged findings of fact reflect that respondent-father was incarcerated from 26 June

2019 to 30 August 2019 because the term of probation that he was serving upon his conviction for methamphetamine possession was revoked. In the slightly over twelve months between respondent-father's release from his incarceration and the termination of parental rights hearing, respondent-father resided at Last Call Ministries before moving into a home with several safety defects which rendered the home unfit for Ronnie. Respondent-father's drug relapse caused him to move back to Last Call Ministries to live because he could no longer afford rent.

¶ 14 Respondent-father moved into a second residence beginning in August 2020. A DSS social worker visited this home on 27 August 2020 and discovered that it needed major repairs; respondent-father represented that the repairs would be finished in two weeks. When the social worker returned a month later, the home was still undergoing construction and was unsafe to serve as a residence for Ronnie. By the end of the termination of parental rights hearing, two bedrooms in the home were completely repaired and furnished, but the kitchen and living room needed additional work.

¶ 15 As the trial court's binding findings demonstrate, respondent-father moved at least four times in the year preceding the termination hearing. Moreover, respondent-father had only occupied his newest residence for a few months by the time that the termination of parental rights hearing sessions had ended, and the residence still required additional repairs. These findings, based on testimonial and other trial and record evidence, support the trial court's determination that respondent-father lacked sufficient stability in his life, which in turn supports the trial court's conclusion that there was a substantial likelihood of repetition of neglect.

B. Substance Abuse

¶ 16 Respondent-father contends that his substance abuse issues were improperly characterized as "unaddressed" in light of the trial court's findings that he had negative urine and hair follicle drug screens on 18 August 2020, that he had completed an intake with treatment provider RHA[4] in August 2020, and that he had been meeting once a week with RHA's "Community Support Team."

¶ 17 While respondent-father's references to the transcript citations and the trial court's order correctly denote a degree of progress concerning

4. The record does not show the full name of the treatment provider. References to the treatment provider are only by the letters "RHA".

his substance abuse issues as of a month before the termination of parental rights hearing began, respondent-father's argument conveniently ignores the trial court's abundant findings regarding his substance abuse history throughout the case. Respondent-father tested positive for controlled substances on at least six separate dates after Ronnie entered DSS custody, including a urine test that was positive for buprenorphine and a positive hair follicle test for amphetamines and methamphetamines on 25 June 2019; four positive drug screens for methamphetamines on 15 January, 27 January, 11 February, and 14 February 2020; and a hair follicle test that was positive for amphetamines and cocaine on 21 April 2020. In addition, respondent-father refused to take a hair follicle test on 22 November 2019 because he knew that it would be positive, and he refused to submit to additional hair follicle tests in October of 2019 and February of 2020.

¶ 18 In the early stages of this case, it was recommended that respondent-father attend intensive outpatient therapy; however, he failed to participate in such therapy until 24 February 2020. Upon doing so, respondent-father did not complete this therapy, attending only four of thirty-six required sessions in February and March 2020. The trial court found that, when respondent-father completed his intake with RHA in August 2020, he "underreported his substance abuse history" and was not interested in RHA's intensive outpatient therapy program because it was only offered virtually.

¶ 19 In light of these findings of fact which respondent-father has chosen to overlook in recalling the pertinent findings on this issue, this Court determines that the trial court did not err in characterizing respondent-father's substance abuse issues as "unaddressed." Respondent-father fell substantially short of completing an intensive outpatient therapy program as recommended and continued to have positive drug tests as the case progressed. While respondent-father had begun to make progress in the month preceding the start of the termination hearing in this case, such progress did not adequately establish that his ongoing and unresolved substance abuse issues would not contribute to Ronnie's future neglect if the child was returned to respondent-father's care. Instead, the trial court's findings establish a pattern of respondent-father's drug relapses and distinct lack of candor when engaging with substance abuse treatment providers, which further buttressed the trial court's determination that neglect would likely be repeated because of "unaddressed" substance abuse issues on the part of respondent-father.

C. Domestic Violence

¶ 20 Respondent-father also asserts that he satisfactorily resolved his issues with domestic violence by severing his relationship with Ronnie's mother, which he testified was akin "to having a millstone removed from around his neck." Nonetheless, as with substance abuse, respondent-father did not begin to make progress on his domestic violence issues until shortly before the start of the termination of parental rights hearing.

¶ 21 The trial court's unchallenged findings reflect that domestic violence occurred between respondent-father and Ronnie's mother throughout this case: On 3 December 2018, respondent-father broke the windows in the mother's vehicle and bruises were observed on the mother's legs; on 23 July 2019, law enforcement was called after the parents engaged in an altercation during which respondent-father slapped Ronnie's mother and poked her with a broom; respondent-father was charged with the offense of assault on a female on 29 June 2020 after he threw a flower pot at Ronnie's mother when she showered him with wasp spray;[5] and in July 2020, Ronnie's mother reported to law enforcement that respondent-father had "beat her up at work."

¶ 22 Respondent-father twice enrolled in the Domestic Violence Offender Program. During his first attempt to complete the program, respondent-father participated in seventeen of twenty-six group sessions, but he was removed from the program in March 2020 after his fourth missed session. Respondent-father began the program for a second time in July 2020, and his participation was described as "serious, humble, articulate, insightful and sincere." The trial court's findings establish that if respondent-father was able to continue this progress in the program, he would finish it in January 2021.

¶ 23 The trial court's findings suggest that respondent-father was showing improvement in addressing his domestic violence issues. However, this progress only began a maximum of two months before the termination hearing—a pattern similar to respondent-father's delayed response in beginning to promisingly address his substance abuse issues—and did not constitute a time period sufficient to compel the trial court to find that respondent-father had made adequate sustained progress so as to preclude the possibility that domestic violence would contribute to Ronnie's future neglect.

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5. The charges stemming from this incident were ultimately dismissed.

D. Likelihood of Repetition of Neglect

¶ 24 The trial court's findings, taken together, reflect that although respondent-father made some progress with respect to stability, substance abuse, and domestic violence issues, any measurable improvement did not begin until July and August of 2020, merely a month or two before the start of the termination of parental rights hearing. Respondent-father did not begin to make meaningful progress toward the accomplishment of his case plan for almost two years while Ronnie was in DSS custody. By the time that the termination hearing began, respondent-father's progress had not been maintained for a sufficient period of time in order to show that he had ameliorated the conditions that led to Ronnie's initial neglect adjudication. Based on the evidence before it, the trial court did not err when it determined that "[r]epetition of neglect [was] highly likely" if Ronnie was returned to respondent-father's care. *See In re H.A.J.*, 377 N.C. 43, 2021-NCSC-26, ¶23 (upholding the trial court's determination "that respondent-mother's last-minute progress was insufficient to outweigh her long-standing history of alcohol and substance abuse and domestic violence, as well as the impact these behaviors had on [her children]"). Accordingly, the trial court properly concluded that respondent-father's parental rights were subject to termination on the ground of neglect.

¶ 25 Because this Court has determined that one ground for termination of parental rights is supported here by findings based on clear, cogent, and convincing evidence, it is unnecessary to address respondent-father's arguments as to the remaining termination ground which was found to exist by the trial court under N.C.G.S. § 7B-1111(a)(2). *See In re A.R.A.*, 373 N.C. 190, 194 (2019) (noting that "a finding of only one ground is necessary to support a termination of parental rights.").

IV. Best Interests

¶ 26 **[2]** Respondent-father argues that the trial court abused its discretion when it determined that termination of his parental rights was in Ronnie's best interests. Under N.C.G.S. § 7B-1110, a court making a best interests determination

> shall consider the following criteria and make written findings regarding the following that are relevant:
>
> (1) The age of the juvenile.
>
> (2) The likelihood of adoption of the juvenile.
>
> (3) Whether the termination of parental rights

> will aid in the accomplishment of the permanent plan for the juvenile.
>
> (4) The bond between the juvenile and the parent.
>
> (5) The quality of the relationship between the juvenile and the proposed adoptive parent, guardian, custodian, or other permanent placement.
>
> (6) Any relevant consideration.

N.C.G.S. § 7B-1110(a) (2019). The court's dispositional findings are binding on appeal if supported by any evidence in the record. *E.g.*, *In re K.N.K.*, 374 N.C. 50, 57 (2020).

¶ 27 In this case, the trial court made the following finding of fact detailing its consideration of the best interests factors:

> 140. That [Ronnie] is six years old. There is a strong likelihood that he will be adopted. He has two prospective adoptive placements. He has no known medical conditions or emotional disorders that would hinder adoption. He has had no mental health or behavioral hospitalizations, and his placement has never been disrupted due to his behaviors. [Ronnie's mom] and [respondent-father] have a bond with [Ronnie], however, it has diminished over the last two years. Respondent-Parents have only seen [Ronnie] once per week for two hours for the last two years. It is not a true quality parental relationship. [Ronnie] desperately needs permanence. [Ronnie]'s need for permanence outweighs the parental bond that exists. . . . Termination of parental rights will aid in the accomplishment of the permanent plan of adoption for the Juvenile. There are no other known barriers to adoption.

Respondent-father challenges two aspects of this finding: the trial court's description of respondent-father's bond with Ronnie and the likelihood that Ronnie will be adopted.

A. Respondent-father's Bond with Ronnie

¶ 28 The trial court found that respondent-father had a bond with Ronnie, but that it had diminished over the course of the two years that Ronnie was in DSS custody. Respondent-father asserts that there was no evidence to support the trial court's determination that the bond between

respondent-father and Ronnie had diminished. Respondent-father notes that at disposition, the DSS social worker testified that Ronnie "has a very strong bond" and "a very close bond" with his parents.

¶ 29 While the social worker testified that the parental bond was "very strong" and very close," all of the other evidence during the hearing's best interests phase established a weaker connection between respondent-father and the juvenile. Ronnie's guardian ad litem testified that she merely observed a bond between Ronnie and respondent-father; she did not characterize the strength of the bond or represent that it was particularly strong. The DSS social worker also testified that Ronnie had recently told her that, if necessary, he was ready to "grow up in foster care, get married, have kids. . . . [A]nd he shared that foster care's kind of like having his own family." The trial court also made an unchallenged finding that Ronnie and respondent-father only had contact "once per week for two hours for the last two years." The record shows that these visits were sometimes contentious. At a visit in March 2020, Ronnie threw a toy across the room at respondent-father, tried to break a watch that respondent-father had given him, and crawled under the couch and would not engage with respondent-father. The guardian ad litem testified that, at a visit conducted shortly before the termination hearing concluded, she witnessed Ronnie biting respondent-father. It was within the trial court's purview as the trier of fact to infer from the aforementioned competent evidence and the findings of fact, in tandem with its assessment of the entirety of the evidence, that Ronnie's bond with respondent-father had diminished over the two years that Ronnie was in DSS custody. *See In re D.L.W.*, 368 N.C. 835, 843, (2016) (As the trier of fact, the district court determines "the reasonable inferences to be drawn" from the evidence.), *limited by In re R.L.D.*, 375 N.C. at 841 n. 3.

¶ 30 We additionally observe that in the remainder of the trial court's findings, the court acknowledged both that there was an existing parent-child bond and that "[Ronnie]'s need for permanence outweighs the parental bond that exists." As this Court has previously explained, even a strong "bond between parent and child is just one of the factors to be considered under N.C.G.S. § 7B-1110(a), and the trial court is permitted to give greater weight to other factors." *In re Z.L.W.*, 372 N.C. 432, 437 (2019). The trial court, in its discretion, clearly believed that the statutory factor relating to the bond between the juvenile and the parent was outweighed in this case by other statutory factors delineated in N.C.G.S. § 7B-1110, and we discern no abuse of discretion in the trial court's determination.

B. Ronnie's Likelihood of Adoption

¶ 31 Respondent-father contends that the trial court's finding that Ronnie has a strong likelihood of adoption is unsupported by competent evidence, because the juvenile's current foster care placement was unwilling to adopt Ronnie, the juvenile's first prospective adoptive placement had met Ronnie on only two occasions, and the juvenile's second prospective adoptive placement was only willing to consider adoption if the first placement did not remain intact.

¶ 32 None of the concerns which respondent-father identifies regarding Ronnie's prospective adoptive placements affect the viability of Ronnie's adoptability. As the trial court also found, Ronnie "has no known medical conditions or emotional disorders that would hinder adoption. He has had no mental health or behavioral hospitalizations and his placement has never been disrupted due to his behaviors," and "[t]here are no other known barriers to adoption." These additional findings portend that Ronnie has a high likelihood of adoption, even if he had no potential adoptive placement at the time of the termination proceedings. *See In re M.A.*, 374 N.C. 865, 876 (2020) (upholding the trial court's findings that the children's likelihood of adoption was very high, even though no prospective adoptive placement had been identified, based on other evidence such as testimony that "there were no barriers to the children's adoption"). The record indicates that two of Ronnie's placements have expressly indicated a willingness to consider adopting him. Combining this fact with the trial court's findings regarding the lack of barriers to Ronnie's adoption, respondent-father's challenge to the trial court's finding addressing Ronnie's adoptability is unpersuasive.

C. Best Interests Determination

¶ 33 Finally, respondent-father contends that the trial court abused its discretion in concluding that termination of respondent-father's parental rights was in Ronnie's best interests. Respondent-father's argument is premised on his observation that "it appears that the trial court made such a momentous decision based on a misunderstanding of Ronnie's true circumstances."

¶ 34 This final contention is without merit. The trial court's termination order includes findings of fact regarding each of the dispositional factors in N.C.G.S. § 7B-1110, and these findings were drawn from a reasonable interpretation of the evidence before the trial court. The dispositional details contained in Finding of Fact 140 are either unchallenged and thus binding on respondent-father, *In re T.N.H.*, 372 N.C. at 407, or are supported by competent evidence as previously explained. "And this is so

notwithstanding evidence to the contrary." *State v. Johnson*, 278 N.C. 126, 138 (1971) (citations omitted). The trial court's conclusion that termination of respondent-father's parental rights was in Ronnie's best interests was the product of the trial court's application of the statutory factors identified in N.C.G.S. § 7B-1110, and respondent-father has failed to show that this conclusion is "manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *In re T.L.H.*, 368 N.C. at 107 (quoting *State v. Hennis*, 323 N.C. 279, 285 (1988)).

V. Conclusion

¶ 35 The trial court's unchallenged findings of fact support its determination that respondent-father's parental rights were subject to termination based on the ground of neglect. Furthermore, the trial court did not abuse its discretion in concluding that, after considering the competent evidence in the record, termination of the parental rights of respondent-father was in Ronnie's best interests. We therefore affirm the 16 November 2020 order of the trial court terminating respondent-father's parental rights.

AFFIRMED.

IN THE MATTER OF K.M.S.

No. 302A21

Filed 11 February 2022

Termination of Parental Rights—no-merit brief—failure to legitimate

In a private termination action, the termination of a father's parental rights to his daughter on the ground of failure to legitimate was affirmed where his counsel filed a no-merit brief—identifying two potential issues for review, neither of which held merit—and the termination order was supported by clear, cogent, and convincing evidence and based on proper legal grounds.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from an order entered on 27 May 2021 by Judge John K. Greenlee in District Court, Gaston County. This matter was calendared for argument in the Supreme Court on 22 December 2021 but determined on the record and brief without

oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

No brief filed for petitioner-appellee mother.

No brief filed for appellee Guardian ad Litem.

W. Michael Spivey for respondent-appellant father.

NEWBY, Chief Justice.

¶ 1 Respondent-father appeals from the trial court's order terminating his parental rights to K.M.S. (Alice).[1] Counsel for respondent filed a no-merit brief under Rule 3.1(e) of the North Carolina Rules of Appellate Procedure. We conclude that the two issues identified by counsel in respondent's brief as arguably supporting the appeal are meritless, and we therefore affirm the trial court's order.

¶ 2 This case arises from a private termination action filed by petitioner, Alice's mother. Petitioner and respondent, Alice's father, met when petitioner was a senior in high school. Immediately after finishing high school, petitioner and respondent moved into an apartment, where they lived together for approximately nine months. Three months after she moved out of the apartment and about six weeks after she and respondent were no longer in a relationship, petitioner learned she was pregnant. The parties never married, though petitioner told respondent about the pregnancy. Respondent was unemployed while petitioner was pregnant. Respondent was present at Alice's birth on 23 June 2013, but no father is listed on Alice's birth certificate. Alice has lived with petitioner since her birth.

¶ 3 Respondent bought diapers for Alice when she was an infant. Respondent also testified that he provided formula, which petitioner contested. Respondent also made one car payment for petitioner. By the time Alice was one year old, respondent and petitioner's relationship "totally cease[d]." A year and a half after Alice was born, petitioner obtained a Chapter 50B restraining order against respondent because "[h]e was mentally abusive" and "was constantly in a rage and upset." Around the same time, respondent allegedly "tried to sign up [to pay child support] at [the Gaston County Department of] Social Services and didn't

1. A pseudonym is used in this opinion to protect the juvenile's identity and for ease of reading.

know [petitioner]'s address." Though respondent recalled speaking to a social worker there and submitting paperwork, he did not execute an affidavit acknowledging his paternity nor did petitioner ever receive child support. Respondent has not seen Alice since she was about a year and a half old. Respondent acknowledged that he never pursued legal action to legitimate Alice. Respondent did file a complaint for custody of Alice and to pay child support, but paternity has not been established in that action.[2]

¶ 4 On 19 January 2021, petitioner filed a petition alleging a ground existed to terminate respondent's parental rights pursuant to N.C.G.S. § 7B-1111(a)(5) (failure to legitimate). Respondent filed an answer on 11 March 2021 wherein he admitted that he had neither legitimated Alice through marriage to petitioner nor "established his paternity with respect to the juvenile through N.C.G.S. § 49-14, 110-132, 130[A]-101, 130A-118, or any other judicial proceeding." At the termination hearing, petitioner submitted into evidence an affidavit from the North Carolina Department of Health and Human Services (DHHS) stating that no affidavit of paternity had been received. Petitioner also testified that she never "receive[d] any kind of letter or correspondence . . . that [respondent] had filed a petition . . . to legitimate [Alice]."

¶ 5 Based on all the evidence, the trial court found respondent did not establish paternity under any of the five prongs set forth in the statute. *See* N.C.G.S. § 7B-1111(a)(5) (2019). Thus, the trial court concluded that a ground existed to terminate respondent's parental rights under N.C.G.S. § 7B-1111. The trial court also concluded that terminating respondent's parental rights was in Alice's best interests. *See id.* § 7B-1110 (2019). Accordingly, the trial court terminated respondent's parental rights.

¶ 6 Counsel for respondent filed a no-merit brief on his client's behalf under Rule 3.1(e) of the Rules of Appellate Procedure, identifying two issues that could arguably support an appeal but also stating why those issues lacked merit. First, counsel noted that respondent objected

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2. In June of 2020, respondent's first attorney filed a complaint for custody. Shortly thereafter, however, the attorney discovered she had a conflict of interest and withdrew from the case. Respondent hired a second attorney, who filed a new complaint for custody on 3 December 2020. The trial court found that respondent "never took any action to prosecute his [c]omplaint in the first filed custody action." Moreover, the trial court found "that no hearing was ever held to make any substantive findings of fact or judicial decree relative to [respondent's] paternity of the juvenile in the second filed case." The guardian ad litem's report filed with the trial court states the second action "is stayed pending the outcome of the case at bar."

at the hearing to admission of the certified reply of DHHS to petitioner stating that no affidavit of paternity had been received. Counsel conceded, however, that the Juvenile Code requires that DHHS's "certified reply shall be submitted to and considered by the court." N.C.G.S. § 7B-1111(a)(5)(a). Because respondent did not argue at the trial court that the document was not DHHS's certified reply to petitioner's inquiry regarding whether an affidavit had been filed, counsel concluded this issue lacked merit.

¶ 7 Counsel next discussed whether the trial court's findings of fact were supported by clear, cogent, and convincing evidence and supported the conclusions of law. Counsel asserted the trial court's findings of fact "are supported by the testimony of both [petitioner and respondent]." Moreover, counsel noted that "[t]he trial court made findings that encompass all of the statutory factors" required to determine whether termination of respondent's parental rights was in Alice's best interests. Thus, counsel concluded that this second issue also lacked merit. Finally, counsel advised respondent of his right to file pro se written arguments on his own behalf and provided him the documents necessary to do so. Respondent has not submitted written arguments to this Court.

¶ 8 Rule 3.1(e) of the Rules of Appellate Procedure "plainly contemplates appellate review of the issues contained in a no-merit brief." *In re L.E.M.*, 372 N.C. 396, 402, 831 S.E.2d 341, 345 (2019). When a no-merit brief is filed pursuant to Rule 3.1(e), it "will, in fact, be considered by the appellate court and . . . an independent review will be conducted of the issues identified therein." *Id.* at 402, 831 S.E.2d at 345. This Court conducts a "careful review of the issues identified in the no-merit brief in light of our consideration of the entire record." *Id.* at 403, 831 S.E.2d at 345. Having reviewed the two issues identified by counsel in the no-merit brief, we are satisfied that the trial court's order terminating respondent's parental rights is supported by clear, cogent, and convincing evidence and is based on proper legal grounds. Accordingly, we affirm the trial court's order terminating respondent's parental rights.

AFFIRMED.

IN RE K.S.

[380 N.C. 60, 2022-NCSC-7]

IN THE MATTER OF K.S.

No. 60PA21

Filed 11 February 2022

Child Abuse, Dependency, and Neglect—neglect—dismissal of claim—standard of review on appeal—de novo

In a neglect case, where the trial court's findings—which were based on the parties' stipulations—were unchallenged and therefore binding on appeal, the Court of Appeals erred in affirming the trial court's dismissal of the neglect claim because it failed to conduct a proper de novo review of the trial court's decision. Rather than determining whether the unchallenged findings of fact supported a legal conclusion of neglect, the Court of Appeals' use of speculative language demonstrated an improper deference to the trial court's conclusion where it stated that another judge "may have" adjudicated the juvenile as neglected, that the findings "might" support a neglect adjudication but did not "compel" one, and that it could not "say as a matter of law" that the trial court erred by dismissing the claim. The matter was remanded to the Court of Appeals to conduct a proper de novo review.

On discretionary review pursuant to N.C.G.S. § 7A-31 from a unanimous, unpublished decision of the Court of Appeals, No. COA20-271, 2020 WL 7974420 (N.C. Ct. App. Dec. 31, 2020) (unpublished), affirming in part, reversing in part, and remanding an order entered on 14 January 2020 by Judge Luis J. Olivera in District Court, Cumberland County. Heard in the Supreme Court on 8 November 2021.

Patrick A. Kuchyt for petitioner-appellant Cumberland County Department of Social Services; and Michelle FormyDuval Lynch for appellant Guardian ad Litem.

J. Thomas Diepenbrock for respondent-appellee mother.

BERGER, Justice.

¶ 1 When reviewing a lower court's order, the appellate court must be ever cognizant of the proper standard of review. Because we conclude the Court of Appeals failed to apply the proper standard of review, we vacate the decision below and remand to the Court of Appeals with instructions to conduct a de novo review.

I. Factual and Procedural Background

¶ 2 On May 26, 2019, Kelly[1] was born to respondent-mother and father. The Cumberland County Department of Social Services (DSS) filed a juvenile petition three days later alleging Kelly to be a neglected and dependent juvenile. On October 4, 2019, DSS filed an amended juvenile petition with additional factual allegations. Following a judicial settlement conference, DSS, respondent-mother, and the guardian ad litem executed a "Stipulation Agreement and Written Agreement for Consent Adjudication Order Per 7B-801(b1)" (Stipulation Agreement).

¶ 3 As part of the Stipulation Agreement, the parties agreed that the following factual allegations set forth in the amended petition were true and accurate at the time the amended petition was filed:

> 1. [DSS] received a Child Protective Services (CPS) referral on 05/27/2019 concerning the safety of [Kelly].
>
> 2. [Respondent-mother] named [father] as [Kelly's] biological father. [Father] signed the Affidavit of Paternity as to [Kelly] and his name appears on [Kelly's] birth certificate.
>
> 3. [Respondent-mother] and [father] have two older children who are currently in the custody of [DSS] . . . . Furthermore, [respondent-mother and father] have an older child that was placed in the legal and physical custody of a relative . . . .
>
> 4. The oldest child . . . was adjudicated abused and neglected on 2/1/16 based on [father] physically abusing the child and the child having sustained severe injuries. The child was approximately three months old when the abuse occurred. [Father] pled guilty and was convicted of felony child abuse. . . .
>
> 5. On 1/18/17, the juvenile [Kori] . . . , a sibling of [Kelly] and a child of [respondent-mother and father] was adjudicated dependent, and on 5/10/18, the juvenile [Kori] . . . , a sibling of [Kelly] and another child of [respondent-mother and father] was adjudicated neglected. These

1. Pseudonyms are used in this opinion to protect the juveniles' identities.

adjudications were based on the adjudication of the older child . . . and [respondent-mother and father] had not alleviated the conditions for which that child was removed from their care. At the time of said adjudications, [respondent-mother and father] continued to be involved in a relationship with each other. . . .

. . . .

10. At the time of the filing of the original petition, [respondent-mother and father] stated they did not have essential necessities for [Kelly].

. . . .

12. [Respondent-mother and father] admitted to Ms. Frances Holstein [(Kelly's kinship placement)] in June 2019 that on June 15, 2019, they were involved in a verbal and physical altercation with each other in the presence of the juvenile [April] . . . when [respondent-mother] drove [father] and the juvenile [April] in a vehicle. Based on said admissions, [respondent-mother] hit [father] and [father] hit [respondent-mother]. In addition, [father] physically choked [respondent-mother] after grabbing her. During these admissions to Ms. Frances Holstein, [respondent-mother] admitted that she knew [father] was not allowed around [April] when [respondent-mother] allowed [father] into the vehicle with [April] . . ..

13. [Father] further admitted to Ms. Frances Holstein that the June 15, 2019 altercation occurred as a result of [father] telling the juvenile [April] that he would bite [April] back after [April] bit him, [respondent-mother] taking [father's] statement seriously, [respondent-mother] hitting [father], [respondent-mother] beginning to drive like a maniac with [April] in the vehicle, and [father] trying to grab [respondent-mother].

14. Pursuant to the last order of the [trial c]ourt in [the sibling's juvenile case], [father] was not allowed any contact with the juvenile [April] . . .

> and that remained the order of the [trial c]ourt at the time of the June 15, 2019 incident.
>
> 15. [Respondent-mother] admitted to the [ ] social worker that an altercation occurred in June 2019 between her and [father] when [respondent-mother] picked [father] up after [father] demanded a car ride.

¶ 4 In addition to the facts set forth above, the parties stipulated that the allegations that led to removal of the juvenile were true and accurate and existed at the time of the filing of the amended petition. Among those facts were the current and prior CPS history; father's conviction for felony child abuse of Kelly's sibling, April; unstable housing; and domestic violence issues between respondent-mother and father. Respondent-mother reserved her right to argue before the trial court whether the stipulated facts were sufficient to support an adjudication of neglect.

¶ 5 Based on these admissions by respondent-mother, in addition to the testimony of a social worker, the trial court adopted the above factual allegations as findings of fact. The trial court found that the evidence presented was sufficient to support an adjudication of dependency. Further, and without explanation, the trial court dismissed the claim of neglect. Respondent-mother appealed the adjudication of dependency, and DSS cross-appealed the trial court's dismissal of the claim of neglect.[2]

¶ 6 In affirming the trial court's dismissal of the claim of neglect, the Court of Appeals noted that "the parties do not challenge the evidentiary underpinnings of these findings of fact, but rather the legal import of these findings." *In re K.S.*, No. COA20-271, 2020 WL 7974420, at *5 (N.C. Ct. App. Dec. 31, 2020) (unpublished). Regarding the prior adjudications of Kelly's siblings, the Court of Appeals stated that the weight of such "is left to the discretion of the trial court." *In re K.S.*, 2020 WL 7974420, at *6. Concerning the verbal and physical altercation between respondent-mother and father and the violation of a court order, the Court of Appeals discussed how such "did not, as a matter of law, *compel* a conclusion that Kelly was neglected," because the altercation, standing alone, was not dispositive on the issue of neglect. *Id.*

¶ 7 The Court of Appeals concluded the trial court did not err in dismissing the neglect claim. In doing so, the Court of Appeals stated that

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2. This Court allowed discretionary review only on issues related to neglect. Thus, the issue of dependency is not before us.

"[w]hile another judge may have adjudicated Kelly as neglected based on the stipulated facts of the instant case," *id.*, it was not permitted to reach such a conclusion as "appellate courts may not reweigh the underlying evidence presented at trial[,]" *id.* (quoting *In re J.A.M.*, 372 N.C. 1, 11, 822 S.E.2d 693, 700 (2019)). The Court of Appeals went on to conclude "that the findings *might* support a conclusion of neglect; nevertheless, the findings do not *compel* such a conclusion, given the discretion we afford the trial courts in making such a determination." *In re K.S.*, 2020 WL 7974420, at *6. "In other words," the Court of Appeals stated, "we cannot say *as a matter of law* that the trial court erred by failing to conclude that Kelly was a neglected juvenile." *Id.*

II. Analysis

¶ 8 An appellate court reviews a trial court's adjudication "to determine whether the findings are supported by clear, cogent and convincing evidence and the findings support the conclusions of law." *In re Montgomery*, 311 N.C. 101, 111, 316 S.E.2d 246, 253 (1984).[3] "Where no exception is taken to a finding of fact by the trial court, the finding is presumed to be supported by competent evidence and is binding on appeal." *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991). Conclusions of law made by the trial court are reviewable de novo on appeal. *In re C.B.C.*, 373 N.C. 16, 19, 832 S.E.2d 692, 695 (2019). An appeal de novo is one "in which the appellate court uses the trial court's record but reviews the evidence and law without deference to the trial court's rulings." *Appeal De Novo*, Black's Law Dictionary (11th ed. 2019). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the [trial court]." *In re T.M.L.*, 377 N.C. 369, 2021-NCSC-55, ¶ 15 (alteration in original) (quoting *In re C.V.D.C.*, 374 N.C. 525, 530, 843 S.E.2d 202, 205 (2020)).

¶ 9 A neglected juvenile is one "whose parent, guardian, custodian, or caretaker . . . [d]oes not provide proper care, supervision, or discipline[;] . . . [or who c]reates or allows to be created a living environment that is injurious to the juvenile's welfare." N.C.G.S. § 7B-101(15) (2021). Traditionally, "there [must] be some physical, mental, or emotional impairment of the juvenile or a substantial risk of such impairment as a consequence of the failure to provide 'proper care, supervision, or

3. We recognize that *In re Montgomery* and *In re C.B.C.* reviewed orders terminating parental rights pursuant to what is currently N.C.G.S. § 7B-1109. Although this case concerns an adjudication order entered pursuant to N.C.G.S. § 7B-800, *et seq.*, both determinations rely upon and relate to the definitions found in the current version of N.C.G.S. § 7B-101, and therefore, we employ the same standard of review.

discipline' in order to adjudicate a juvenile neglected." *In re E.P.*, 183 N.C. App. 301, 307, 645 S.E.2d 772, 775 (quoting *In re Helms*, 127 N.C. App. 505, 511, 491 S.E.2d 672, 676 (1997)), *aff'd per curiam*, 362 N.C. 82, 653 S.E.2d 143 (2007). "In neglect cases involving newborns, 'the decision of the trial court must of necessity be predictive in nature, as the trial court must assess whether there is a substantial risk of future abuse or neglect of a child based on the historical facts of the case.' " *In re J.A.M.*, 372 N.C. at 9, 822 S.E.2d at 698–99 (quoting *In re McLean*, 135 N.C. App. 387, 396, 521 S.E.2d 121, 127 (1999)).

¶ 10 Here, the trial court's findings of fact are largely based on facts agreed upon by the parties in the Stipulation Agreement and, thus, are supported by sufficient evidence. Further, as neither party challenges any of those findings, they are presumed to be supported by competent evidence and are binding on appeal. *Koufman*, 330 N.C. at 97, 408 S.E.2d at 731. With the facts in this case being supported by competent evidence and binding, the Court of Appeals was presented with the task of determining whether those facts supported the conclusion of law that Kelly was a neglected juvenile. Stated differently, the Court of Appeals was to decide whether the facts contained in the Stipulation Agreement supported the conclusion that respondent-mother did not provide proper care, supervision, or discipline; or that there is a substantial risk of future abuse or neglect. N.C.G.S. § 7B-101(15).

¶ 11 De novo review of an adjudication of neglect or dismissal of a claim of neglect does not allow a reweighing of the evidence. Nor does it require deference to the trial court. The Court of Appeals did not decide whether, from its review, the findings of fact support the conclusion of law that Kelly is a neglected juvenile pursuant to N.C.G.S. § 7B-101(15). Rather, the Court of Appeals stated that "another judge may have adjudicated Kelly as neglected based on the stipulated facts"; "the findings *might* support a conclusion of neglect"; and it could not "say *as a matter of law* that the trial court erred by failing to conclude that Kelly was a neglected juvenile." *In re K.S.*, 2020 WL 7974420, at *6. Such speculation is not appropriate under the applicable standard of review. Instead, under a de novo review, the Court of Appeals was tasked with determining whether or not, from its review, the findings of fact supported a conclusion of neglect.

¶ 12 The Court of Appeals failed to conduct a proper de novo review on the issue of neglect. It did not discuss whether the findings of fact derived from the Stipulation Agreement were sufficient to conclude as a matter of law that Kelly should be adjudicated a neglected juvenile. Rather, the Court of Appeals' analysis showed improper deference to

the trial court's conclusion of law. As such, we remand to the Court of Appeals with instructions to conduct a de novo review consistent with this opinion. By virtue of the result here, we need not address the remaining issues.

III. Conclusion

¶ 13 For the foregoing reasons, we vacate the decision of the Court of Appeals and remand with instructions to apply the proper standard of review.

VACATED AND REMANDED.

LUON NAY, EMPLOYEE
v.
CORNERSTONE STAFFING SOLUTIONS, EMPLOYER, AND STARNET INSURANCE COMPANY, CARRIER, (KEY RISK MANAGEMENT SERVICES, ADMINISTRATOR)

No. 409PA20

Filed 11 February 2022

Workers' Compensation—average weekly wages—calculation method—fair and just results—standards of review

In a workers' compensation case, the Supreme Court held that whether the Industrial Commission selected the correct method under N.C.G.S. § 97-2(5) for calculating an injured employee's average weekly wages is a question of law subject to de novo review on appeal, while the issue of whether a particular method produces "fair and just" results is a question of fact reviewable under the "any competent evidence" standard—unless the Commission's determination on that issue lacked evidentiary support or was based upon a misapplication of the legal standard presented in section 97-2(5) (whether the result most nearly approximates the amount the employee would be earning but for the injury), in which case the Commission's erroneous statutory construction is reviewable de novo. Thus, where the Commission determined plaintiff's average weekly wages based on an apparent misapplication of the law, the Court remanded the case for further proceedings, including the entry of a new order correctly applying the law.

Justice BARRINGER dissenting.

Chief Justice NEWBY joins in this dissenting opinion.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 273 N.C. App. 135 (2020), reversing and remanding an opinion and award entered on 22 February 2019 by the North Carolina Industrial Commission. Heard in the Supreme Court on 4 October 2021.

Law Offices of Kathleen G. Sumner by Kathleen G. Sumner; David P. Stewart; and Jay Gervasi, P.A., by Jay A. Gervasi, for plaintiff-appellee.

Brewer Defense Group by Joy H. Brewer and Ginny P. Lanier for defendant-appellants.

Dickie McCamey & Chilcote, P.C., by Michael W. Ballance; Teague Campbell Dennis & Gorham, L.L.C., by Tracey L. Jones and Bruce Hamilton, for the North Carolina Association of Defense Attorneys and North Carolina Association of Self-Insurers, amici curiae.

Lennon, Camak & Bertics, PLLC, by Michael W. Bertics; Poisson Poisson Bower, PLLC, by E. Stewart Poisson, for the North Carolina Advocates for Justice, amicus curiae.

ERVIN, Justice.

¶ 1 This case involves the issue of whether the Commission's decision concerning the method that should be utilized to calculate an injured worker's average weekly wages pursuant to N.C.G.S. § 97-2(5) and the Commission's determination concerning the extent to which the results obtained by a particular method for determining the injured employee's average weekly wages are "fair and just to both parties" so as to "most nearly approximate the amount which the injured employee would be earning were it not for the injury" are questions of law or questions of fact. After careful consideration of the relevant facts in light of the applicable law, we modify and affirm the Court of Appeals' decision and remand this case to the Commission for further proceedings not inconsistent with this opinion, including the entry of a new order containing appropriate findings of fact and conclusions of law.

I. Factual and Procedural History

A. Substantive Factual Background

¶ 2 On 25 August 2015, plaintiff Luon Nay began working for defendant Cornerstone Staffing Solutions, a staffing agency owned and operated by Thomas Chandler. In the course of its business, Cornerstone places people seeking employment with companies in need of workers in the Charlotte-Mecklenburg and Rock Hill-York County regions. According to Mr. Chandler, Cornerstone often places workers in jobs with logistics and manufacturing companies that pay between ten and thirteen dollars per hour, with its employees being primarily people who are either unemployed and seeking full-time employment or are, while currently employed, seeking a better or higher-paying job. Mr. Chandler described many of the entities with whom Cornerstone places workers as "medium-size or small companies" that lack "broad Human Resources department[s]," with these entities having elected to use Cornerstone to hire their workers and take care of employment-related costs such as those involved in recruiting potential employees, performing drug tests and background checks, and the handling of "Medicare, Social Security, Workers' Comp," and any other expenses that are typically involved in the hiring of new workers.

¶ 3 At least ninety-five percent of the workers that Cornerstone places with other entities occupy "temp-to-perm" positions which will, hopefully, lead the entity with whom the worker has been placed to hire that worker to fill a permanent position at the end of a successful trial period. During the trial period, which typically lasts until the worker has worked for 520 hours with the entity with whom he or she has been placed, the worker is still technically employed by Cornerstone. After the worker has worked with the entity with whom he or she has been placed for at least 520 hours, the worker is typically either given full-time employment by the entity with whom Cornerstone has contracted or the assignment ends, with there being no guarantee that the worker will receive full-time employment at the conclusion of the 520-hour trial period.

¶ 4 Cornerstone placed plaintiff in a temp-to-perm position with FieldBuilders, an entity that creates and updates athletic fields and performs other landscaping tasks, with plaintiff having worked at FieldBuilders during the interval between 25 August 2015 and 7 December 2015. According to Mr. Chandler, a worker's schedule with FieldBuilders could be affected by the "[h]olidays, weather, [or] season." In the course of a typical week, plaintiff worked with FieldBuilders for eight hours a day for four to five days each week and was compensated

at the rate of eleven dollars per hour. On occasion, however, plaintiff worked as few as six hours or as many as ten hours each day.

¶ 5 On 24 November 2015, while working with FieldBuilders, plaintiff and another worker attempted to lift a heavy machine into a truck given their inability to load the machine using the truck's broken ramp. As plaintiff tried to raise the machine, he heard a noise and felt a pop on the right side of his lower back and immediately recognized that he had been injured. The lower back pain that plaintiff was experiencing gradually worsened throughout the day upon which he was injured and the day after that. Although plaintiff attempted to return to work on the following Monday, he was only able to work for about four hours before his lower back pain forced him to stop. On 1 December 2015, plaintiff sought medical treatment for his persistent back pain and was prescribed medication and physical therapy. After a treatment session on 22 December 2015, plaintiff stopped attending physical therapy due to increased lower back pain.

¶ 6 On 19 January 2016, Cornerstone filed a Form 19, which is titled "Employer's Report of Employee's Injury or Occupational Disease to the Industrial Commission," stating that plaintiff had worked with FieldBuilders for five days each week and that plaintiff had earned average weekly wages of $440.00. On 15 February 2016, Cornerstone filed Form 22, which is titled "Statement of Days Worked and Earnings of Injured Employee," reciting that plaintiff had worked for four days during the last week of August 2015, which was the first week during which he had been assigned to work with FieldBuilders; that plaintiff worked for five days each week during September 2015; that plaintiff worked for five days each week during October 2015; that plaintiff had worked for five days each week during three weeks in November 2015 and for four days during one week in November 2015; and that plaintiff had worked for three days during the first week of December 2015 and for one day during the second week of December, which was plaintiff's last day of work at FieldBuilders. Cornerstone's records indicated that plaintiff had earned a total of $5,805.25 during the sixteen weeks that he had been assigned to work at FieldBuilders.

¶ 7 On 8 March 2016, the Commission received a completed Form 18, which is titled "Notice of Accident to Employer and Claim of Employee, Representative, or Dependent," describing plaintiff's back injury. On 25 March 2016, Cornerstone filed a Form 63 with the Commission and began directing the medical care that plaintiff received and paying temporary total disability benefits to plaintiff. In June 2016, plaintiff returned to Cornerstone for the purpose of seeking another job placement

and was placed with an entity known as JMS, at which plaintiff worked for eight hours per day cleaning and polishing metal. After plaintiff had worked with JMS for three weeks, he was told that there was no more work for him at that placement and that Cornerstone had been unable to find another entity with which to place him.

B. Procedural History

¶ 8 On 21 July 2017, plaintiff filed a Form 33, which is titled "Request That Claim Be Assigned for Hearing," in which he claimed that Cornerstone had unilaterally lowered the amount of temporary total disability benefits that he had been receiving with respect to his back injury and that the parties had been unable to reach agreement with respect to the amount of benefits that plaintiff was entitled to receive. On 9 February 2018, plaintiff's claim came on for hearing before Deputy Commissioner David Mark Hullender. At the hearing, plaintiff contended that his average weekly wage was $419.20, which yielded a compensation rate of $279.48, while Cornerstone and defendant Starnet Insurance Company contended that plaintiff's average weekly wage was $111.64, which yielded a compensation rate of $74.43. The parties stipulated that Cornerstone had paid benefits to plaintiff at the rate of $258.03 per week between 1 December 2015 and 5 July 2016 and that Cornerstone had lowered plaintiff's compensation rate to $74.43 per week after that point, with this figure having been derived by dividing the $5,805.25 in total earnings that plaintiff had received while working with FieldBuilders by fifty-two weeks. In an opinion and award filed on 7 June 2018, Deputy Commissioner Hullender found that the lower weekly compensation rate for which Cornerstone had advocated was the correct one. Plaintiff noted an appeal from Deputy Commissioner Hullender's order to the Commission.

¶ 9 On 22 February 2019, the Commission filed an opinion and award finding, in pertinent part, that "[d]efendants' modification of [p]laintiff's average weekly wage and compensation rate to $111.64 and $74.43, respectively, . . . was appropriate." In making this determination, the Commission reviewed the five methods for calculating an injured employee's average weekly wages set out in N.C.G.S. § 97-2(5), which states that

> [Method 1:] "Average weekly wages" shall mean the earnings of the injured employee in the employment in which the employee was working at the time of the injury during the period of 52 weeks immediately preceding the date of the injury, . . . divided by 52[.]

> [Method 2: [B]ut if the injured employee lost more than seven consecutive calendar days at one or more times during such period, although not in the same week, then the earnings for the remainder of such 52 weeks shall be divided by the number of weeks remaining after the time so lost has been deducted.
>
> [Method 3:] Where the employment prior to the injury extended over a period of fewer than 52 weeks, the method of dividing the earnings during that period by the number of weeks and parts thereof during which the employee earned wages shall be followed; provided, results fair and just to both parties will be thereby obtained.
>
> [Method 4:] Where, by reason of a shortness of time during which the employee has been in the employment of his employer or the casual nature or terms of his employment, it is impractical to compute the average weekly wages as above defined, regard shall be had to the average weekly amount which during the 52 weeks previous to the injury was being earned by a person of the same grade and character employed in the same class of employment in the same locality or community.
>
> [Method 5:] But where for exceptional reasons the foregoing would be unfair, either to the employer or employee, such other method of computing average weekly wages may be resorted to as will most nearly approximate the amount which the injured employee would be earning were it not for the injury.

N.C.G.S. § 97-2(5) (2021). In its findings of fact, the Commission determined that the first and second methods set out in N.C.G.S. § 97-2(5) had no application to plaintiff given that he had not been employed by Cornerstone for the fifty-two week period immediately preceding his injury. In addition, in Finding of Fact 13, the Commission determined that the third method set out in N.C.G.S. § 97-2(5) was not appropriate for use in this case given that

> [u]se of the 3rd method in this claim would produce an inflated average weekly wage that is not fair to [d]efendants because [p]laintiff was employed in a

> temporary capacity with no guarantee of permanent employment, length of a particular assignment, or specific wage rate, and he was assigned to a client account whose work was seasonal. Thus, the 3rd method would not take into account that [p]laintiff was on a temporary assignment that in all likelihood would not have approached 52 weeks in duration.

After declining to use the fourth method on the grounds that "no sufficient evidence was presented of wages earned by a similarly situated employee," the Commission determined in Finding of Fact 15 that "exceptional reasons exist, and [p]laintiff"s average weekly wage should be calculated pursuant to the 5th method," so that the $5,805.25 in total wages that plaintiff had earned while working with FieldBuilders over the course of the sixteen-week period prior to his injury should be divided by fifty-two in order to calculate plaintiff's average weekly wage. According to the Commission, "[t]he figure of $111.64 is an average weekly wage that is fair and just to both sides" because "[i]t takes into account that [p]laintiff was working a temporary assignment that most likely would have ended once he worked 520 hours" and that the average weekly wage that the Commission believed to be appropriate "annualize[d] the total wages that [p]laintiff likely could have expected to earn in the assignment." After making these findings of fact, the Commission repeated many of these determinations in its conclusions of law, concluding that the "calculation of [p]laintiff's average weekly wage via the 3rd method does not yield results that are fair and just to both parties," that the use of the "first [four] methods of calculating [p]laintiff's average weekly wage" would not be appropriate, and that "exceptional reasons exist in this case, so [that p]laintiff's average weekly wage should be calculated based upon the 5th method as this is the only method which would accurately reflect [p]laintiff's expected earnings but for his work injury" and because the use of the fifth method "produces results that are fair and just to both parties." Plaintiff noted an appeal to the Court of Appeals from the Commission's order.

¶ 10 In seeking relief from the Commission's order before the Court of Appeals, plaintiff argued that (1) the Commission had erred by determining that the fifth method for calculating his average weekly wage was appropriate for use in this case, (2) that the use of the third method for calculating plaintiff's average weekly wage would be fair and just to both parties, and (3) that the use of the fifth method for calculating plaintiff's average weekly wage was unfair, unjust, and provided defendants with a windfall. In reversing the Commission's order and remanding this

case to the Commission for further proceedings, the Court of Appeals began by holding that the Commission's decision to use the fifth method for calculating defendant's average weekly wage set out in N.C.G.S. § 97-2(5) was subject to de novo review given that the Commission's determination that this approach would be "fair and just" to both parties was "actually [a] conclusion[ ] of law to the extent that [it] declared a particular method of calculating [plaintiff's] average weekly wages to be fair or unfair." *Nay v. Cornerstone Staffing Sols.*, 273 N.C. App. 135, 142 (2020). In support of this determination, the Court of Appeals relied upon *Boney v. Winn Dixie, Inc.*, 163 N.C. App. 330, 331–32 (2004), for the proposition that "[t]he determination of [a] plaintiff's average weekly wages requires application of the definition set forth in the Workers' Compensation Act, and the case law construing that statute" so as to "raise[ ] an issue of law, not fact." *Nay*, 273 N.C. App. at 141 (second alteration in original). In addition, the Court of Appeals cited *Tedder v. A & K Enterprises*, 238 N.C. App. 169, 173 (2014), in which it had relied upon *Boney* for the proposition that "review [of] the Commission's calculation of [the plaintiff]'s average weekly wages [is] *de novo*." *Nay*, 273 N.C. App. at 141–42. As a result, given its conclusion that the choice of a method for determining a plaintiff's average weekly wages was a conclusion of law, the Court of Appeals "review[ed] de novo the Commission's declaration that a Method 3 calculation of [plaintiff's] average weekly wages under N.C.G.S. § 97-2(5) was unfair in Finding of Fact 13, and that a Method 5 calculation of [plaintiff's] average weekly wages under N.C.G.S. § 97-2(5) was fair in Finding of Fact 15." *Nay*, 273 N.C. App. at 142.

¶ 11 After having identified what it believed to be the correct standard of review, the Court of Appeals addressed the issue of which method for calculating a plaintiff's average weekly wages would be "fair and just" to both parties and should, for that reason, have been used in calculating the relevant amount. *Id.* at 142–43. According to the Court of Appeals, "[r]esults fair and just . . . consist of such average weekly wages as will most nearly approximate the amount which the injured employee *would be earning* were it not for the injury, in the employment in which he was working at the time of his injury." *Id.* (quoting *Liles v. Faulkner Neon & Elec. Co.*, 244 N.C. 653, 660 (1956)). The Court of Appeals further noted that, in the event that it "determine[d] Method 3 to be fair, [it] need not consider Method 5" given that "[t]he five methods [listed in N.C.G.S. § 97-2(5)] are ranked in order of preference, and each subsequent method can be applied *only if* the previous methods are inappropriate." *Id.* (citing *Tedder*, 238 N.C. App. at 173–74).

¶ 12 In the Court of Appeals' view, a calculation of plaintiff's average weekly wages utilizing the third method would be "fair and just" given that this determination was intended to reflect the amount that plaintiff would be earning in the absence of his compensable injury, with calculation of plaintiff's "average weekly wages according to what he earned from Cornerstone [divided by] the number of weeks he worked for the staffing agency fairly approximat[ing] what he would have earned but for the injury." *Id.* at 143. In determining that the third method for calculating plaintiff's average weekly wages would be fair and just to both parties, the Court of Appeals noted "the lack of a definite employment end date for [plaintiff] with Cornerstone is important" and the fact that plaintiff had "continued his relationship with Cornerstone after his injury and could have continued to earn money from Cornerstone indefinitely." *Id.* As a result, the Court of Appeals held that a calculation of plaintiff's average weekly wages using the third method "averages [his] earnings over the course of his employment at Cornerstone, not a hypothetical 52 week period"; that this calculation produced results that were fair and just to both parties; and that the Commission's decision should be reversed and this case remanded to the Commission for recalculation of plaintiff's average weekly wage. *Id.* at 143–44. This Court allowed defendants' request for discretionary review of the Court of Appeals' decision on 3 February 2021.

II. Analysis

A. Parties' Arguments

¶ 13 In seeking to persuade us to overturn the Court of Appeals' decision, defendants begin by arguing that the Court of Appeals erred by utilizing a de novo standard in reviewing the Commission's decision concerning the manner in which plaintiff's average weekly wages should be calculated. In support of this contention, defendants direct our attention to this Court's decision in *Liles*, 244 N.C. at 660, in which we stated that the question of whether a method for calculating an injured employee's average weekly wages produces results that are "fair and just" "is a question of fact"; that, "in such a case[,] a finding of fact by the Commission controls [the] decision"; and that "this [principle] does not apply if the finding of fact is not supported by competent evidence or is predicated on an erroneous construction of the statute." In addition, defendants direct our attention to several earlier decisions in which we utilized the "any competent evidence" standard in reviewing the Commission's findings of fact. *See Munford v. W. Constr. Co.*, 203 N.C. 247, 249 (1932) (stating that, since the "evidence indicated both shortness of time and casual nature of the employment[,] . . . regard sh[ould] be had to the average wages

earned by others," with these considerations being "questions of fact for the [C]ommission to pass on"); *Mion v. Atl. Marble & Tile Co.*, 217 N.C. 743, 747 (1940) (stating that the Commission's findings "appear[ed] to be supported by the evidence except with respect to the average weekly wage"); *Early v. W. H. Basnight & Co.*, 214 N.C. 103, 107 (1938) (using the "any competent evidence" standard in reviewing the lawfulness of the Commission's findings of fact). According to defendants, this Court's precedent "requires application of the any competent evidence standard as opposed to the *de novo* review erroneously applied by the Court of Appeals" in reviewing a challenge to the lawfulness of the Commission's decision with respect to the manner in which an injured employee's average weekly wages should be calculated.

¶ 14 In addition, defendants argue that the Court of Appeals erred to the extent that it interpreted *Boney*, 163 N.C. App. 330; *McAninch v. Buncombe Cnty. Schs.*, 347 N.C. 126 (1997); and *Tedder*, 238 N.C. App. 169, as supporting the use of a de novo standard of review in evaluating the validity of plaintiff's challenge to the Commission's average weekly wages calculation. Similarly, as a matter of public policy, defendants assert that the use of a de novo standard of review in examining the Commission's decision concerning the manner in which an injured employee's average weekly wages should be calculated would "create uncertainty and increased litigation with respect to the correct calculation of average weekly wage."

¶ 15 Finally, defendants argue that the Commission's determination that the use of the third method to calculate plaintiff's average weekly wages would be unfair to defendants was a finding of fact that should be upheld on the grounds that it had adequate evidentiary support. In defendants' view, the record contains evidence tending to show that the amount of work that plaintiff would have expected to be assigned while working with FieldBuilders could have potentially been impacted by the weather or the season of the year; that plaintiff's assignment with FieldBuilders was temporary and would, "in all likelihood, . . . not have approached 52 weeks"; and that there is "no evidence [that] plaintiff ever earned or would have earned an annual salary close to" $21,798.40, which is the salary that correlates with plaintiff's contended average weekly wages of $419.20, so that "provid[ing] him benefits at this rate" would give plaintiff a "substantial, unfounded windfall." Similarly, defendants contend that the record contains sufficient evidence to support the Commission's determination that the use of the fifth method to calculate plaintiff's average weekly wages would be fair to both parties on the theory that plaintiff would not have worked for an entire year with

Cornerstone given that he would have "either been hired permanently by FieldBuilders and/or he would have experienced gaps in employment because another assignment could not be identified due to many different variables." As a result, defendants urge us to reverse the Court of Appeals' decision and reinstate the Commission's order.

¶ 16 In seeking to persuade us to affirm the Court of Appeals' decision in this case, plaintiff argues that the Court of Appeals correctly utilized a de novo standard of review in evaluating the Commission's calculation of plaintiff's average weekly wages because the issue of whether a particular calculation is "fair and just to both parties" is either a question of law or a mixed question of law and fact. More specifically, plaintiff argues that, "[a]lthough there is some language in *Boney* supporting the proposition that the fair and just determination is, at least in part, a question of fact, it is nevertheless clear that the *Boney* Court properly employed a *de novo* standard of review" when it reviewed the Commission's conclusions, citing *Boney*, 163 N.C. App. at 331–32. According to plaintiff, the Court of Appeals, citing *Tedder*, 238 N.C. App. 169, and *Frank v. Charlotte Symphony*, 255 N.C. App. 269 (2017), and this Court, citing *Liles*, 244 N.C. 653, *McAninch*, 347 N.C. 126, and *Barnhardt v. Yellow Cab Co.*, 266 N.C. 419 (1966), *overruled on other grounds by Derebery v. Pitt Cnty. Fire Marshall*, 318 N.C. 192 (1986), have utilized a de novo standard of review in evaluating the validity of challenges to the Commission's average weekly wages calculation. In addition, plaintiff argues that average weekly wages of $419.20 would be fair and just to both parties given that this amount is "based upon [plaintiff's] actual weekly earnings," which are "the very same weekly earnings used by [Cornerstone's] carrier to compute the weekly workers' compensation premium to cover the 'temp to perm' employees of [Cornerstone]." Finally, plaintiff urges us to uphold the Court of Appeals' decision on public policy grounds and contends that, if the Court of Appeals' decision were to be reversed, injured workers would receive compensation based upon average weekly wages that would only be "a fraction" of the amount that they actually earned during their period of employment.

B. Standard of Review

¶ 17 "The findings of fact by the Industrial Commission are conclusive on appeal if supported by any competent evidence." *Gallimore v. Marilyn's Shoes*, 292 N.C. 399, 402 (1977). "The Commission's findings of fact are conclusive on appeal when supported by such competent evidence, 'even though there [is] evidence that would support findings to the contrary.' " *McRae v. Toastmaster, Inc.*, 358 N.C. 488, 496 (2004)

(alteration in original) (quoting *Jones v. Myrtle Desk Co.*, 264 N.C. 401, 402 (1965)). The Commission's conclusions of law, on the other hand, are subject to de novo review on appeal. *Id.*

¶ 18 Subsection 97-2(5) "sets forth in priority sequence five methods by which an injured employee's average weekly wages are to be computed" and "establishes an order of preference for the calculation method to be used," with the Commission to refrain from using the fifth method "unless there has been a finding that unjust results would occur by using the [four] previously enumerated methods." *McAninch*, 347 N.C. at 129–30. "[T]he primary intent of this statute is that results are reached which are fair and just to both parties." *Id.* at 130 (citing *Liles*, 244 N.C. at 660). As we have already noted, the ultimate issue before us in this case is whether the Commission's selection of a method for calculating an injured employee's average weekly wages and the extent to which the method that the Commission has selected is "fair and just" is a question of law or a question of fact. In order to make this determination, we must begin by reviewing the relevant decisions of this Court and the Court of Appeals.

¶ 19 In *Liles*, this Court reviewed a Commission order entered in a case in which a worker had worked part-time for his employer until the time of the worker's death and in which the Commission used the third method (which is now the fourth method) described in N.C.G.S. § 97-2(5) for the purpose of calculating his average weekly wages. 244 N.C. at 658. In reaching this result, the Commission "conclude[d] as a matter of law that results fair and just to both parties [could] not be obtained" using the preceding statutory methods on the grounds that, in light of "the casual nature or terms of [the injured worker's] employment it would be impractical to compute his average weekly wage by basing [the] same on his average earnings for the previous 52 weeks" and that the injured worker's average weekly wages should be set at $34.88 "based upon the earnings of a person of the same grade and character employed in the same class of employment in the same locality or community." *Id.* at 656. On appeal, this Court held that the Commission had improperly "determined the 'average weekly wages' of a part-time employee to be the amount he would have earned had he been a full-time employee" given that there was "no factual basis" for the Commission's use of the third (now fourth) method in light of the fact that the worker had been employed on a part-time basis and that there was "no evidence that any part-time worker, the nature of whose employment was similar to that of [the worker], earned 'average weekly wages' " that approximated those calculated under the third (now fourth) method. *Id.* at 658–59. In the course of making this determination, we stated that

> all provisions of [N.C.]G.S. [§] 97-2(e) must be considered in order to ascertain the legislative intent; and the dominant intent is that results fair and just to both parties be obtained. Ordinarily, whether such results will be obtained by the said second method is a question of fact; and in such case a finding of fact by the Commission controls [the] decision. However, this does not apply if the finding of fact is not supported by competent evidence or is predicated on an erroneous construction of the statute.
>
> The words "fair and just" may not be considered generalities, variable according to the predilections of the individuals who from time to time compose the Commission. These words must be related to the standard set up by the statute. Results fair and just, within the meaning of [N.C.]G.S. [§] 97-2(e), consist of such 'average weekly wages' as will most nearly approximate the amount which the injured employee *would be earning* were it not for the injury, in the employment in which he was working at the time of his injury.

Id. at 660. After concluding that "the evidence does not warrant a finding of fact or conclusion of law that the said second method would not obtain results fair and just to both parties," we held that the Commission erred by applying the third [now fourth] method rather than the second method, with the extent to which "fair and just" results had been obtained being dependent upon whether the Commission had correctly construed the relevant statutory language in accordance with its spirit and the underlying legislative intent. *Id.* at 660–61. As a result, a careful reading of our opinion in *Liles* indicates that we did not give significant deference to the Commission's decision concerning the manner in which the plaintiff's average weekly wages should be calculated in that case.

¶ 20 Approximately four decades later, we considered a case involving an injured worker who had been employed as a cafeteria worker for the Buncombe County Schools during the school year and as a babysitter, housekeeper, and painter during the summer months. *McAninch*, 347 N.C. at 128. In that case, the injured worker and the school system had entered into an agreement pursuant to which the defendant was required to pay the worker an amount of compensation based upon average weekly wages of $163.37, a rate that "did not reflect any wages [that] the [worker had] earned from other employment undertaken during

the ten-week summer vacation." *Id.* After the Commission affirmed the average weekly wages determination to which the parties had agreed, the Court of Appeals reversed the Commission's decision, holding that the Commission should have included the extra income that the worker had earned performing her additional jobs in its calculation and should have computed the plaintiff's average weekly wages by "aggregating her wages from defendant with her summer earnings and then dividing that sum by fifty-two." *Id.* at 129. This Court, in turn, reversed the Court of Appeals' decision, *id.* at 134, on the theory that the Court of Appeals' "recalculation of plaintiff's average weekly wages . . . through application of the fifth computation method constituted an improper contravention of the Commission's factfinding authority, and specifically its finding of fairness in this case," *id.* at 131.

¶ 21 In reaching this result, we quoted from our prior decision in *Barnhardt*, 266 N.C. at 427–29, in which we held that the fifth method for calculating an injured employee's average weekly wages did not give the Commission the "implied authority" to aggregate wages from multiple sources of employment in the course of calculating an injured employee's average weekly wages for the reason that such a result would be unfair to the employer. *McAninch*, 347 N.C. at 133. According to our decision in *Barnhardt*, "had the Legislature intended to authorize the Commission in the exceptional cases to combine those wages with the wages from *any* concurrent employment, we think it would have been equally specific," with it being unlikely "that the legislature would have left such intent solely to a questionable inference." *Id.* at 133–34 (quoting *Barnhardt*, 266 N.C. at 427–29). As a result, we concluded that "the definition of 'average weekly wages' and the range of alternatives set forth in the five methods of computing such wages . . . do not allow the inclusion of wages or income earned in employment or work other than that in which the employee was injured." *Id.* at 134.

¶ 22 Our decision in *Barnhardt* involved a worker who had performed both part-time work as a cab driver and part-time work as a machine maintenance man. 266 N.C. at 420. After having become permanently disabled while working as a cab driver, the plaintiff sought workers' compensation benefits from the cab company. *Id.* In determining the amount of workers' compensation benefits to which the plaintiff was entitled, the Commission utilized the fourth (now fifth) method for calculating the plaintiff's average weekly wages, having combined the wages that the plaintiff had earned while working for both the cab company and the entity for which the plaintiff performed machine maintenance work. *Id.* at 422. In vacating and remanding the Commission's order, we

stated that "[N.C.]G.S. § 97-2(5) contains no specific provision which would allow wages from any two employments to be aggregated in fixing the wage base for compensation" before noting that

> [u]nusually severe or totally disabling injuries are not the *exceptional reasons* contemplated by method (4) [now five].
>
> It seems reasonable to us that the Legislature, having placed the economic loss caused by a workman's injury upon the employer for whom he was working at the time of the injury, would also relate the amount of that loss to the average weekly wages which that employer was paying the employee. Plaintiff, of course, will greatly benefit if his wages from both jobs are combined; but, if this is done, Cab Company and its carrier, which has not received a commensurate premium, will be required to pay him a higher weekly compensation benefit than Cab Company ever paid him in wages. Whether an employer pays this benefit directly from accumulated reserves, or indirectly in the form of higher premiums, to combine plaintiff's wages from his two employments would not be fair to the employer.

Id. at 427 (citations omitted). In reaching this conclusion, we both interpreted N.C.G.S. § 97-2(5) and applied our understanding of the relevant legal principles to the facts of this case without making any obvious use of the "any competent evidence" standard of review.

¶ 23 In *Boney*, 163 N.C. App. 330, the Court of Appeals discussed the standard of review that a reviewing court should utilize in evaluating the validity of a challenge to the Commission's average weekly wages determination. As an initial matter, the Court of Appeals described the Commission's determination that the worker's "average weekly wage of $194.88 yield[ed] a weekly compensation rate of $129.93" as a conclusion of law, noting that the "determination of the plaintiff's 'average weekly wages' requires application of the definition set forth in the Workers' Compensation Act, N.C.[G.S.] § 97-2(5) (2001), and the case law construing that statute and thus raises an issue of law, not fact." *Id.* at 331–32 (cleaned up) (quoting *Swain v. C & N Evans Trucking Co.*, 126 N.C. App. 332, 335–36 (1997)). On the other hand, however, the Court of Appeals stated that the issue of "[w]hether the results of calculating the average weekly wage by the applicable enumerated method would

be unfair to either employer or employee is a question of fact, and the Commission's determination on this issue would control, unless there was no competent evidence in the record to support the determination." *Id.* at 333. At the conclusion of its analysis, the Court of Appeals refrained from determining whether the Commission had erred in selecting a method for calculating the plaintiff's average weekly wages and, instead, remanded the case to the Commission for recalculation of the worker's average weekly wages given the Commission's failure to "clearly state what method it used to calculate [the worker]'s average weekly wage," *id.*, with the Court of Appeals having instructed the Commission that, if it found on remand that "that the calculation of [the worker]'s average weekly wage by use of the second method in N.C.G.S. § 97-2(5) would create an unfair result," it was authorized to "use an appropriate method to calculate [the worker]'s average weekly wage 'as will most nearly approximate the amount which [the worker] *would be earning* were it not for the injury' under the fifth method," *id.* at 334 (quoting *Liles*, 244 N.C. at 660).

¶ 24 In *Tedder*, 238 N.C. App. 169, the Court of Appeals reversed the Commission's average weekly wages calculation after utilizing what it described as a de novo standard of review. *Id.* at 173. In *Tedder*, the Commission had determined that the plaintiff had been hired by the employer to work for a limited period of seven weeks at a rate of $625 per week, during which time the plaintiff had injured his back. *Id.* at 172. After determining that the use of the first four methods for the purpose of calculating the plaintiff's average weekly wages would be inappropriate, the Commission had utilized the fifth method and determined that plaintiff's average weekly wages should be set at $625, even though the plaintiff would have only earned that amount for the seven-week period during which he had been employed by the defendant. *Id.* at 175. After citing *Boney* for the proposition that a "determination of the plaintiff's 'average weekly wages' require[d] application of the definition set forth in the Workers' Compensation Act, and the case law construing that statute[,] and thus raises an issue of law, not fact," the Court of Appeals stated that it would "review the Commission's calculation of [plaintiff]'s average weekly wages *de novo*," *id.* at 173 (quoting *Boney*, 163 N.C. App. at 331–32 (second alteration in original)), before reversing the Commission's decision with respect to that issue on the grounds that "it squarely conflicts with [N.C.G.S. § 97-2(5)]'s unambiguous command to use a methodology that 'will most nearly approximate the amount which the injured employee would be earning were it not for the injury,' " *id.* at 175 (quoting N.C.G.S. § 97-2(5) (2013)). According to the Court of Appeals, the Commission's decision to utilize the fifth method for the

purpose of calculating the plaintiff's average weekly wages created "a financial windfall for [the plaintiff] and an unjust result for" the employer in contravention of "the guiding principle and primary intent of the statute—obtaining 'results that are fair and just to both employer and employee.' " *Id.* at 177 (quoting *Conyers v. New Hanover Cnty. Schs.*, 188 N.C. App. 253, 256 (2008)). As a result, the Court of Appeals remanded this case to the Commission for the making of a new average weekly wages calculation.

¶ 25 The difference between a question of law, on the one hand, and a question of fact, on the other, is well-established, although often difficult to determine. As a general proposition, questions of fact involve "things in space and time that can be objectively ascertained by one or more of the five senses or by mathematical calculation," *State ex rel. Utils. Comm'n v. Pub. Staff–N.C. Utils. Comm'n*, 322 N.C. 689, 693 (1988), while questions of law involve a "determination requiring the exercise of judgment or the application of legal principles," *State v. Sparks*, 362 N.C. 181, 185 (2008) (quoting *In re Helms*, 127 N.C. App. 505 (1997)). Although this Court has not, to the best of our knowledge, previously determined whether the selection of the proper method for calculating an injured employee's average weekly wages is a question of law or a question of fact, it appears to us that the making of the required determination involves "the application of legal principles" to the facts, making it, as the Court of Appeals correctly determined in *Boney*, a question of law that requires the Commission to properly apply the relevant statutory principles based upon findings of fact that are supported by "any competent evidence." *See Boney*, 163 N.C. App. at 331–32.

¶ 26 As we have already noted, this Court held in *Liles* that the extent to which the use of a particular calculation method produces a result that is "fair and just" was a question of fact, subject to the caveat that "the finding of fact is . . . supported by competent evidence" and does not rest upon "an erroneous construction of the" relevant statutory provision. *Liles*, 244 N.C. at 660. For that reason, we are unable to interpret *Liles* as requiring a single, universally-valid standard of review which applies to all issues that might arise concerning the "fairness and justness" of a particular Commission determination; on the contrary, the language in which *Liles* is couched, when read literally and in context, requires a reviewing court to undertake a much more nuanced analysis than either party seems to suggest. As a result, in the absence of a showing that the use of a particular method for calculating an injured employee's average weekly wages does or does not produce "fair and just" results lacks

sufficient evidentiary support or rests upon an erroneous application of the relevant legal standard, which is whether the result reached by the Commission "most nearly approximate[s] the amount which the injured employee *would be earning* . . . in the employment in which he [or she] was working at the time of his injury," *id.*, the applicable standard of review is whether the Commission's decision with respect to that issue is supported by any competent evidence. In the event that the issue before the Court is whether the Commission's determination rests upon a misapplication of the applicable legal standard, that determination is, according to *Liles* and its progeny, a question of law subject to de novo review.

¶ 27 The approach that we deem to be appropriate appears to properly reconcile the various decisions of this Court that the parties have discussed in their briefs. After acknowledging in *Liles* that "[t]he words 'fair and just' may not be considered generalities, variable according to the predilections of the individuals who from time to time compose the Commission," and must, instead, "be related to the standard set up by the statute," we reversed the Commission's average weekly wages decision on the grounds that the Commission's decision improperly applied the applicable legal standard without giving any apparent deference to the Commission's decision. *Id.* Similarly, in *Barnhardt*, we held that it "would not be fair to the employer" to combine wages from the worker's two jobs in calculating his average weekly wage, on the grounds that, "had the Legislature intended to authorize the Commission in the exceptional cases to combine those wages with the wages from *any* concurrent employment, . . . it would have been equally specific," and that it was "not likely that the legislature would have left such intent solely to a questionable inference." 266 N.C. at 427. In the same vein, our decision in *McAninch* relied upon a determination that the average weekly wages calculation that the Court of Appeals had deemed appropriate could not be squared with the relevant statutory language. In other words, neither *Liles*, *Barnhardt*, nor *McAninch* employs a simple sufficiency of the evidence analysis; instead, all of them focus upon the extent to which particular "fairness and justness" determinations reflect a proper understanding of the relevant statutory language. As a result, it is clear that the understanding of the applicable standard of review set out above is completely consistent with the prior decisions of this Court, which subject what are essentially issues of statutory construction to de novo review regardless of whether they are made in the context of the selection of the appropriate method for determining an injured employee's average weekly wages or determining whether the use of a particular

method would produce results that are "fair and just" in light of the applicable legal standard.

¶ 28 In its order, the Commission determined that the use of the third method for calculating plaintiff's average weekly wages set out in N.C.G.S. § 97-2(5) "would produce an inflated average weekly wage that is not fair to [d]efendants because [p]laintiff was employed in a temporary capacity with no guarantee of permanent employment, length of a particular assignment, or specific wage rate, and he was assigned to a client account whose work was seasonal" and that average weekly wages of $111.64 would be "fair and just to both sides" given that it took "into account that [p]laintiff was working a temporary assignment that most likely would have ended once he worked 520 hours" and that "annualize[d] the total wages that [p]laintiff likely could have expected to earn in the assignment." As we understand his brief, plaintiff's challenge to the validity of the Commission's determinations rests upon an assertion that the approach adopted by the Commission cannot be squared with the applicable legal standard that has been enunciated by this Court. Although the record does contain sufficient evidence to support the specific factual assertions set out in the Commission's order, its analysis does not, at least in our opinion, reflect a proper understanding of that legal standard, which focuses upon whether, based upon a consideration of all relevant facts and circumstances, the chosen method for calculating plaintiff's average weekly wages "most nearly approximate[s] the amount which the injured employee *would be earning* . . . in the employment in which he [or she] was working at the time of his [or her] injury," *Liles*, 244 N.C. at 660 (emphasis added), given that dividing the wages that plaintiff earned over sixteen weeks by fifty-two, instead of sixteen, assumes that plaintiff would have only worked for Cornerstone for a fraction of a year in the absence of his injury, an assumption that might not be a plausible one given the existence of evidence tending to show that temporary employees sometimes worked more than 520 hours at specific assignments and the Commission's failure to find that plaintiff would not have received further work assignments from Cornerstone had he not sustained a compensable back injury (regardless of what the situation might have been with an "average" employee). As a result, since the Commission appears to have found the facts on the basis of a misapprehension of the applicable law, *McGill v. Town of Lumberton*, 215 N.C. 752, 754 (1939) (stating that it is still the rule that "[f]acts found under misapprehension of the law will be set aside on the theory that the evidence should be considered in its true legal light"), and since the Court of Appeals appears to have made its own factual determinations in the course of reversing the Commission's decision rather than simply

reviewing the Commission's decision using the applicable standard of review, we believe that the most appropriate disposition would be for this case to be remanded to the Commission for the entry of a order that contains findings and conclusions based upon a correct understanding of the applicable law.

III. Conclusion

¶ 29 Thus, for the reasons set forth above, we hold that the issue of whether the Commission selected the correct method for determining plaintiff's average weekly wages pursuant to N.C.G.S. § 97-2(5) is a question of law subject to de novo review and that the issue of whether a particular method for making that determination produces results that are "fair and just" is a question of fact subject to the "any competent evidence" standard of review in the absence of a showing that the Commission's determination lacked sufficient evidentiary support or rested upon a misapplication of the relevant legal principle, in which case the relevant issue of statutory construction is subject to de novo review on appeal. We further hold that the findings and conclusions that the Commission made in support of its average weekly wages determination in this case appear to rest upon a misapplication of the applicable legal standard. As a result, we modify and affirm the Court of Appeals' decision and remand this case to the Commission for further proceedings not inconsistent with this opinion, including the entry of a new opinion and award containing appropriate findings of fact and conclusions of law.

MODIFIED AND AFFIRMED.

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

Justice BARRINGER dissenting.

¶ 30 The issue before this Court is whether the Industrial Commission correctly calculated plaintiff's average weekly wage under N.C.G.S. § 97-2(5). The majority's answer to this question should be troubling for staffing agencies and similar entities who hire part-time or temporary workers. In a workers' compensation action, the determination of which method calculates an average weekly wage that is fair and just to both employee and employer is a question of fact. This Court's precedent has never indicated otherwise. Here, the Commission found that the fifth method, not the third method, produced results fair and just to both parties. Competent evidence supported this finding. As a result, this

Court should affirm the Commission's opinion and award. Accordingly, I respectfully dissent.

I. Background

¶ 31 Defendant, Cornerstone Staffing Solutions, provides temporary staffing to businesses primarily located in and around Charlotte, North Carolina, and Rock Hill, South Carolina. Client businesses contract directly with defendant, and defendant then sends its employees to work for the client businesses for a limited period of time, generally 520 hours. Defendant recruits, hires, and manages the payroll of these employees, even though they complete work for the client business. Defendant's employees are paid only for time spent working for a client business. On average, employees work only ten weeks for defendant. Some employees go on to be hired by the client business, either during or at the end of the 520 hours. Others stop working of their own volition or do not receive further work because defendant is unable to place them with another client business. Employment with defendant is limited by the needs of the client businesses and the qualifications of defendant's employees.

¶ 32 Plaintiff, Luon Nay, began working for defendant on 25 August 2015. Prior to working for defendant, plaintiff had not been able to find work for eight months. Defendant assigned plaintiff to work for Field Builders, a client business that creates and updates ball fields at schools and performs landscaping work. While on assignment with Field Builders, plaintiff suffered a compensable workplace injury. As a result, plaintiff ceased working for defendant on 7 December 2015 after working over 496.25 hours and earning wages of $5,805.25.

¶ 33 Plaintiff was medically released to full duty work in June of 2016—meaning he could accept any job without restriction. Plaintiff went back to work for defendant and was placed with another client. Three weeks later, however, that client had no more work for plaintiff. Plaintiff requested defendant find him another job, but defendant informed him that at the present time there were no jobs available, even though plaintiff had no medical restrictions. A week later, plaintiff checked again, and again there was no work for him. Later, plaintiff attempted to find work through another staffing agency, but it too was unable to place him.

¶ 34 After plaintiff's injury, defendant began paying disability benefits to plaintiff. Initially, defendant calculated plaintiff's average weekly wage by dividing plaintiff's total wages of $5,805.25 across the fifteen-week period plaintiff worked for defendant, which produced an average weekly wage of $387.02. However, given the temporary nature of plaintiff's employment, defendant subsequently modified its calculation to $111.64,

which was reached by dividing plaintiff's total wages across the previous fifty-two weeks. Plaintiff requested a hearing before the Commission to challenge this recalculation.

¶ 35 After a hearing, the presiding deputy commissioner entered an opinion and award finding that defendant had correctly calculated plaintiff's average weekly wage as $111.64. To reach this finding, the deputy commissioner found that given the temporary nature of employment with defendant, plaintiff's employment would not have "extended over a 52-week period if he had not been injured" and that there was no evidence of a similarly situated employee whose wages could be used to calculate plaintiff's average weekly wage. Thus the first four methods of calculating an average weekly wage laid out in N.C.G.S. § 97-2(5) did not produce results fair and just to both parties, and the deputy commissioner had to use the fifth method. Under this method, the deputy commissioner took into account the temporary nature of plaintiff's work and divided plaintiff's total wages by fifty-two weeks to reach an average weekly wage of $111.64.

¶ 36 Plaintiff appealed to the full Commission which entered an opinion and award using the same calculation as the deputy commissioner. The full Commission found that plaintiff's employment with defendant "most likely would have ended once he worked 520 hours," and thus an average weekly wage of $111.64 calculated under the fifth method produced fair and just results.

¶ 37 Plaintiff appealed the opinion and award of the full Commission to the Court of Appeals. Reversing and remanding the Commission's opinion and award, the Court of Appeals held that the determination of which method calculates a fair and just average weekly wage was a question of law, subject to de novo review. *Nay v. Cornerstone Staffing Sols.*, 273 N.C. App. 135, 141–42 (2020). Next, the Court of Appeals examined the evidence and drew different inferences from it than those drawn by the Commission, finding that plaintiff "could have continued to earn money from Cornerstone indefinitely." *Id.* at 143. As a result, the Court of Appeals concluded that the third method produced an average weekly wage that was fair and just to both parties. *Id.* at 143–44. Defendant petitioned this Court for review.

II. Analysis

¶ 38 At issue in this case is whether the Commission correctly calculated plaintiff's average weekly wage under N.C.G.S. § 97-2(5). Subsection 97-2(5) requires that the calculation of an employee's average weekly wage produce "results fair and just to both parties." N.C.G.S. § 97-2(5) (2021).

Results fair and just to both parties are reached when the Commission calculates an average weekly wage that "most nearly approximate[s] the amount which the injured employee would be earning were it not for the injury, in the employment in which he was working at the time of his injury." *Liles v. Faulkner Neon & Elec. Co.*, 244 N.C. 653, 660 (1956) (citing N.C.G.S. § 97-2(5)).

¶ 39 This calculation requires the Commission to determine not only the rate of pay at the time of the injury but also the total number of hours the employee *would have worked* in a year for the employer if not for the injury. *See McAninch v. Buncombe Cnty. Schs.*, 347 N.C. 126, 128–31 (1997) (recognizing that because the plaintiff worked only forty-two weeks out of the year for the employer in whose employ she was injured, her average weekly wage would be calculated by extending her earnings from the forty-two weeks across an entire year). Determining the length of time an employee would have worked for an employer but for the injury is especially important in cases involving temporary or seasonal workers, where a failure to recognize the limited duration of employment would result in a windfall—with the employer paying far more in disability benefits than the employee would ever have earned if not for the injury.

¶ 40 To perform this calculation, N.C.G.S. § 97-2(5) "sets forth in priority sequence" five methods for calculating an employee's average weekly wage. *McAninch*, 347 N.C. at 129; N.C.G.S. § 97-2(5). The Commission must consider each method in turn, starting with the first method and only moving on to the next prescribed method if it finds that the previous one would not fairly or justly reflect the wages which the employee would have been earning if not for the injury. *McAninch*, 347 N.C. at 129–30; *Liles*, 244 N.C. at 657–60. Whichever method the Commission first finds to accurately estimate the average weekly wage that the employee would be earning were it not for the injury is the one the Commission must use to calculate the employee's disability benefit. *McAninch*, 347 N.C. at 129–30; *Liles*, 244 N.C. at 660.

¶ 41 When a party appeals a decision by the full Commission to the North Carolina appellate courts, the appellate courts review the decision to "determine, first, whether there is competent evidence to support the Commission's findings of fact and, second, whether the findings of fact support the conclusions of law." *McAninch*, 347 N.C. at 131. Since this Court started reviewing the Commission's decisions, it has treated the calculation of an employee's average weekly wage as a question of fact. This case should be no different.

A. The Calculation of an Average Weekly Wage that Obtains Fair and Just Results Is a Question of Fact.

¶ 42 Our precedent uniformly holds that whether a certain method calculates an average weekly wage that is fair and just is a question of fact. Most recently, in *McAninch v. Buncombe County Schools*, we held that, "the primary intent of [N.C.G.S. § 97-2(5)] is that results are reached which are fair and just to both parties. Ordinarily, whether such results will be obtained is a question of fact; and in such case a finding of fact by the Commission controls [the] decision." 347 N.C. at 130 (cleaned up). *McAninch*, when laying out this standard, quoted *Liles v. Faulkner Neon & Electric Co.*, which, over forty years prior to *McAninch*, stated that N.C.G.S. § 97-2(5)'s: "dominant intent is that results fair and just to both parties be obtained. Ordinarily, whether such results will be obtained by the said second method is a question of fact; and in such a case a finding by the Commission controls [the] decision." 244 N.C. at 660. Notably, *Liles* did not distinguish between the question of whether results are fair and just and the question of whether a selected calculation obtains results that are fair and just, or hold that the first inquiry involves a question of fact and the second a question of law. Instead, it simply held that there is one single question of fact: whether the use of a given calculation method will produce results fair and just. *Id.*

¶ 43 Going back even further, *Early v. W. H. Basnight & Co.*, 214 N.C. 103 (1938), one of this Court's first decisions reviewing an Industrial Commission award, likewise treated as a question of fact the Commission's determination that "exceptional reasons" existed such that it needed to use the last method provided in the statute for calculating the employee's average weekly wage. *Id.* at 106–07. In no case has this Court reviewed the calculation method chosen by the Commission under a different standard. How many hours and at what rate are quintessential questions of fact. *See State ex rel. Utils. Comm'n v. Pub. Staff-N.C. Utils. Comm'n*, 322 N.C. 689, 693 (1988) ("Facts are things in space and time that can be objectively ascertained by one or more of the five senses or by mathematical calculation."). Accordingly, our review of the Commission's calculation in this case should simply involve determining whether it was supported by competent evidence.[1]

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1. Of course, as *Liles* also notes, this Court will reverse the Commission's opinion and award if it is "predicated on an erroneous construction of the statute." *Liles v. Faulkner Neon & Elec. Co.*, 244 N.C. 653, 660 (1956). However, this statement has no bearing on whether the calculation of an average weekly wage according to the fifth (or any other) method is a question of fact—which *Liles* already answered in the affirmative. *Id.* Rather, it was merely a recognition of the fundamental principle that it is emphatically the

B. The Commission's Findings are Supported by Competent Evidence.

¶ 44 Applying the correct standard of review to this case confirms that the full Commission's opinion and award should be affirmed. The Commission found as fact that none of the other methods in N.C.G.S. § 97-2(5) produced a fair and just result, and therefore, exceptional reasons existed for calculating plaintiff's average weekly wage pursuant to the fifth method. Further, in performing this calculation, the Commission complied with this Court's previous interpretations of N.C.G.S. § 97-2(5) by considering only the wages that plaintiff earned from the employment in which he was injured and disregarding all other sources or potential sources of income. *See Barnhardt v. Yellow Cab Co.*, 266 N.C. 419, 427–29 (1966), *overruled on other grounds by Derebery v. Pitt Cnty. Fire Marshall*, 318 N.C. 192 (1986). Accordingly, the opinion and award should be affirmed.

¶ 45 Plaintiff does not challenge the Commission's findings that the first, second, and fourth methods were improper for calculating plaintiff's average weekly wage. Additionally, plaintiff does not challenge the following findings by the Commission: Plaintiff suffered a compensable injury while working for defendant, a staffing agency. At the time of the injury, plaintiff was on a work assignment for one of defendant's clients, Field Builders. Plaintiff worked more than 496.25 hours for defendant from 25 August 2015 until 7 December 2015 and earned $5,805.25 total. Ninety-five percent of defendant's employees were placed in "temp-to-perm" positions. In a temp-to-perm position, an employee was eligible to be hired by the client after working 520 hours but had no guarantee of receiving an offer from the client.

¶ 46 Plaintiff does challenge the following findings by the Commission:

> [E]mployees for [defendant] worked an average of 10 weeks in the 52 weeks prior to [p]laintiff's work injury . . . .
>
> . . . The 3rd method, which applies when the period of employment prior to the injury extended over a period fewer than 52 weeks, calls for the earnings of the employee to be divided by the actual number

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province and duty of an appellate court to say what the law is. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

> of weeks and parts thereof that the employee earned wages, provided that the result is fair and just to both sides. Use of the 3rd method in this claim would produce an inflated average weekly wage that is not fair to [d]efendant[ ] because [p]laintiff was employed in a temporary capacity with no guarantee of permanent employment, length of a particular assignment, or specific wage rate, and he was assigned to a client account whose work was seasonal. Thus, the 3rd method would not take into account that [p]laintiff was on a temporary assignment that in all likelihood would not have approached 52 weeks in duration.
>
> . . . [T]he payroll data submitted into evidence merely shows the temporary and sporadic nature of a temporary employees' employment with [defendant].
>
> . . . The Full Commission finds that exceptional reasons exist, and [p]laintiff's average weekly wage should be calculated pursuant to the 5th method. Based upon a preponderance of the evidence in view of the entire record, the Full Commission finds that [p]laintiff would have at least worked 520 hours in his assignment with [Field Builders] but for his [24 November 2015] work injury. Thus, [p]laintiff's total earnings of $5,805.25 should be divided by 52 weeks, which yields an average weekly wage of $111.64 and compensation rate of $74.43. The figure of $111.64 is an average weekly wage that is fair and just to both sides in this claim. It takes into account that [p]laintiff was working a temporary assignment that most likely would have ended once he worked 520 hours . . . .

¶ 47 Reviewing the record demonstrates that these findings were supported by competent evidence. Thomas Chandler, CEO and owner of defendant, testified that defendant's clients would sign a contract with defendant agreeing not to hire an employee until the employee worked for 520 hours. Agreements like this were standard in the industry, though some companies used the term thirteen weeks—the weekly equivalent of 520 hours. Sometimes, a client would want to hire an employee full-time before the 520 hours were completed. In that situation, the client still had to pay defendant for the full 520 hours. However, many

employees did not stay with defendant for the full 520 hours, as the average amount of time employees worked for defendant was ten weeks.

¶ 48 Chandler testified that if an employee was not hired by a client after working a particular job assignment for 520 hours, the client rarely had the employee stay on, as the client would have to pay a premium to retain the employee through defendant. Typically, employees who were not hired were either let go or the assignment ended. When not assigned to a client, employees might wait a significant amount of time before another position became available. Thus, as Chandler noted, it was not "fair to say that there[was] pretty much always a job available." Since employees could only be placed in positions for which they were qualified, an employee's language barrier might prevent him or her from finding a position. Plaintiff testified that he spoke very little English.

¶ 49 Chandler further testified that plaintiff was working for Field Builders, a company that creates or updates ball fields at schools and performs landscaping work. Field Builders's work can be impacted by the weather, the season, and holidays. Plaintiff had exceeded thirteen weeks with Field Builders and had completed over ninety-five percent of his 520 hours when he ceased working.

¶ 50 Plaintiff was injured in December 2015 but was medically released to full duty work in June of 2016—allowing him to accept any job without restriction. Initially, defendant found plaintiff work with a client for three weeks. However, after that job ended, defendant was unable to place plaintiff with another client. Later, a different staffing agency was also unable to find plaintiff work. Additionally, plaintiff was unable to find a job for the eight months preceding his employment with defendant.

¶ 51 This competent evidence supported the Commission's findings that plaintiff would have stopped working for defendant around 7 December 2015, regardless of the injury. As the Commission repeatedly stated, "[p]laintiff would have at least worked 520 hours in his assignment with Field[ ]Builders but for his November 24, 2015 work injury," "[p]laintiff was working a temporary assignment that most likely would have ended once he worked 520 hours," and plaintiff's employment with defendant "in all likelihood would not have approached 52 weeks in duration." Supporting this finding was the evidence that plaintiff had completed over ninety-five percent of the required 520 hours. Accordingly, either plaintiff would have reached 520 hours and been hired by Field Builders, or his position would have ended. If plaintiff had gone to work for Field Builders, any income he earned from them would not have counted

toward his average weekly wage calculation since Field Builders was a different employer than defendant. *See Joyner v. A. J. Carey Oil Co.*, 266 N.C. 519, 521 (1966) ("When an employee who holds two separate jobs is injured in one of them, his compensation is based only upon his average weekly wages earned in the employment producing the injury."). Conversely, if the position ended, the Commission could reasonably infer that plaintiff would have ceased working for defendant since, when plaintiff returned to defendant in June of 2016 with no work restrictions, defendant was unable to find plaintiff a job, other than three weeks with one client. As such, the third method would not produce results fair and just to defendant because it would compensate plaintiff for far more hours than he would have worked for defendant if he was not injured. Rather, a fair and just average weekly wage would reflect the Commission's finding that plaintiff would not have worked significantly longer for defendant. The Commission's chosen calculation under the fifth method—dividing plaintiff's wages by fifty-two weeks—obtained that outcome.

¶ 52 Perhaps different factual inferences could be drawn from the evidence. However, that is not the role of the appellate courts. Appellate courts review the Commission's resolutions of questions of fact simply to determine if they are supported by competent evidence; they do not "have the right to weigh the evidence and decide the issue on the basis of its weight." *Anderson v. Lincoln Constr. Co.*, 265 N.C. 431, 433–34 (1965). Competent evidence in this case supported the Commission's findings. Accordingly, we should affirm the opinion and award.

III. Conclusion

¶ 53 "The rule is well settled to the effect that, if in any reasonable view of the evidence it will support, either directly or indirectly, or by fair inference, the findings made by the commission, they must be regarded as conclusive." *McGill v. Town of Lumberton*, 218 N.C. 586, 591 (1940) (cleaned up). Here, a reasonable view of the evidence and fair inferences support the finding of the Commission that plaintiff's average weekly wage should be calculated according to the fifth method. Further, a careful review of this Court's precedent demonstrates that the Commission's finding rested on a proper interpretation of N.C.G.S. § 97-2(5). There is no need to remand this case to the Commission for further findings or a reperformance of a calculation that it has already correctly performed. Accordingly, I respectfully dissent.

Chief Justice NEWBY joins in this dissenting opinion.

NEW HANOVER CNTY. BD. OF EDUC. v. STEIN

[380 N.C. 94, 2022-NCSC-9]

THE NEW HANOVER COUNTY BOARD OF EDUCATION
v.
JOSHUA H. STEIN, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE STATE OF NORTH CAROLINA, AND NORTH CAROLINA COASTAL FEDERATION, INC., AND SOUND RIVERS, INC.

No. 339A18-2

Filed 11 February 2022

Appeal and Error—swapping horses on appeal—statute enacted during pendency of appeal—new claim raised

Where a case arising from a school board's constitutional challenge to the attorney general's administration of funds received pursuant to an agreement with a hog farming company (following the contamination of water supplies by swine waste lagoons) was on remand at the Court of Appeals for further proceedings not inconsistent with the Supreme Court's prior opinion, the Court of Appeals erred by concluding that the school board's amended complaint sufficed to state a claim for relief pursuant to a statute that was enacted during the pendency of the appeal (N.C.G.S. § 147-76.1). The school board could not raise an entirely new claim for the first time on appeal—based on a statute that did not even exist at the time its amended complaint was filed—from the trial court's order granting summary judgment to the attorney general.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 275 N.C. App. 132 (2020), reversing and remanding an order entered on 12 October 2017 by Judge Paul C. Ridgeway in Superior Court, Wake County, granting summary judgment in favor of defendant Joshua H. Stein, Attorney General. On 14 April 2021, the Supreme Court allowed the Attorney General's petition for discretionary review as to additional issues and plaintiff New Hanover County Board of Education's conditional petition for discretionary review. Heard in the Supreme Court on 9 November 2021.

Stam Law Firm, PLLC, by Paul Stam and R. Daniel Gibson, for plaintiff-appellee.

Joshua H. Stein, Attorney General, by James W. Doggett, Deputy Solicitor General, and Marc Bernstein, Special Deputy Attorney General, for defendant-appellant.

The Southern Environmental Law Center, by Mary Maclean Asbill, Brooks Rainey Pearson, and Blakeley E. Hildebrand, for intervenor-appellants.

Ward and Smith, P.A., by Christopher S. Edwards and Marcus Gadson, for amicus curiae Marcus Gadson.

ERVIN, Justice.

¶ 1 This case arises from the Board of Education's challenge to the Attorney General's administration of an environmental enhancement grant program funded by payments made by Smithfield Foods, Inc., and several of its subsidiaries pursuant to a 2000 agreement between the Smithfield companies and the Attorney General. After the Board of Education filed an amended complaint alleging that the payments received from the Smithfield companies in accordance with the agreement amounted to civil penalties that should have been made available to the public schools pursuant to article IX, section, 7 of the North Carolina Constitution, the trial court granted summary judgment in favor of the Attorney General. On appeal, the Court of Appeals reversed, finding that the record disclosed the existence of genuine issues of material fact that precluded the entry of summary judgment in the Attorney General's favor. This Court reversed the Court of Appeals' decision on the grounds that the record did not disclose the existence of any genuine issues of material fact and that the Attorney General was entitled to judgment as a matter of law given that the undisputed evidence demonstrated that the funds provided by the Smithfield companies did not constitute civil penalties for purposes of article IX, section 7, of the North Carolina Constitution and remanded this case to the Court of Appeals for further proceedings not inconsistent with its opinion. On remand, the Court of Appeals allowed the Board of Education's motion for supplemental briefing and filed an opinion holding that the funds made available by the agreement were subject to a newly enacted statute requiring all funds received by the State to be deposited in the State treasury and that the Board of Education's amended complaint sufficed to state a claim against the Attorney General pursuant to this statute. As a result, the determinative issue before this Court at this point is whether the Board of Education's amended complaint suffices to support a claim pursuant to N.C.G.S. § 147-76.1. After careful consideration of the record in light of the applicable law, we reverse the decision of the Court of Appeals and remand this case to the Court of Appeals for further remand to the

Superior Court, Wake County, with instructions to reinstate its earlier order granting summary judgment in favor of the Attorney General.

I. Factual Background

A. Substantive Facts

¶ 2 After a five-year period during which hog waste lagoons in eastern North Carolina ruptured or overflowed and spilled millions of gallons of waste into the State's waterways, then-Attorney General Michael F. Easley entered into an agreement with Smithfield Foods, Inc., the state's largest hog-farming operation, and several of its subsidiaries[1] on 25 July 2000, pursuant to which the Smithfield companies agreed to

> (1) undertake immediate measures for enhanced environmental protection on Company-owned Farms and provide assistance to Contract Farmers in undertaking these same measures;
>
> (2) commit $15 million for the development of Environmentally Superior Technologies for the management of swine waste and to facilitate the development, testing, and evaluation of potential technologies on Company-owned Farms;
>
> (3) install Environmentally Superior Technologies on each Company-owned Farm in North Carolina and provide financial and technical assistance to Contract Farmers for the installation of these technologies
>
> (4) commit $50 million to environmental enhancement activities;
>
> (5) cooperate fully with the Attorney General to ensure compliance with applicable laws, regulations, policies and standards; and
>
> (6) in cooperation with the Attorney General and all other interested parties, take a leadership role in enhancing the effectiveness of the Albemarle-Pamlico National Estuary Program . . . .

1. The subsidiaries involved in the agreement include Brown's of Carolina, Inc.; Carroll's Foods, Inc; Murphy Farms, Inc.; Carroll's Foods of Virginia, Inc.; and Quarter M Farms, Inc.

In order to provide $50 million for use in funding environmental enhancement activities in accordance with the agreement, the Smithfield companies agreed "to pay each year for 25 years an amount equal to one dollar for each hog in which the Companies . . . have had any financial interest in North Carolina during the previous year, provided, however, that such amount shall not exceed $2 million in any year," with these funds to "be paid to such organizations or trusts as the Attorney General will designate" as long as they were used "to enhance the environment of the State, including eastern North Carolina, to obtain environmental easements, construct or maintain wetlands and such other environmental purposes, as the Attorney General deems appropriate." In carrying out his obligations under the agreement, the Attorney General was authorized to consult with representatives from the Smithfield companies, the North Carolina Department of Environmental Quality,[2] and "any other groups or individuals he deems appropriate and may appoint any advisory committees he deems appropriate."

¶ 3 On 18 October 2002, the Smithfield companies, with the consent of then-Attorney General Roy A. Cooper, entered an escrow agreement with RBC Centura Bank[3] pursuant to which the Smithfield companies agreed to deposit all funds provided in accordance with the agreement into a bank account in which those funds would be held for disbursement directly to recipients by the Attorney General. In accordance with the terms of the agreement, the Smithfield companies made an annual deposit into the relevant account around the anniversary of the date upon which they entered into their agreement with the Attorney General.

¶ 4 In January 2003, then-Attorney General Cooper established the Environmental Enhancement Grants Program for the purpose of "improv[ing] the air, water and land quality of North Carolina by funding environmental projects that address the goals of the agreement between Smithfield and the Attorney General." On an annual basis, the program solicits applications from governmental agencies and nonprofit entities, which are then reviewed by a panel consisting of representatives of the North Carolina Department of Justice, the North Carolina Department of Environmental Quality, the North Carolina Department of Natural and Cultural Resources, various academic institutions, and certain nonprofit organizations involved in conservation efforts. After the panel makes

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2. At the time the agreement was signed, the North Carolina Department of Environmental Quality was known as the North Carolina Department of Environment and Natural Resources.

3. In 2012, RBC Centura Bank was acquired by PNC Financial Services.

recommendations to the Attorney General concerning the manner in which the available grant funds should be disbursed, representatives of the Smithfield companies have the opportunity to make recommendations to the Attorney General as well. At the conclusion of this process, the Attorney General selects the recipients of the grants to be awarded in the exercise of his discretion and may designate up to $500,000 for use by the individual grant recipients. During the period from 2000 to 2016, the Attorney General awarded more than $25 million pursuant to the agreement for the purpose of funding more than 100 separate initiatives that addressed a variety of environmental problems, with the work to be performed using these grant payments having included rehabilitating abandoned waste lagoons, conserving wildlife habitats, improving water quality, reducing pollution from agricultural and stormwater runoff, funding environmental research, and restoring forests, shorelines, wetlands, and streams across North Carolina.

B. Procedural History

1. The First Appeal

¶ 5 On 18 October 2016, Francis X. De Luca filed a complaint in the Superior Court, Wake County, in which he alleged that the payments made by the Smithfield companies pursuant to the agreement constituted penalties for purposes of article IX, section 7, of the North Carolina Constitution, which requires that the "proceeds of all penalties and forfeitures and of all fines collected in the several counties for any breach of the penal laws of the State . . . shall be faithfully appropriated and used exclusively for maintaining free public schools." In his complaint, Mr. De Luca requested that the Attorney General "be preliminarily and permanently enjoined from distributing payments made pursuant to [the agreement] to anyone other than to the Civil Penalty and Forfeiture Fund" and that the Attorney General be required to recover all program-related funds that had been distributed to grant recipients within the last three years and deposit those monies into the Civil Penalties and Forfeiture Fund. On 25 January 2017, Mr. De Luca filed an amended complaint that added the New Hanover County Board of Education as an additional party plaintiff and substituted the current Attorney General, Joshua H. Stein, acting in his official capacity, as a party defendant.

¶ 6 On 12 October 2017, the trial court entered an order granting summary judgment in favor of the Attorney General on the grounds that payments made pursuant to the program did not constitute "penalties," "forfeitures," or "fines" that had been collected for "any breach of the penal laws of the State" subject to article IX, section 7, of the North

Carolina Constitution. On the same date, the trial court entered an order allowing the North Carolina Coastal Federation, Inc., and Sound Rivers, Inc., to intervene as party-defendants. Mr. De Luca and the Board of Education noted an appeal from the trial court's summary judgment order to the Court of Appeals.

¶ 7 On 4 September 2018, a divided panel of the Court of Appeals filed an opinion holding that, while Mr. De Luca lacked standing to assert a claim against the Attorney General pursuant to article IX, section 7, of the North Carolina Constitution, the Board of Education was entitled to assert such a claim on the theory that, in the event that its claim against the Attorney General proved successful, it was entitled to receive a portion of the funds at issue in this case. *De Luca v. Stein*, 261 N.C. App. 118, 128 (2018). In addition, the Court of Appeals held that the record disclosed the existence of "genuine issues of material fact" concerning the extent to which payments made pursuant to the agreement were intended to penalize the Smithfield companies or to deter them from violating the State's environmental laws in the future, rendering them subject to the requirements of article IX, section 7, of the North Carolina Constitution. *Id.* at 136. As a result, the Court of Appeals reversed the trial court's summary judgment order and remanded this case to the Superior Court, Wake County, for a trial on the merits with respect to the Board of Education's claim. *Id.*

¶ 8 After the Attorney General and the environmental intervenors noted an appeal to this Court on the basis of a dissent by former Judge Wanda Bryant and after we granted petitions for discretionary review with respect to additional issues filed by all of the parties to this case, this Court filed an opinion on 3 April 2020 in which it reversed the Court of Appeals' decision and remanded this case to the Court of Appeals for further proceedings not inconsistent with its opinion. *New Hanover Cty. Bd. of Educ. v. Stein*, 374 N.C. 102 (2020). Although this Court agreed that the Board of Education was authorized to assert a claim against the Attorney General pursuant to article IX, section 7, of the North Carolina Constitution, we noted that it did not have standing "to assert that the Attorney General lacked the authority to enter the agreement at all and appropriately made no such argument." *Id.* at 117. In addition, we held that the Court of Appeals had erred by determining that the record disclosed the existence of a genuine issue of material fact concerning the extent, if any, to which payments made pursuant to the agreement constituted penalties for purposes of N.C. Const. art. IX, § 7, and concluded that the trial court had not erred by granting summary judgment in favor of the Attorney General with respect to the Board

of Education's civil penalties clause claim. *Id.* at 123. As a result, we reversed the Court of Appeals' decision and remanded this case to the Court of Appeals "for any additional proceedings not inconsistent with this opinion." *Id.* at 123–24.

¶ 9 In a footnote that appeared at the end of our opinion, we acknowledged that the General Assembly had recently enacted N.C. Sess. L. 2019-250, which took effect on 1 July 2019, *id.* at 124 n.8, and that the statutory provision in question had amended chapter 147, article 6, of the North Carolina General Statutes by adding a new section that provided, in pertinent part, that, "[e]xcept as otherwise provided by law, all funds received by the State, including cash gifts and donations, shall be deposited in the State treasury," N.C.G.S. § 147-76.1(b) (2021); that, "[e]xcept as otherwise provided by subsection (b) of this section, the terms of an instrument evidencing a cash gift or donation are a binding obligation of the State," N.C.G.S. § 147-76.1(c); and that "[n]othing in this section shall be construed to supersede, or authorize a deviation from the terms of an instrument evidencing a gift or donation setting forth the purpose for which the funds may be used," N.C.G.S. § 147-76.1(c). After noting that "the parties [had] agreed that the provisions of newly-enacted N.C.G.S. § 147-76.1 would not have the effect of mooting this appeal," we stated that we would not attempt to construe the new statute or to apply it to the facts of this case and expressed "no opinion as to what effect, if any, N.C.G.S. § 147-76.1 has on the agreement or any past or future payments made thereunder." *Stein*, 374 N.C. at 260.[4]

2. The Second Appeal

¶ 10 On 26 May 2020, the Board of Education filed a motion with the Court of Appeals seeking leave to file a supplemental brief addressing the applicability of N.C.G.S. § 147-76.1 to this case. The Court of Appeals allowed the Board of Education's motion for supplemental briefing on 18 June 2020. In its supplemental brief, the Board of Education argued that N.C.G.S. § 147-76.1 applied to payments made pursuant to the agreement on the grounds that those payments constituted "funds received by the State" in the form of a "cash gift" and that the Attorney General was required to deposit payments made pursuant to the agreement in the State treasury. After acknowledging that the General Assembly had not

4. On 18 May 2020, this Court entered an order denying the Board of Education's petition for rehearing while modifying the wording contained in Footnote No. 8 as it appeared in our original opinion. The language quoted in the text of this opinion reflects the wording change that resulted from the modification that we made to the relevant footnote. *See* 374 N.C. 260 (2020).

enacted § 147-76.1 until after the amended complaint had been filed, the Board of Education argued that appellate courts "must apply the law in effect at the time it renders its decision," citing *State v. Currie*, 19 N.C. App. 241, 243 (1973), *aff'd*, 284 N.C. 562 (1974). As a result, the Board of Education urged the Court of Appeals to hold that § 147-76.1 applied to the agreement and required the Attorney General to deposit all payments that had been received from the Smithfield companies since 1 July 2019 and all future payments received pursuant to the agreement into the State treasury.

¶ 11 In response, the Attorney General argued that, while it was "unclear if new section 147-76.1 applies to Smithfield's funding of the grant program," he would, "out of an abundance of caution," transfer the only payment that had been received from the Smithfield companies since 1 July 2019 to the State treasury and committed to ensuring that all future payments received from the Smithfield companies would be deposited into the State treasury as well. The Attorney General also asserted that N.C.G.S. § 147-76.1 had "no effect on the only claim that the [Board of Education had] assert[ed] in its complaint," which was that payments made pursuant to the agreement were "subject to [the civil penalties clause] of the Constitution and must go to the Civil Penalty and Forfeiture Fund." For that reason, the Attorney General contended that "[n]othing about the enactment of section 147-76.1 or the deposit of the funding for the grant program into the state treasury" altered this Court's decision with respect to the civil penalties issue, so that "this case [was] over," and that, by asking the Court of Appeals to "apply" § 147-76.1 to this case, the Board of Education was asking the Court of Appeals "to do nothing less than resolve a new claim" that was completely unrelated to the claim asserted in the amended complaint despite the fact that "no such claim [had been] pleaded" in the Board of Education's amended complaint.

¶ 12 In addition, the Attorney General contended that, even if any claim that the Board of Education might assert pursuant to N.C.G.S. § 147-76.1 was properly before the Court of Appeals, that claim lacked merit. More specifically, the Attorney General contended that the Board of Education lacked standing to assert a claim pursuant to § 147-76.1 on the theory that, unlike article IX, section 7, of the North Carolina Constitution, § 7, N.C.G.S. § 147-76.1 did not confer any "financial interest" upon the Board of Education, with "some generalized grievance about the operation of the grant program" being insufficient to support the assertion of a claim pursuant to 147-76.1. Moreover, the Attorney General argued that a decision to deposit funds received pursuant to the agreement into the State

treasury would have no effect upon the operation of the grant program because § 147-76.1(b) expressly provided that "the terms of an instrument evidencing a cash gift or donation are a binding obligation of the State." For that reason, the Attorney General contended that the terms of his agreement with the Smithfield companies, including the provisions giving him the authority to administer the grant program, remained in effect even after the funds provided pursuant to the agreement had been deposited into the State treasury. Finally, the Attorney General claimed that, in the event that the Board of Education was merely seeking to have funds received pursuant to the agreement deposited into the State treasury, any such claim had been rendered moot by virtue of the fact that the relevant funds had already been placed there.

¶ 13 On 15 December 2020, a divided panel of the Court of Appeals filed an opinion in which it reversed the trial court's summary judgment order and remanded this case to Superior Court, Wake County, for the entry of an order compelling the Attorney General to transfer "all funds presently held" and "all funds received under the [a]greement in the future" into the State treasury as required pursuant to N.C.G.S. § 147-76.1. *New Hanover Cty. Bd. of Educ. v. Stein*, 275 N.C. App. 132, 141 (2020). After noting that this Court had remanded this case to the Court of Appeals for "any additional proceedings not inconsistent with this opinion" and that compliance with this instruction "include[d] determination of the applicability of [§ 147-76.1]," the Court of Appeals concluded that it was entitled to resolve the issue posited in the Board of Education's supplemental brief on the merits without the necessity for a remand to Superior Court, Wake County, given that "[n]either party asserts there are any disputed facts" and that the issue of the applicability of § 147-76.1 to the monies that the Attorney General received pursuant to the agreement raised "purely a question of law." *Id.* at 136–38.

¶ 14 In reaching this conclusion, the Court of Appeals began by observing that the Attorney General had agreed that he had accepted the funds that had been made available pursuant to the agreement on behalf of the State and that N.C.G.S. § 147-76.1 provided that "all funds received by the State, including cash gifts and donations, shall be deposited into the State treasury." *Id.* at 137; § 147-76.1(b). In light of that set of facts, the Court of Appeals concluded that "[t]he statute clearly mandates these are public funds, [that] they belong to taxpayers of the State, and [that they] are required 'to be deposited into the State treasury.' " *Stein*, 275 N.C. App. at 137 (quoting § 147-76.1(b)). According to the Court of Appeals, the fact that § 147-76.1 had not been enacted until after the filing of the amended complaint had no bearing upon the proper resolution of this

case given that the Attorney General did not raise this issue on appeal and that, in any event, "[o]ur courts have held[ ] '[t]he general rule is an appellate court *must* apply the law in effect at the time it renders its decision.' " *Id.* (quoting *Currie*, 19 N.C. App. at 243). After acknowledging that current law should not be applied in the event that doing so "would result in manifest injustice or there is a statutory direction or legislative history to the contrary," *Bradly v. Sch. Bd. of Richmond*, 416 U.S. 696, 711 (1974), the Court of Appeals noted that the Attorney General had not argued that applying § 147-76.1 to the facts of this case would be manifestly unfair and that there was no "legislative history to indicate that [§ 147-76.1] does not apply to these admittedly public funds." *Stein*, 275 N.C. at 137.

¶ 15 The Court of Appeals rejected the Attorney General's contention that the Board of Education's claim pursuant to N.C.G.S. § 147-76.1 represented a new claim for relief that had not been alleged in the amended complaint on the grounds that "[t]he Board's allegations are sufficient to provide the Attorney General with notice of the transactions and occurrences showing entitlement to relief and is well within the scope of [the Court of Appeals'] jurisdiction." *Id.* In support of this determination, the Court of Appeals pointed out that pleadings only needed 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," N.C.G.S. § 1A-1, Rule 8(a), so that "[t]he only question is whether the complaint 'gives notice of the events and transactions' that allows 'the adverse party to understand the nature of the claim.' " *Stein*, 275 at 138 (quoting *Haynie v. Cobb*, 207 N.C. App. 143, 149 (2010)). In addition, the Court of Appeals directed the parties' attention to N.C.G.S. § 1A-1. Rule 54(c), which provides that "every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings[,]" N.C.G.S. § 1A-1, Rule 54(c), and this Court's opinion in *Holloway v. Wachovia Bank & Trust Co.*, in which we held that "[t]he prayer for relief does not determine what relief ultimately will be awarded" but that, "[i]nstead, the court should grant the relief to which a party is entitled, whether or not demanded in his pleading," 339 N.C. 338, 346 (1994). As a result, the Court of Appeals held that, "[i]f the party makes a demand for relief, it is 'not crucial that the wrong relief has been demanded' " given that the purpose of Rule 54(c), "is to provide 'whatever relief is supported by the complaint's factual allegations and proof at trial.' " *Stein*, 275 N.C. at 138 (quoting *Holloway*, 339 N.C. at 346).

¶ 16 In applying these legal principles to the facts of this case, the Court of Appeals stated that "[t]he Board's original prayer for relief seeks deposit of [the funds received pursuant to the agreement] into the State treasury in the Civil Penalty and Forfeiture Fund," that the Smithfield companies are "depositing $2 million dollars of admittedly public funds per year into a private bank account for public environmental purposes," and that, "under the [a]greement, the Attorney General purports to exercise sole authority to allocate and distribute these sums to his chosen recipients." *Id.* at 139. In addition, the Court of Appeals noted that the Board of Education had "requested a preliminary and permanent injunction against the Attorney General to prevent future distribution of these funds" and alleged that there was "a current and ongoing course of future payments of public funds under the [a]greement." *Id.* According to the Court of Appeals,

> [w]hether the funds should be deposited into the State treasury for further appropriation and distribution or be earmarked for the Civil Penalty and Forfeiture Fund is immaterial as juxtaposed with deposits of public funds into a private bank account with distributions therefrom and recipients thereof within the Attorney General's sole discretion and control.

Id. As a result, the Court of Appeals held that the allegations contained in the amended complaint sufficed to state a claim for relief pursuant to N.C.G.S. § 147-76.1. *Id.*

¶ 17 In addition, the Court of Appeals noted that it had recently held that the General Assembly, rather than the Governor, had the authority to decide how certain federal block grant awards should be spent; that "North Carolina courts have not permitted members of the executive branch to exercise unbridled appropriation or expenditure of unbudgeted public funds"; and that N.C.G.S. § 147-76.1 "mandates the location and depository where the public money is to be deposited and held." *Stein*, 275 N.C. App. at 140 (citing *Cooper v. Berger*, 268 N.C. App. 468 (2019), *aff'd* 376 N.C. 22 (2020)). In light of that set of circumstances, the Court of Appeals concluded that "[t]he State Treasurer must receive, hold, and account for the disbursement of these funds in accordance with the stated environmental purposes of the [a]greement" and that " '[n]o money shall be drawn from the State treasury but in consequence of appropriations made by law . . . .' " *Id.* (quoting N.C. Const. art. V, § 7(1)). As a result, the Court of Appeals reversed the trial court's summary judgment order and remanded this case to Superior Court, Wake County, "for entry of an order to compel [the Smithfield companies] and

the Attorney General to transfer and deposit all funds presently held and those to be paid and received from [the Smithfield companies] under the [a]greement in the future into the State treasury in compliance with [§ 147-76.1]." *Id.* at 141.[5]

¶ 18 In dissenting from the Court of Appeals' decision, Judge Bryant concluded that the Board of Education lacked standing to assert a claim against the Attorney General pursuant to N.C.G.S. § 147-76.1. *Id.* at 142 (Bryant, J., dissenting). In Judge Bryant's view, the Board of Education had failed to advance any claim pursuant to § 147-76.1 at the time of its initial appeal, that the Board of Education could not have done so because the relevant legislation had not been enacted at that time, and that this Court had not addressed the issue at the time of its initial consideration of this case. *Id.* According to Judge Bryant, "[t]he issue raised by the Board concerning [N.C.G.S. § 147-76.1] is novel" and "is not, therefore, an 'additional proceeding' as contemplated by the Supreme Court's mandate" but is, instead, "an entirely new proceeding which a trial court of competent jurisdiction must rule on before this Court may consider arguments." *Id.* at 142–43.

¶ 19 In addition, Judge Bryant disagreed with the Court of Appeals' reliance upon N.C.G.S. § 1A-1, Rules 8 and 54(c), on the theory that "[t]he Rules of Civil Procedure apply to our trial courts," citing N.C.G.S. § 1A-1, Rule 1 ("Scope of Rules"), and that, while the appellate courts "are authorized to determine whether the trial courts properly applied the Rules of Civil Procedure," they "are not authorized to substitute those rules for the rules which govern [their] review on appeal." *Id.* at 143–44. As a result, Judge Bryant concluded that the Court of Appeals had prematurely addressed the effect of § 146-76.1 upon the funds received pursuant to the agreement and should have refused to consider that issue on ripeness grounds. *Id.* at 144.

¶ 20 The Attorney General and environmental intervenors noted appeals to this Court from the Court of Appeals' decision based upon Judge Bryant's dissent. In addition, the Attorney General, the environmental intervenors, and the Board of Education filed separate petitions

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5. Although the Court of Appeals remand order mandated that *all* funds presently held by the Attorney General pursuant to the agreement be deposited in the State treasury, the Board of Education acknowledges that this portion of the Court of Appeals' decision was erroneous given that the enacting legislation specified that § 147-76.1 would "appl[y] to funds received on or after" 1 July 2019 and asks that the Court refrain from affirming the Court of Appeals decision with respect to funds received by the Attorney General prior to 1 July 2019. *See* 2019 N.C. Sess. Laws 250, § 5.7.(c).

seeking discretionary review with respect to additional issues. On 14 April 2021, this Court allowed the discretionary review petitions filed by the Attorney General and the Board of Education while dismissing the environmental intervenors' discretionary review petition as moot.

II. Substantive Legal Analysis

A. Standard of Review

¶ 21 This Court reviews decisions of the Court of Appeals for errors of law. N.C. R. App. P. 16(a); *State v. Melton*, 371 N.C. 750, 756 (2018). In determining whether a complaint states a claim for which relief can be granted, we use a de novo standard of review, taking as true the factual allegations contained in the complaint. *See, e.g.*, *Krawiec v. Manly*, 370 N.C. 602, 604 (2018) (taking as true the factual allegations contained in a complaint in reviewing an order concerning a motion to dismiss for failure to state a claim for which relief can be granted pursuant to N.C.G.S. § 1A-1, Rule 12(b)(6)); *see also Leary v. N.C. Forest Prods., Inc.*, 157 N.C. App. 396, 400 (2003), *aff'd per curiam*, 357 N.C. 567 (2003) (holding that appellate courts "must conduct a *de novo* review of the pleadings to determine their legal sufficiency and to determine whether the trial court's ruling on the motion to dismiss was correct").

B. The Board's Complaint

¶ 22 An analysis of the extent to which the Board of Education's amended complaint states a claim for relief pursuant to N.C.G.S. § 147-76.1 must begin with an examination of N.C.G.S. § 1A-1, Rule 8, which provides that a pleading must contain (1) "[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" and (2) "[a] demand for judgment for the relief to which [the plaintiff] deems himself entitled." As we have previously stated, "when the allegations in the complaint give sufficient notice of the wrong complained of[,] an incorrect choice of legal theory should not result in dismissal of the claim if the allegations are sufficient to state a claim under *some* legal theory." *Stanback v. Stanback*, 297 N.C. 181, 202 (1970) (emphasis added), *overruled on other grounds by Dickens v. Puryear*, 302 N.C. 437, 448 (1981); *see also Sutton v. Duke*, 277 N.C. 94, 100 (1970). "[T]he policy behind notice pleading is to resolve controversies on the merits, after an opportunity for discovery, instead of resolving them based on the technicalities of pleadings." *Ellison v. Ramos*, 130 N.C. App. 389, 395 (1998). In evaluating whether a complaint adequately states a claim for relief for purposes of N.C.G.S. § 1A-1, Rule 12(b)(6), we take the

allegations in the complaint as true and draw all reasonable inferences in the plaintiff's favor. *N.C. Consumers Power, Inc. v. Duke Power Co.*, 285 N.C. 434, 439 (1974); *see also Kaleel Builders, Inc v. Ashby*, 161 N.C. App. 34, 37 (2003) (noting that, in reviewing a trial court's decision to dismiss a claim for failure to state a claim for which relief can be granted pursuant to N.C.G.S. § 1A-1, Rule 12(b)(6), "we read all allegations in the light most favorable to plaintiff").

¶ 23 In seeking to persuade us that the amended complaint fails to state a claim for relief pursuant to N.C.G.S. § 147-76.1, the Attorney General argues that, even though the applicable standard of review is a liberal one, it "does not relieve plaintiffs of the burden of making factual allegations that provide defendants with sufficient notice of the specific claims that plaintiffs might assert." In support of this assertion, the Attorney General directs our attention to *Sutton*, in which we recognized that the General Assembly intended "to require a more specific statement, or notice in more detail" by enacting N.C.G.S. § 1A-1, Rule 8, compared to the requirements of Rule 8(a)(2) of the Federal Rules of Civil Procedure. *Sutton*, 277 N.C. at 100.

¶ 24 According to the Attorney General, the amended complaint failed to provide notice that the Board of Education was asserting a claim pursuant to N.C.G.S § 147-76.1, which had been enacted three years after the filing of the amended complaint, or any other claim relating to the location in which funds provided under the agreement were being deposited other than the Civil Penalties and Forfeiture Fund. On the contrary, the Attorney General argues that "the only ground that the Board identifies that provides it with standing to sue the Attorney General relates to a claim under the civil-penalty clause" of the state constitution. More specifically, the Attorney General notes that the factual allegations set out in the amended complaint revolve around the Board of Education's contention that the payments that the Smithfield companies had made pursuant to the agreement constituted civil penalties and that the only relief that the Board of Education had requested was that the payments that the Smithfield companies had made pursuant to the agreement should be deposited in the Civil Penalties and Forfeiture Fund. In the Attorney General's view, the absence of any allegation that the funds provided by the Smithfield companies under the agreement were being held outside the State treasury necessitated a conclusion that the Attorney General had not been provided with sufficient notice that the Board of Education was contending that the trial court should have ordered the Attorney General to deposit any funds that had been received pursuant to the agreement in the State treasury.

¶ 25 The Attorney General asserts that the Court of Appeals' reliance upon N.C.G.S. § 1A-1, Rule 54(c), which directs trial courts to award a prevailing party the relief to which it was entitled "even if the party has not demanded such relief in its pleadings," has no bearing upon the proper resolution of this case given that "it is 'well-settled' that relief granted under Rule 54 'must be consistent with the claims pleaded.' " *N.C. Nat'l Bank v. Carter*, 71 N.C. App. 118, 121 (1984)). In the Attorney General's view, the Board of Education's request for relief in the form of an order that funds paid by the Smithfield companies pursuant to the agreement be deposited in the State treasury was not consistent with its original claim that the monies that the Smithfield companies had paid pursuant to the agreement violated article IX, section 7, of the North Carolina Constitution given that "a violation of the civil-penalty clause cannot be remedied simply by placing the proceeds of civil penalties into the state treasury."

¶ 26 In seeking to convince us that the amended complaint did, in fact, sufficiently allege a claim for relief predicated upon N.C.G.S. § 147-76.1, the Board of Education contends that it had "allege[d] that the Attorney General [was] receiving and disbursing State funds." According to the Board of Education, a complaint should not be dismissed simply because it fails to cite the statutory provision upon which the claim that it asserts rests and that a complaint is sufficient in the event that it alleges the relevant facts even though the claim being asserted is either mislabeled or not labeled at all, citing in support of that proposition *Enoch v. Inman*, 164 N.C. App. 415, 417–18 (2004). In the Board of Education's view, as long as the complaint alleges facts that give the opposing party sufficient notice to permit it to understand the nature of the claim that is being asserted, that claim has been sufficiently stated.

¶ 27 According to the Board of Education, the "elements" of a claim pursuant to N.C.G.S § 147-76.1 are "(1) receipt of State funds and (2) those funds not being deposited into the State Treasury or those funds not being properly appropriated." In the Board of Education's view, the allegation in the amended complaint that the Smithfield companies "pa[id] North Carolina and deliver[ed] to the Attorney General of North Carolina up to $2 million per year" that was "distribute[d] . . . to grant recipients for Supplemental Environmental Programs" sufficed to put the Attorney General on notice that he had improperly received and spent State money, thereby effectively informing the Attorney General that a claim has been stated pursuant to § 147-76.1 despite the absence of any reference to the relevant statutory provisions in the relevant pleading. Similarly, the Board of Education argues that the amended complaint

sufficiently requests that the funds that the Smithfield companies provided under the agreement be deposited in the State treasury on the theory that a trial court should provide "whatever relief is supported by the complaint's factual allegations and proof at trial." *Holloway*, 339 N.C. at 346. As a result, the Board of Education contends that, since the factual allegations set out in the amended complaint show that it is entitled to relief pursuant to § 147-76.1, the Court of Appeals appropriately ordered the Attorney General to deposit funds received pursuant to the agreement into the State treasury.

¶ 28 In an amicus curiae brief submitted in support of the Board of Education, Professor Marcus Gadson of the Campbell Law School argues that "the policy behind the notice theory of the present [pleading] rules is to resolve controversies on the merits, following opportunity for discovery, rather than resolving them on technicalities of pleading." *Smith v. City of Charlotte*, 79 N.C. App. 517, 528 (1986). According to Professor Gadson, the Board of Education's allegation that "the Attorney General ha[d] distributed [the funds provided the Smithfield companies] to grant recipients" was, in the event that all reasonable inferences are made in the Board of Education's favor, sufficient to "suggest[] that the Attorney General has taken the funds and then given them to grant recipients without the intermediate step of putting the money in the [State] treasury first." In addition, Professor Gadson claims a complaint is "not insufficient because it does not provide facts to expressly correspond to each element of a . . . claim" and that the proper test for determining the sufficiency of a complaint is "whether it is clear from the complaint's face that the [plaintiff] can never satisfy each element." Finally, Professor Gadson contends that a complaint should survive a dismissal motion in the event that "no insurmountable bar to recovery on the claim alleged appears on the face of the complaint and where the allegations contained therein are sufficient to give a defendant notice of the nature and basis of plaintiffs' claim so as to enable him to answer and prepare for trial." *Forbis v. Honeycutt*, 301 N.C. 699, 702 (1979). According to Professor Gadson, the Board of Education's complaint passes muster in light of these criteria.

¶ 29 We agree with the Attorney General that the Board of Education's amended complaint did not suffice to state a claim for relief pursuant to N.C.G.S. § 147-76.1. The fundamental flaw in the arguments advanced by both the Board of Education and Professor Gadson is their reliance upon decisions addressing the role of the *trial court* in evaluating the sufficiency of pleadings. In *Enoch*, for example, the *trial court* dismissed a complaint alleging racial discrimination by a local government employee

on the grounds that the plaintiff had based her claim on the Fourteenth Amendment to the United States Constitution rather than 42 U.S.C. § 1983, which is the means by which relief can be sought for federal constitutional violations by state and local government officials. *Enoch*, 164 N.C. App. at 417. Similarly, the issue before the Court in *Holloway* was whether the plaintiffs' failure to explicitly request an award of punitive damages in their prayer for relief precluded the recovery of such damages even though the factual allegations set out in the complaint and evidence elicited *at trial* supported an award of punitive damages. *Holloway*, 339 N.C. at 342. Finally, in *N.C. Consumer Power*, upon which Professor Gadson relies for the "cardinal principle that the Court should give the Board the benefit of all reasonable inferences when evaluating the complaint," this Court was faced with whether the *trial court* had erroneously denied the defendant's dismissal motion in the face of an assertion that the plaintiff had failed to allege the existence of a justiciable controversy. 285 N.C. at 439.

¶ 30 In this case, however, the trial court was never asked to consider whether the Board of Education's complaint sufficed to state a claim pursuant to N.C.G.S. § 147-76.1 and could not have done so because the relevant statutory provision *did not exist* at the time that the trial court decided to grant summary judgment in the Attorney General's favor. As a result, this case does not involve "mislabel[ing]" or a "fail[ing] to label" a claim properly; instead, the Board of Education could not have asserted a claim based upon § 147-76.1 before the trial court because the amended complaint was filed years before the relevant statutory provision was enacted. In other words, the Court of Appeals lacked the authority to address and decide a wholly new claim that had been asserted for the first time on remand from this Court's initial decision. As Judge Bryant recognized in her dissenting opinion, "[t]he Rules of Civil Procedure apply to our trial courts" and "[w]e are not authorized to substitute those rules [for the rules that] govern our review on appeal[,]" i.e., the North Carolina Rules of Appellate Procedure. *Stein*, 275 N.C. App. at 143–44.

¶ 31 Although the Board of Education argues that it did not mislabel the claims that it asserted against the Attorney General "[b]ecause the law changed while [its] appeal was pending," it cites no authority in support of the proposition that a plaintiff may assert for the first time in the appellate division that a complaint alleges the existence of a cause of action that did not exist at the time the plaintiff filed his or her complaint in the trial division. Aside from the chaotic conditions that could result in the appellate courts in the event that the procedures utilized by the

Court of Appeals in this case became commonplace, allowing such a result to occur would effectively deprive the trial court of the ability to perform its primary role—either through the judge or a jury—as the finder of fact, since the trial court would not have had the opportunity to decide the issue of whether the record contains sufficient factual support for the proposed claim for relief. *See Carolina Power & Light Co. v. City of Asheville*, 358 N.C. 512, 517 (2004) (stating that, "[o]n appeal, this Court is bound by the facts *found by the trial court* if supported by the evidence") (emphasis added); *Nate v. Ethan Allen*, 199 N.C. App. 511, 521 (2009) (noting that "[i]t is not the role of the appellate courts to make findings of fact."); *see also Winston Affordable Hous., LLC v. Roberts*, 374 N.C. 395, 403–04 (2020) (remanding a case to the trial court for additional factfinding after determining that the trial court had erroneously concluded that the plaintiff had waived the right to assert certain breach of contract claims).

¶ 32 In addition, the Court of Appeals' decision cannot be sustained upon the basis of the legal theory upon which the Board of Education has relied in attempting to persuade us to affirm that decision. As this Court has previously held, "[u]nder the notice theory of pleading a statement of a claim is adequate if it gives sufficient notice of the claim asserted *to enable the adverse party to answer and prepare for trial . . .* and to show the type of case brought." *Sutton*, 277 N.C. at 102 (emphasis added). Although "the concept of notice pleading is liberal in nature, a complaint must nonetheless state enough to give the substantive elements of a *legally recognized claim*." *Estate of Savino v. Charlotte-Mecklenburg Hospital Authority*, 375 N.C. 288, 297 (2020) (emphasis added) (quoting *Raritan River Steel Co. v. Cherry, Bekaert & Holland*, 322 N.C. 200, 205 (1988)). In spite of the fact that the amended complaint sufficed to put the Attorney General on notice that the Board of Education contended that he had violated article IX, section 7, of the North Carolina Constitution, we are completely unable to see how the allegations set out in the amended complaint would have permitted the Attorney General to "prepare for trial" with respect to a claim that did not, at that time, exist or how the Board of Education could have pled or proved the elements of a "legally recognized claim" based upon a statutory provision that had not yet been enacted or even proposed.

¶ 33 In addition, after carefully analyzing the allegations set out in the amended complaint and after assuming, without in any way deciding, that the Board of Education has properly stated the elements of any claim for relief that might be available to it pursuant to N.C.G.S. § 147-76.1, we conclude that the Board of Education would have been

required to allege that the Attorney General had failed to deposit the funds that the Smithfield companies have paid in accordance with the agreement into the State treasury. The amended complaint is, however, completely devoid of any such allegation. Instead, the amended complaint simply alleges that the Attorney General had failed to deposit the relevant funds into the Civil Penalty and Forfeiture Fund, which is an entirely different kettle of fish. In addition, any contention that the allegation in the amended complaint that "the Attorney General has distributed these sums to grant recipients for Supplemental Environment[al] Programs" necessarily "suggests that the Attorney General has taken the funds and then given them to grant recipients without the intermediate step of putting the money in the treasury first" involves a logical leap that we are unable to take and rests upon an after-the-fact attempt to imply the existence of a factual allegation that would not have had any bearing upon the claim that the Board of Education actually asserted in the amended complaint had it been made.

¶ 34 The Court of Appeals' determination that the amended complaint suffices to assert a claim for relief pursuant to N.C.G.S § 147-76.1 seems even more dubious when one considers that the original cause of action that the Board of Education asserted in the amended complaint was constitutional, rather than statutory, in nature. In *Enoch*, the Court of Appeals determined that the factual allegations underlying the plaintiff's claim that a local employee had violated her federal constitutional rights in contravention of the Fourteenth Amendment sufficed to support a claim for relief pursuant to 42 U.S.C. § 1983, a statute that provides the exclusive remedy for the infringement of federal constitutional rights by a state or local employee. *Enoch*, 164 N.C. App. at 418–19; *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 731 (1989). Simultaneously, however, the Court of Appeals rejected the plaintiff's contention that her complaint sufficed to state a claim for relief pursuant to 42 U.S.C. § 1981, which confers upon "[a]ll persons within the jurisdiction of the United States" the right to enter into and enforce contracts and to the "full and equal benefit of all laws and proceedings for the security of persons and property . . . ," reasoning that "the wrong complained of" in the complaint was repeatedly characterized as resting upon an alleged violation of the plaintiff's federal constitutional rights, with there being "no indication" that the plaintiff was attempting to enforce a statutory right pursuant to 42 U.S.C. § 1981. Id. at 428–29 (quoting *Stanback*, 297 N.C. at 202). Similarly, the "wrong complained of" in the amended complaint is an alleged violation of the Board of Education's constitutional rights as a beneficiary of the Civil Penalties and Forfeitures Fund, into which it believed that the funds provided by the Smithfield companies

under the agreement had to be deposited, with there being "no indication" that the Board of Education sought to enforce any substantive right pursuant to § 147-76.1 (to the extent that it had the ability to assert such a claim at all)[6] or any other statutory provision.

¶ 35 Furthermore, we reject the Court of Appeals' determination that it was entitled to consider the applicability of N.C.G.S. § 147-76.1 on remand because "[t]he general rule is that an appellate court must apply the law in effect at the time it renders its decision." *Currie*, 19 N.C. App. at 243. The language upon which the Court of Appeals relied in making this statement is derived from the decision of the Supreme Court of the United States in *Thorpe v. Housing Authority of Durham*, in which the Supreme Court considered whether a regulation that had been promulgated by the Department of Housing and Urban Development, which required that a tenant facing eviction from a federally assisted housing project be provided with notice of the reasons for the proposed eviction and an opportunity to respond to the allegations upon which the proposed eviction rested, applied to eviction proceedings that had been initiated before the regulation took effect. 393 U.S. 268, 269–70 (1969). In addressing this issue, the Supreme Court quoted Chief Justice John Marshall for the proposition that, "if subsequent to the judgment and before the decision of the appellate court, a law intervenes and *positively changes the rule which governs*, the law must be obeyed, or its obligation denied." *Id.* at 282 (emphasis added) (quoting *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1801)). The principle stated in *Thorpe* upon which the Court of Appeals relied in *Currie* and in this case has no application here.

¶ 36 The issue that the Board of Education attempted to raise in the amended complaint was whether payments made by the Smithfield companies in accordance with the agreement constituted civil penalties for purposes of article IX, section 7, of the North Carolina Constitution, which is an issue that this Court definitively resolved in its earlier decision in this case. As far as we have been able to ascertain, nothing in N.C.G.S. § 147-76.1 "positively changes the rule which governs" the

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6. As we have already discussed, the Board of Education has failed to cite any authority tending to suggest that it has any substantive rights under or the ability to assert a claim pursuant to § 147-76.1. Although we do not reach the question of the Board of Education's standing to assert a claim against the Attorney General pursuant to § 147-76.1, the absence of statutory language authorizing the Board of Education to assert such a claim casts further doubt upon the validity of its argument that the allegations that it made in support of the state constitutional claim asserted in the amended complaint sufficed to support a separate state statutory claim.

proper resolution of the civil penalties issue. For that reason, nothing in *Currie* or the decisions upon which it relies provides any support for a determination that the enactment of a statute during the pendency of an appeal that does not have any direct bearing upon the proper resolution of the issue that is before the appellate court on appeal allows a party to assert a completely new claim for the first time in an intermediate appellate court on remand from the decision of a state court of last resort. As a result, the enactment of § 147-76.1 does not constitute a change in the applicable legal principles governing the claim asserted in the amended complaint that was addressed in the first round of appellate decisions in this case.

¶ 37 Our decision to reverse the Court of Appeals and order the reinstatement of the trial court's original summary judgment order does not, contrary to the contentions that have been advanced by the Board of Education and Professor Gadson, completely deprive the Board of Education of the ability to assert any claim that might be available to it pursuant N.C.G.S. § 147-76.1. Instead, the Board of Education remains free under our decision in this case to file a new complaint in the Trial Division of the General Court of Justice asserting any claims that might otherwise be available to it pursuant to § 147-76.1 or any other statutory provision. *See Stein*, 275 N.C. App. at 144 (Bryant, J., dissenting) (noting that "the appropriate venue for the Board's claim under [§ 147-76.1] is the trial court."). Instead, our decision in this case reflects nothing more than a recognition that the Board of Education is not free to raise a completely new claim for the first time on appeal from a trial court order granting summary judgment in favor of the opposing party, a result that reaffirms the long-standing principle that a party cannot "swap horses between courts in order to get a better mount in the Supreme Court." *Weil v. Herring*, 207 N.C. 6, 10 (1934). As a result, we hold that the Court of Appeals erred by considering and granting the Board of Education's request for relief pursuant to N.C.G.S. § 147-76.1.

¶ 38 We are unable to conclude our consideration of this case without taking notice of the unusual procedural posture in which it arrived at this Court. After "revers[ing] the decision of the Court of Appeals and remand[ing] this case to the Court of Appeals for any additional proceedings not inconsistent with [that] opinion[,]" in our original decision, *Stein*, 374 N.C. at 124, we stated in a footnote that,

> [a]lthough 2019 N.C. Sess. Laws 250, § 5.7.(c) provided that newly-enacted N.C.G.S. § 147-76.1 became effective on 1 July 2019, and would be applicable to all funds received on or after that date, the parties agreed that

> the provisions of newly-enacted N.C.G.S. § 147-76.1 would not have the effect of mooting this appeal. As a result, we will refrain from attempting to construe N.C.G.S. § 147-76.1 or to apply its provisions to the facts of this case. We express no opinion as to what effect, if any, N.C.G.S. § 147-76.1 has on the agreement or on any past or future payments made thereunder.

Id. at 260.[7] On remand, the Court of Appeals determined that the language contained in this footnote had "remanded to [the Court of Appeals] the task of determining additional proceedings regarding [§ 147-76.1]." *Stein*, 275 N.C. App. at 139. In reaching this conclusion, the Court of Appeals misapprehended the purpose for which we included Footnote No. 8 in our original opinion. Instead of requesting the Court of Appeals to consider any issues relating to § 147-76.1 on remand, Footnote No. 8 simply acknowledged the enactment of § 147-76.1 while expressing no opinion concerning the manner in which that newly enactment statutory provision should be construed or applied with respect to funds received from the Smithfield companies pursuant to the agreement. Although this Court does, on occasion, remand cases to the lower courts for the consideration of additional issues, *see, e.g.*, *Farm Bureau v. Cully's Motorcross Park*, 366 N.C. 505, 514 (2013) (noting that, "[w]hen this Court implements a new analysis to be used in future cases, we may remand the case to the lower courts to apply that analysis"), we did not take any such step in this case and clarify that, in the event that we remand a case to the Court of Appeals or a trial court "for further proceedings not inconsistent with [its] opinion," such language should not be interpreted as an invitation to consider new claims that are unrelated to any contention that had been advanced before this Court, the Court of Appeals, or the trial court to that point in the litigation.

III. Conclusion

¶ 39 Thus, for the reasons set forth above, we hold that the Court of Appeals erred by concluding that the Board of Education's amended complaint sufficed to support a claim for relief pursuant to N.C.G.S. § 147-76.1 and remanding this case to Superior Court, Wake County, for the entry of an order requiring compliance with the Court of Appeals' interpretation of that newly enacted statutory provision. In light of this determination, we need not address the other arguments that have been

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7. See Footnote 4 above.

advanced for our consideration by the parties. As a result, we reverse the decision of the Court of Appeals and remand this case to the Court of Appeals for further remand to Superior Court, Wake County, with instructions to reinstate the trial court's order granting summary judgment in favor of the Attorney General.

REVERSED AND REMANDED.

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

LORETTA NOBEL
v.
FOXMOOR GROUP, LLC, MARK GRIFFIS, AND DAVE ROBERTSON

No. 337A20

Filed 11 February 2022

Unfair Trade Practices—in or affecting commerce—solicitation of investments—single market participant

Plaintiff was not entitled to protection under the Unfair and Deceptive Trade Practices Act where defendant encouraged her to loan money to his company—based on representations of the strength of the business and a promise to provide health insurance—and then reneged on the promissory note that was issued, because soliciting funds to raise capital did not constitute a business activity in or affecting commerce. The investment interactions related to the internal operations of the company and occurred solely within a single market participant.

Justice EARLS dissenting.

Justice HUDSON joins in this dissenting opinion.

Appeal pursuant to N.C.G.S. § 7A–30(2) from the decision of a divided panel of the Court of Appeals, 272 N.C. App. 300, 846 S.E.2d 761 (2020), affirming in part and reversing in part a judgment entered 30 November 2018 by Judge Charles H. Henry in Superior Court, New Hanover County. Heard in the Supreme Court 4 October 2021.

Amanda B. Mason and Sarah C. Thomas for plaintiff-appellant.

James E. Lea, III, for defendant-appellee.

BERGER, Justice.

¶ 1 On November 30, 2018, the trial court, sitting without a jury, determined that defendant had violated the North Carolina Unfair or Deceptive Trade Practices Act (the Act). On July 7, 2020, a divided panel of the Court of Appeals reversed the trial court's decision as to plaintiff's claims under the Act. *Nobel v. Foxmoor Grp., LLC*, 272 N.C. App. 300, 846 S.E.2d 761, *review denied in part*, 375 N.C. 495, 847 S.E.2d 884 (2020).[1] Plaintiff appeals to this Court pursuant to N.C.G.S. § 7A-30(2), arguing that the Court of Appeals erroneously concluded plaintiff's claims were beyond the scope of the Act. Upon review, we affirm the decision of the Court of Appeals.

I. Factual and Procedural Background

¶ 2 In November 2010, Dave Robertson (defendant)[2] and Mark Griffis formed Foxmoor Group, LLC (Foxmoor). The business was intended to operate as a trucking company, and Foxmoor's annual report filed with the Secretary of State listed the nature of the business as "agricultural and transportation." Griffis and defendant were the sole members and managers of Foxmoor.

¶ 3 In an effort to raise capital for the newly formed company, Griffis and defendant reached out to plaintiff and encouraged her to invest in Foxmoor. Plaintiff was a personal friend of Griffis and defendant. The three interacted in various social and professional settings, and Griffis and defendant assisted plaintiff financially at one point. On December 12, 2011, plaintiff emailed Griffis to further inquire about "how an investment [in Foxmoor] might work." Griffis subsequently notified plaintiff of an opportunity to invest either $75,000 or $150,000 in the company. Plaintiff informed Griffis and defendant that she was only able to invest $25,000 at that time. The parties agreed, and plaintiff sent a personal

1. Defendant Robertson petitioned this Court for discretionary review pursuant to N.C.G.S. § 7A–31. Defendant's petition was denied, and the only issue before this Court is plaintiff's appeal based upon a dissent at the Court of Appeals.

2. Only defendant filed a timely notice of appeal from the trial court to the Court of Appeals. As to the other two original defendants, Griffis and Foxmoor Group, LLC, their appeals were dismissed by order of the Court of Appeals on January 31, 2020. Accordingly, the claims against defendant Robertson are the only claims on appeal before this Court.

check addressed to "Foxmoor Transport" on January 9, 2012. Although there is no evidence that a promissory note was executed by the parties at that time, the check from plaintiff to Foxmoor had the word "loan" written in the memo line. Plaintiff received payments of $3,510 in March, April, and May 2012, towards satisfaction of the $25,000 loan.

¶ 4 Griffis and defendant met with plaintiff throughout April and May 2012, and they informed plaintiff that the company had been performing well. Griffis and defendant offered plaintiff an opportunity to make an additional $75,000 investment in Foxmoor. On May 24, 2012, plaintiff agreed to provide an additional $75,000 investment in Foxmoor. Plaintiff again sent a personal check made out to "Foxmoor Group, LLC" with "investment" written in the memo line.

¶ 5 Also on May 24, 2012, Griffis executed a promissory note evidencing indebtedness to plaintiff for "the principal sum of $75,000, together with interest of $93,000." The promissory note required Foxmoor to make monthly payments to plaintiff to satisfy the debt beginning on July 1, 2012. Additionally, and in light of their personal friendship, Griffis included an attachment to the promissory note extending health insurance to plaintiff for four years. That same day, plaintiff's $75,000 check was deposited into Foxmoor's account.

¶ 6 In June 2012, plaintiff received a check from Foxmoor in the amount of $7,000. Defendant advised plaintiff that half of the $7,000 amount constituted the first payment on the $75,000 loan, with the remainder being an installment of the initial $25,000 loan. Plaintiff did not receive any additional payments from defendant, Griffis, or Foxmoor, and she was not provided health insurance. When plaintiff inquired into the status of the missed payments, Griffis and defendant informed plaintiff that any further attempt to receive repayment would result in the company filing for bankruptcy. Foxmoor was administratively dissolved by the Secretary of State on March 4, 2014.

¶ 7 In December 2015, plaintiff filed the present action, alleging, *inter alia*, that defendant, Griffis, and Foxmoor, "by their conduct, acting individually and corporately, engaged in unfair and deceptive trade practices in and affecting commerce, all in violation of N.C.G.S. § 75-1, *et seq*." Following a bench trial, the trial court determined that defendant, Griffis, and Foxmoor had violated the Act and awarded treble damages in the amount of $493,500.

¶ 8 Defendant timely appealed from the trial court's judgment to the Court of Appeals. The majority of a divided panel of the Court of Appeals

reversed the portion of the trial court's judgment that allowed for plaintiff to recover under the Act. *Nobel*, 272 N.C. App. 300, 310, 846 S.E.2d 761, 768. The Court of Appeals majority reasoned that the conduct at issue related to an investment for the purpose of funding Foxmoor and therefore was not "in or affecting commerce." *Id.* Based on a dissenting opinion, plaintiff appealed to this Court, arguing that the majority opinion of the Court of Appeals erred in holding that plaintiff's claim fell outside of the purview of the Act. We disagree.

II. Analysis

¶ 9 Whether an act found to have occurred is an unfair or deceptive practice which violates N.C.G.S. § 75–1.1 is a question of law for the court. *Hardy v. Toler*, 288 N.C. 303, 308–09, 218 S.E.2d 342, 345–46 (1975).

> Ordinarily it would be for the jury to determine the facts, and based on the jury's finding, the court would then determine as a matter of law whether the defendant engaged in unfair or deceptive acts or practices in the conduct of trade or commerce. Therefore, it does not invade the province of the jury for this Court to determine as a matter of law on appeal that acts expressly found by the jury to have occurred and to have proximately caused damages are unfair or deceptive acts in or affecting commerce under N.C.G.S. § 75–1.1.

Ellis v. N. Star Co., 326 N.C. 219, 226, 388 S.E.2d 127, 131 (1990) (cleaned up).

¶ 10 Pursuant to N.C.G.S. § 75-1.1(a), "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful." N.C.G.S. § 75-1.1 (2019). This Court has stated that the purpose of North Carolina's Unfair and Deceptive Trade Practices Act is to provide

> civil legal means to maintain [ ] ethical standards of dealings between persons engaged in business, and between persons engaged in business and the consuming public within this State, to the end that good faith and fair dealings between buyers and sellers at all levels of commerce be had in this State.

Bhatti v. Buckland, 328 N.C. 240, 245, 400 S.E.2d 440, 443 (1991) (cleaned up).

¶ 11 To recover under the Act, a plaintiff must establish that: "(1) defendant committed an unfair or deceptive act or practice, (2) the action in question was in or affecting commerce, and (3) the act proximately caused injury to the plaintiff." *Dalton v. Camp*, 353 N.C. 647, 656, 548 S.E.2d 704, 711 (2001). " 'Commerce' includes all business activities, however denominated, but does not include professional services rendered by a member of a learned profession." N.C. Gen. Stat. 75-1.1(b). This Court has explained that the term " '[b]usiness activities' . . . connotes the manner in which businesses conduct their regular, day-to-day activities, or affairs, such as the purchase and sale of goods, or whatever other activities the business regularly engages in and for which it is organized." *HAJMM Co. v. House of Raeford Farms, Inc.*, 328 N.C. 578, 594, 403 S.E.2d 483, 493 (1991). "Although th[e] statutory definition of commerce is expansive, the [Act] is not intended to apply to all wrongs in a business setting." *Id.* at 593, 403 S.E.2d at 492.

¶ 12 In *HAJMM*, this Court held that the plaintiff there could not recover under the Act because the issuance of corporate securities to raise capital was not a business activity "in or affecting commerce." *Id.* at 594–95, 403 S.E.2d at 493. There, the conduct complained of involved the issuance of revolving fund certificates. *Id.* This Court held that "the legislature simply did not intend for the trade, issuance and redemption of corporate securities or similar financial instruments to be transactions 'in or affecting commerce' as those terms are used in N.C.G.S. § 75-1.1(a)[.]" *Id.* In so concluding, this Court noted that utilization of financial mechanisms for capitalization merely enable an entity to organize or continue ongoing business activities in which it is regularly engaged and cannot give rise to a claim under the Act. *Id.* Thus, actions solely connected to a company's capital fundraising are not " 'in or affecting commerce,' even under a reasonably broad interpretation of the legislative intent underlying these terms." *Id.*

¶ 13 Plaintiff attempts to distinguish *HAJMM*, arguing that the type of security used to raise capital in *HAJMM* is different than the promissory note at issue here. However, this argument overlooks the purpose for which both the security in *HAJMM* and the promissory note here were issued. In this case, as in *HAJMM*, defendant's dealings with plaintiff did not involve the normal business activity of the purported company. Instead, the transactions in both instances involved investments "to provide and maintain adequate capital for [the] enterprise." *Id.* at 593, 403 S.E.2d at 493.

¶ 14 Investments and other mechanisms associated with financing business entities are "unlike [the] regular purchase and sale of goods, or

whatever else [an] enterprise was organized to do" and "are not 'business activities' as that term is used in the Act." *Id.* at 594, 403 S.E.2d at 493. Instead, investments are "extraordinary events done for the purpose of raising capital" for a business entity to continue its business purpose and day-to-day activities. *Id.* To be sure, the nature of the personal relationship between the parties and defendant's use of that relationship to advance his own personal gain certainly suggests bad faith on the part of defendant; however, "the [Act] is not intended to apply to all wrongs in a business setting." *Id.* at 593, 403 S.E.2d at 492. As in *HAJMM*, the underlying activity at issue here concerns a business entity's acquisition of capital. Thus, while defendant's conduct in securing the loans from plaintiff may be morally suspect, it was not "in or affecting commerce" because plaintiff's investment did not constitute a "business activity" as defined by this Court.

¶ 15 Moreover, this Court has clarified that the Act concerns two types of business transactions: "(1) interactions between businesses, and (2) interactions between businesses and consumers." *White v. Thompson*, 364 N.C. 47, 52, 691 S.E.2d 676, 679 (2010). The internal operations of a business entity are not within the purview of the Act. *Id.* at 53, 691 S.E.2d at 680 ("[T]he Act is not focused on the internal conduct of the individuals within a single market participant, that is, within a single business.") Instead, the Act's provisions seek to regulate interactions between businesses and those involving businesses and consumers. Thus, if an alleged unfair or deceptive action remains confined within a single business, the Act is inapplicable. *See Dalton*, 353 N.C. at 658, 548 S.E.2d at 712 (noting the "longstanding presumption against unfair and deceptive practices claims as between employers and employees"); *see also Sara Lee Corp. v. Carter*, 351 N.C. 27, 519 S.E.2d 308 (1999) (concluding that the unfair conduct of the defendant-employee was within the Act's coverage because it occurred outside of the employer-employee relationship).

¶ 16 In the case before us, plaintiff does not fall under either category of market participants for which the Act protects. While a personal relationship existed between plaintiff and defendant, there is no evidence that plaintiff was a consumer of Foxmoor, nor engaged in any commercial transaction with the company. *See Marshall v. Miller*, 302 N.C. 539, 543, 276 S.E.2d 397, 400 (1981) (concluding that the purpose of the Act is "to establish an effective private cause of action for aggrieved consumers in this State."). Instead, plaintiff's involvement with the company, albeit initially through her friendship with defendant, was limited to the loans she provided for the purpose of capitalization. Thus, plaintiff was an investor in Foxmoor. The investments provided by plaintiff, and any

related exchanges, concern the internal operations of Foxmoor, and plaintiff's claim is based solely on the interaction between her, as an investor, and the company's member manager. This interaction occurred entirely within a single market participant, i.e., within a single business, thus taking it outside the ambit of the Act.

¶ 17 Because the loan at issue here was a capital raising device, it was not "in or affecting commerce" for purposes of the Act. Moreover, the conduct occurred solely within a single market participant, and plaintiff, as an investor, is not a market participant protected under the Act. Accordingly, the Court of Appeals did not err in reversing the trial court with respect to plaintiff's unfair and deceptive trade practices claim.

AFFIRMED.

Justice EARLS dissenting.

¶ 18 The majority holds that when the co-founder and manager of a limited liability company repeatedly defrauds an acquaintance in an effort to convince her to invest money in the business, and then misappropriates the company's funds for his own personal use, those actions are not "unfair or deceptive acts or practices in or affecting commerce." N.C.G.S. § 75-1.1(a) (2021). To reach this conclusion, the majority adopts the curious and counterintuitive position that these actions are not "business activities" or conduct "in or affecting commerce" because they involve "[i]nvestments and other mechanisms associated with financing business entities." This premise is untethered from the UDTPA's text and is inconsistent with the General Assembly's obvious intent to protect the public from unscrupulous dealings in business interactions, which it attempted to achieve by enacting a broad "remedial statute[ ]." *Taylor v. Volvo N. Am. Corp.*, 339 N.C. 238, 258 (1994). Accordingly, I respectfully dissent.

¶ 19 In this case, plaintiff Loretta Nobel sued defendant Dave Robertson, the co-founder and co-manager of Foxmoor Group LLC (Foxmoor), a company purportedly involved in the trucking industry. Nobel alleged that Robertson repeatedly deceived her regarding the activities and health of Foxmoor, misled her about the terms of investments she was considering making in the company, and lied to her in promising that Foxmoor would provide her with health insurance and a regular stream of interest-bearing repayments in exchange for her investment. Robertson did all this in an effort to convince Nobel to give him more money, supposedly to fund Foxmoor.

¶ 20 Nobel was not a sophisticated institutional investor. She was a retiree facing "financial difficulties" who had been living in Ecuador and knew Robertson and Foxmoor's other co-founder socially. When she agreed to invest in Foxmoor, she alleges she tapped into her retirement savings account and handed over her personal credit card information. Robertson and his co-founder used portions of the funds obtained from Nobel to purchase cruise tickets, pay for cosmetic surgery, and book a stay at a luxury hotel. When Nobel expressed concern that she had not been repaid as promised, Robertson threatened bankruptcy.

¶ 21 North Carolina's Unfair and Deceptive Trade Practices Act (UDTPA) prohibits "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce." N.C.G.S. § 75-1.1(a) (2021). For the purposes of the UDTPA, the General Assembly defined "commerce" to include "all business activities, however denominated, [except] professional services rendered by a member of a learned profession." N.C.G.S. § 75-1.1(b). The UDTPA contains only one other enumerated exception, a provision excluding certain acts undertaken "in the publication or dissemination of an advertisement." N.C.G.S. § 75-1.1(c). Neither of these exceptions applies here.

¶ 22 Like all remedial statutes, the UDTPA is to "be construed liberally to accomplish the purpose of the Legislature and to bring within it all cases fairly falling within its intended scope." *Hicks v. Albertson*, 284 N.C. 236, 239 (1973). One purpose of the UDTPA, a purpose also underlying the provision allowing successful plaintiffs treble damages, is to "encourage private enforcement of violations of [the UDTPA] and to encourage settlements." *Taylor*, 339 N.C. at 257–58.

¶ 23 On its face, nothing in the UDTPA gives any reason to think that when a corporate manager acting in his capacity as a manager interacts with an independent member of the public in an effort to obtain financing to operate that company, the manager's conduct is not "in or affecting commerce." The UDTPA applies to "*all* business activities," with two statutorily defined exceptions not relevant here. N.C.G.S. § 75-1.1(b) (emphasis added). Words included in a statute are "presumed . . . to convey their natural and ordinary meaning." *In re McLean Trucking Co.*, 281 N.C. 242, 252 (1972). Surely, the "natural and ordinary meaning" of the phrase "business activit[ies]" and "in and affecting commerce" encompasses efforts to obtain the funds needed to sell goods or services for profit. Dictionaries only confirm the obvious. *See*, *e.g.*, Activity, Black's Law Dictionary (11th ed. 2019) (defining "commercial activity" as "[a]n activity, such as operating a business, conducted to make a profit"). So does reality: undergraduate and post-graduate business schools

routinely teach courses and offer concentrations in subjects like corporate finance because it is a business activity.[1]

¶ 24 The structure of the UDTPA further confirms the General Assembly's intent to sweep broadly. As previously described, the UDTPA contains two enumerated carve-outs. Typically, when the General Assembly sees fit to include specific exceptions in a statute, we presume the General Assembly did not intend to create other, unenumerated exceptions. *See*, *e.g.*, *Evans v. Diaz*, 333 N.C. 774, 779–80 (1993) ("Under the doctrine of *expressio unius est exclusio alterius*, when a statute lists the situations to which it applies, it implies the exclusion of situations not contained in the list."). There is no reason to think the General Assembly meant otherwise in choosing what activities to exempt from the purview of the UDTPA.

¶ 25 Admittedly, this Court departed somewhat from the plain text of the UDTPA in *HAJMM*, where we held that the "[i]ssuance and redemption of securities are not . . . business activities" within the meaning of the UDTPA because they are "done for the purpose of raising capital in order that the enterprise can either be organized for the purpose of conducting its business activities or, if already a going concern, to enable it to continue its business activities." *HAJMM Co. v. House of Raeford Farms*, *Inc.*, 328 N.C. 578, 594 (1991). We explained that the phrase "business activities" was "a term which connotes the manner in which businesses conduct their regular, day-to-day activities, or affairs, such as the purchase and sale of goods, or whatever other activities the business regularly engages in and for which it is organized." *Id.* As then-Justice Martin noted in a vigorous dissent, the majority

> cites no authority, and our statute and cases provide none, to support its argument that "commerce" means only the "regular, day-to-day activities or affairs" of a business. The plain words of the statute state otherwise. . . . How can raising funds to operate a business not be a business activity?

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1. *See*, *e.g.*, University of North Carolina Kenan-Flagler Business School, *MBA Corporate Finance Concentration*, https://www.kenan-flagler.unc.edu/programs/mba/full-time-mba/academics/concentrations-electives/corporate-finance/; North Carolina State University, *Business Administration (BS): Finance Concentration*, http://catalog.ncsu.edu/undergraduate/management/business/business-administration-bs-finance-concentration/; Duke University Fuqua School of Business, *MBA Program* (describing concentrations in corporate finance and investments) https://areas.fuqua.duke.edu/finance/academic-programs/mba-program/; North Carolina Central University, *Business Administration*, *Financial Analytics Concentration*, *BBA*, https://www.nccu.edu/academics/undergraduate-programs/business-administration-financial-concentration-bba.

> . . . .
>
> The acquisition of capital in one form or another is the lifeblood today for business. . . . [In its holding] the majority loses touch with the reality of the business world. Limiting the meaning of "business activities" to the day-to-day affairs of the business eliminates most of the raising of business capital from the protection of the statute. The most important area of business life is no longer subject to the Act . . . . Surely this could not have been the intent of the legislature.
>
> . . . .
>
> The statute in plain words says that "commerce" includes "all business activities." *Id.* No matter how one twists it, the issuance of the certificate and defendant's refusal to redeem it were business activities within the meaning of the Act.

Id. at 596–97 (1991) (Martin, J., dissenting in part). Nevertheless, Nobel does not ask us to reconsider *HAJMM*, and the majority is correct that it remains good law.

¶ 26 Still, the majority errs in choosing to expand the holding of *HAJMM* beyond the circumstances addressed in that case, in contravention of the UDTPA's text, structure, and animating purpose. *HAJMM* involved a stock certificate issued to a limited partnership, not a promissory note offered to a non-professional individual investor. *HAJMM*, 328 N.C. at 580. This is a salient distinction. One of the primary justifications for the rule announced in *HAJMM* was the Court's belief that the General Assembly did not intend to "create overlapping supervision, enforcement, and liability in this area, which is already pervasively regulated by state and federal statutes and agencies." *Id.* at 593. Yet it is unclear whether this transaction is subject to the North Carolina Securities Act. While the existence of these regulations was "not the only basis" for the decision in *HAJMM*, *id.* at 594, the potential absence of regulatory oversight in this case risks undermining the "overall purpose" of the UDTPA which was to "supplement federal legislation, so that local business interests could not proceed with impunity." *Marshall v. Miller*, 302 N.C. 539, 549 (1981).

¶ 27 Further, the line between a company's "business purpose and day-to-day activities" and a company's efforts relating to the "acquisition of capital" is not as clear on the facts of this case as the majority suggests.

Besides stray references to "trucking" and "transportation" contained in documents Foxmoor filed with the State, it is unclear if Foxmoor ever endeavored to provide any kind of good or service to the public in an effort to earn a profit. Put another way, there is no evidence Foxmoor had any "business purpose" or "day-to-day activities" other than the "acquisition of capital" from people like Nobel.[2] To the extent Foxmoor did sell a product or service to the public, it appears to have been the (ultimately illusory) opportunity to own an income-generating asset. Robertson's conduct in selling that product to Nobel should not be immunized by his self-serving (and seemingly false) description of the nature of his business.

¶ 28 I also disagree with the majority's reliance on *White v. Thompson*, 364 N.C. 47 (2010), another case in which this Court discerned an exception to the UDTPA not immediately apparent on the face of the act. Even if *White* means that the UDTPA does not apply to actions that "remain[ ] confined within a single business," it is difficult to discern how a company receiving funding from an entirely unaffiliated investor is an "interaction occurr[ing] entirely within a single market participant." As Judge Arrowood correctly explained in his dissent below, Nobel "is neither a partner nor has any ownership stake in [Foxmoor]. Instead, [she] acted as an outside investor, and is therefore better viewed as a separate market participant." *Nobel*, 272 N.C. App. at 312. Prior to giving money to Foxmoor, Nobel had absolutely no connection to the company. She was not an owner, director, manager, or employee.[3] Further, at least some of the conduct she asserts violated the UDTPA occurred *before* she executed the promissory note—it was that conduct which induced her to invest. Thus, applying the UDTPA under these circumstances would in no way "intrude into the internal operations of a single market participant." *White*, 364 N.C. at 53.

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2. This ambiguity is not limited to companies as haphazardly operated as Foxmoor. Some companies that sell goods or services interact with consumers in ways that could fairly be characterized as both a "day-to-day activity" and an effort to "acqui[re] . . . capital"—for example, when a company accepts payment for goods or services in the form of an alternative currency it then holds as an asset on its balance sheet in the hopes that the value of the currency appreciates. *See*, *e.g.*, Anne Sraders, *Corporate crypto 101: How companies are using Bitcoin and other digital currency*, Fortune Magazine (29 July 2021), https://fortune.com/2021/07/29/companies-using-bitcoin-btc-crypto-101/.

3. By contrast, if Robertson had been sued by his co-founder, who was also Foxmoor's co-manager, the exception recognized in *White* would obviously apply.

¶ 29 In interpreting and applying *HAJMM* and *White*'s interpretation of the UDTPA, we should do our best to respect the General Assembly's decision to enact a broad remedial statute designed to protect the general public. The fact that a statute is broadly written is never itself justification for curtailing its sweep. *See, e.g.*, *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2381 (2020) ("It is a fundamental principle of statutory interpretation that absent provisions cannot be supplied by the courts. . . . This principle applies not only to adding terms not found in the statute, but also to imposing limits . . . that are not supported by the text.") (cleaned up). Here, the defendant's conduct is clearly encompassed within the plain language of the UDTPA, even as that language has been construed in our precedents. Accordingly, I respectfully dissent.

Justice HUDSON joins in this dissenting opinion.

STATE OF NORTH CAROLINA
v.
CHRISTOPHER ANTHONY CLEGG

No. 101PA15-3

Filed 11 February 2022

1. Jury—selection—Batson challenge—overruled by trial court—clear error—purposeful discrimination

The trial court's decision overruling defendant's *Batson* challenge was clearly erroneous where the totality of the evidence demonstrated it was more likely than not that the State's peremptory strike to remove an African-American woman from the jury in an armed robbery trial was improperly motivated by race. Although the trial court properly rejected the State's race-neutral reasons for striking the juror and accepted defendant's statistical evidence of peremptory strikes against Black potential jurors in this case and statewide, the trial court should have ruled for defendant when there were no race-neutral reasons remaining. In addition, the court imposed an improperly high burden of proof on defendant, considered a reason for the strike not offered by the prosecutor, and failed to consider the State's disparate questioning of comparable white and Black prospective jurors.

2. Criminal Law—Batson violation—conviction vacated—time already served—no new trial

Where the trial court improperly denied defendant's *Batson* claim—after defendant proved purposeful discrimination by the State in its use of a peremptory strike to remove an African-American woman from the jury—its order was reversed and defendant's conviction for armed robbery was vacated. However, no new trial was warranted where defendant had already served his sentence and completed post-release supervision, because N.C.G.S. § 15A-1335 prohibited the imposition of a sentence more severe than the prior sentence imposed minus time served.

Justice EARLS concurring.

Justice BERGER dissenting.

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

On discretionary review pursuant to N.C.G.S. § 7A-31 of an order entered on 15 July 2019 by Judge Paul Ridgeway in Superior Court, Wake County, based on this Court's 14 August 2018 Order, 371 N.C. 443, (2018), remanding the case to the trial court in reconsideration of defendant's *Batson* challenge and retaining jurisdiction. On 26 February 2020, the Supreme Court allowed in part defendant's supplemental petition for discretionary review. Heard in the Supreme Court on 6 October 2021.

Joshua Stein, Attorney General, by Amy Kunstling Irene, Special Deputy Attorney General for the State-appellee.

Dylan J.C. Buffum Attorney at Law, PLLC, by Dylan J.C. Buffum, for defendant-appellant.

David Weiss and Elizabeth Hambourger, for amici curiae Common Cause and Democracy North Carolina.

HUDSON, Justice.

¶ 1 Over 140 years ago, the Supreme Court of the United States held that exclusion of African Americans from juries on the basis of race violates the Equal Protection Clause of the Fourteenth Amendment of the

United States Constitution. *Strauder v. West Virginia*, 100 U.S. 303, 310 (1880). Just over a century later, in *Batson v. Kentucky*, that same Court established a three-step process through which courts analyze claims of racial discrimination in jury selection. 476 U.S. 79, 96–98 (1986); *see Foster v. Chatman*, 578 U.S. 488, 499–500 (2016) (summarizing the *Batson* process). Today, we must decide whether the prosecutor's exclusion of an African-American potential juror constitutes a substantive violation of the defendant's constitutional right to equal protection under *Batson* when the trial court found that "both race-neutral justifications offered by the prosecutor fail." We hold that it does, and therefore reverse the ruling of the trial court below, vacate defendant's conviction, and remand the case back to the trial court for any further proceedings.

I. Background

A. Jury Selection and Trial

¶ 2 On 8 April 2014, defendant Christopher A. Clegg, an African-American man, was indicted for robbery with a dangerous weapon and possession of a firearm by a felon. Beginning on 4 April 2016, defendant was tried by a jury in Wake County Superior Court, Judge Paul C. Ridgeway presiding. During jury selection, defense counsel raised a challenge under *Batson v. Kentucky* (*Batson* challenge) after the prosecutor used peremptory strikes to remove two African-American women from the jury: Viola Jeffreys and Gwendolyn Aubrey. 476 U.S. 79. In response, the prosecutor proffered race-neutral reasons for the strikes. Specifically, the prosecutor asserted that he struck Ms. Jeffreys and Ms. Aubrey "based on their body language[] and . . . their failure to look at me when I was trying to communicate with them." The prosecutor also claimed that he struck Ms. Jeffreys due to potential bias toward defendant arising from her previous employment at Dorothea Dix Hospital, and that he struck Ms. Aubrey due to her answer of "I suppose" in response to a question asking whether she could be fair and impartial. Defense counsel then argued that these reasons were pretextual. The trial court subsequently ruled that defendant had failed to establish that race was a significant factor in the peremptory strikes, and therefore overruled his *Batson* challenge. After the completion of jury selection and the resolution of a few other preliminary issues, the case proceeded to trial.

¶ 3 At trial, the State's evidence, as presented through several witnesses and exhibits, tended to show that in the early morning hours of 25 January 2014, defendant, brandishing a gun, robbed a sweepstakes business located at the Timber Landing Business Center in Garner, North Carolina. Defendant neither testified nor offered witnesses or

evidence of his own at trial. On 6 April 2016, the jury found defendant guilty of robbery with a dangerous weapon and not guilty of possession of a firearm by a felon. Defendant was sentenced to a term of sixty-six to ninety-two months' imprisonment, with credit for 767 days of pre-trial incarceration. On 8 April 2016, defendant appealed his conviction to the North Carolina Court of Appeals.

B. Court of Appeals

¶ 4 On appeal, defendant raised two issues. First, he argued that the trial court erred by overruling his *Batson* challenge. Second, he argued that the trial court erred by admitting prejudicial victim impact testimony in violation of Rules 401, 402, and 403 of the North Carolina Rules of Evidence. The State contended that the trial court had acted properly on both issues.

¶ 5 On 5 September 2017, in a unanimous, unpublished opinion, the Court of Appeals rejected both of defendant's arguments. *State v. Clegg*, 2017 WL 3863494 (N.C. Ct. App. Sept. 5, 2017) (unpublished). First, the Court of Appeals considered defendant's *Batson* challenge. The court first summarized the three-step process of a *Batson* challenge:

> First, the defendant must make a prima facie showing that the state exercised a race-based peremptory challenge. If the defendant makes the requisite showing, the burden shifts to the state to offer a facially valid, race-neutral explanation for the peremptory challenge. Finally, the trial court must decide whether the defendant has proved purposeful discrimination.

Clegg, 2017 WL 3863494 at *2 (citing *State v. Taylor*, 362 N.C. 514, 527 (2008), *cert. denied*, 558 U.S. 851 (2009)). The Court of Appeals noted, though, that "[o]nce a prosecutor has offered a race-neutral explanation for the peremptory challenges and the trial court has ruled on the ultimate question of intentional discrimination, the preliminary issue of whether the defendant has made a prima facie showing becomes moot." *Id.* (citing *State v. Bell*, 359 N.C. 1, 12 (2004)).

¶ 6 The Court of Appeals then reviewed the trial court's handling of defendant's *Batson* challenge. "Because the trial court heard the State's reasons for striking Jeffreys and Aubrey prior to making a ruling on defendant's *Batson* objections," thus rendering the preliminary issue of defendant's prima facie case moot for *Batson* purposes, the Court of Appeals moved directly to step two: reviewing the prosecution's proffered reasons for the peremptory strikes. *Id.* at *3. As a preliminary

matter, the court "note[d] that there is a discrepancy between the State's characterization of its *voir dire* of Aubrey and what the transcript reveals." *Id.* at *4. Specifically, the court noted that while the prosecutor's given rationale for striking Ms. Aubrey claimed that she had answered "I suppose" to a question about whether she could be fair and impartial, the transcript reveals that she actually gave that answer to a question about whether she was confident that she would be able to focus on the trial. Consequently, the court "review[ed] the State's argument in light of this clarification." *Id.* The court subsequently ruled that "[t]he State's concerns of both Jeffreys' and Aubrey's failure to make eye contact and their ability to be fair and focused on the trial constitute neutral explanations for each peremptory strike." Accordingly, the court found "no discriminatory intent inherent in the State's explanations and thus agree[d] with the trial court's determination that the State's justifications were race neutral." *Id.*

¶ 7 The Court of Appeals then "move[d] to the third step of the *Batson* inquiry and consider[ed] whether the trial court erred by finding that there was no *Batson* error." *Id.* at *11. Here, the court noted defendant's argument that the proffered reasoning regarding Aubrey's ability to focus was revealed as pretextual because a white juror, David Williams, also indicated that he might be distracted from the trial due to work concerns. But "[t]he distinguishing factor between Aubrey and David Williams[,]" the court ruled, "appears to be the State's additional stated bases for striking Aubrey[:] . . . her body language and failure to make eye contact." *Id.* The court likewise dismissed defendant's argument that the prosecutor's proffered reasoning for striking Ms. Jeffreys—her previous employment at Dorothea Dix, a psychiatric hospital—was pretextual. Specifically, the court ruled that because "there was a competency evaluation of defendant ordered and defense counsel stated that she had also requested an in-custody evaluation of the defendant[,] . . . the State's basis for striking Jeffreys due to her work history is rationally related to defendant's potential competency issues." *Id.* "Moreover, [the court] note[d,] . . . the State explained that it also exercised its peremptory strike on Jeffreys based on her body language and failure to make eye contact." *Id.* "As such," the court found that "defendant has failed to carry his burden of proving purposeful discrimination[,]" and therefore held that "defendant's *Batson* challenge was properly denied." *Id.* at *6.

¶ 8 Second, the Court of Appeals likewise ruled that the trial court did not commit plain error by admitting the victim impact testimony of Patrice Williams, who was present at the robbery. *Id.* at *6–7. Because defendant does not raise this issue before this Court, we do not consider

it further here. In sum, the Court of Appeals held that the trial court committed no error. *Id.* at *7.

C. Special Order and Batson Rehearing

¶ 9 On 10 October 2017, defendant filed a notice of appeal with this Court under N.C.G.S. § 7A-30(1), asserting that the case presented a substantial constitutional question under the Equal Protection Clause of the U.S. Constitution and Article I Sections 19 (equal protection) and 26 (jury service) of the North Carolina Constitution. In response, the State filed a motion to dismiss defendant's appeal for lack of a substantial constitutional question. Also on 10 October 2017, defendant filed a petition for discretionary review with this Court under N.C.G.S. § 7A-31(c), asserting that the case fulfilled all three of the statutory bases for discretionary review: (1) significant public interest; (2) legal principles of major significance to the jurisprudence of the State; and (3) conflict with a decision of the Supreme Court. In both the notice of appeal and petition for discretionary review, defendant focused exclusively on the *Batson* challenge issue.

¶ 10 On 14 August 2018, this Court responded to defendant's petition via special order. The order directed "that this case be remanded to the trial court for reconsideration of defendant's *Batson* challenge based upon the existing record and the entry of a new order addressing the merits of defendant's *Batson* challenge in light of the United States Supreme Court decision in *Foster v. Chatman*, [578] U.S. [488], 136 S. Ct. 1737, 195 L. Ed. 1 (2016), which was decided after the trial court's decision in this case." 371 N.C. 443 (2018). The order further instructed that "[a]fter the entry of the order on remand, the trial court should certify that order to this Court, which retains jurisdiction and will undertake any necessary additional proceedings at that time." That same day, this Court allowed the State's motion to dismiss defendant's notice of appeal.

¶ 11 On 17 December 2018, in accordance with this Court's order, the trial court held a new hearing regarding defendant's *Batson* challenge. Judge Ridgeway, the same judge as at the initial trial, also presided over this new *Batson* hearing. In briefing and at the hearing, defense counsel (different from original trial) and the prosecutor (same as at original trial) presented arguments regarding the application of the U.S. Supreme Court's ruling in *Foster* to defendant's *Batson* challenge.

¶ 12 First, defense counsel argued that two findings from Foster "are especially important in this case": (1) "that when a prosecutor mischaracterizes a juror's answers, this is strong evidence that the justification is, in fact, pretext[;]" and (2) "that in order to prevail in step three of

Batson, the defendant does not need to disprove each and every reason given by the prosecutor."

¶ 13 Both of these elements, defense counsel argued, relate directly to the State's striking of Ms. Aubrey. First, as noted by the Court of Appeals, defense counsel argued that the prosecutor repeatedly mischaracterized Ms. Aubrey's answers by claiming that she answered "I suppose" to a question about whether she could be fair and impartial, when she actually gave that answer to a question about whether she was confident that she would be able to focus at trial. Second, defense counsel argued that because the prosecutor's first justification for the strike was shown to be pretextual, defendant did not need to undermine every other reason provided by the prosecutor, including body language and lack of eye contact. Further, defense counsel sought to undermine the prosecutor's reliance on body language and eye contact because defense counsel at trial disputed those findings and the trial court made no contemporary findings of their veracity.

¶ 14 Next, defense counsel argued that the prosecution's proffered reasons for striking Ms. Jeffreys likewise fall short. Regarding the prosecutor's "body language and eye contact" reasoning, defense counsel noted that the prosecutor always referred to Ms. Aubrey and Ms. Jeffreys collectively when discussing body language, never distinguishing between the two Black women and never offering more specific details about what exactly was troubling to him about their body language. Regarding the Dorothea Dix reasoning, defense counsel argued that "[i]f the prosecutor [was] genuinely concerned about [jurors'] experience with mental health being a disqualifying factor for him in making his peremptory strikes[,] . . . he would have asked at least one other juror [about it]."

¶ 15 Finally, defense counsel emphasized the burden of proof in a *Batson* challenge: "the defendant needs to show…that it is more likely than not that race was a substantial motivating factor for the strike[,]" not the sole reason for the strike. Based on the evidence presented that the prosecutor's proffered reasons were pretextual, defense counsel argued that defendant had met that burden.

¶ 16 In response, the prosecutor argued that his proffered race-neutral reasons for the peremptory strikes of Ms. Aubrey and Ms. Jeffreys pass *Batson* scrutiny. First, the prosecutor noted "some very obvious distinctions between the record here and the *Foster* case," namely: (1) that the victim and witnesses here are also African American; (2) that the jury here included one juror who identified as mixed race (African-American father and Chinese mother); and (3) that the prosecutor here did not blatantly and persistently focus on race during jury selection.

¶ 17 Next, the prosecutor repeated his proffered race-neutral reasons for striking Ms. Jeffreys and Ms. Aubrey. Regarding Ms. Jeffreys, the prosecutor argued that because defendant's "mental health was an underlying issue and concern for the defense," Jeffreys's experience as a nurse to mental health patients may render her "sympathetic to the Defendant despite overwhelming evidence of his guilt." The prosecutor further noted that while all of the potential jurors were asked about their occupation, "Ms. Jeffreys was the only one who said she worked or used to work in the mental health field."

¶ 18 Regarding Ms. Aubrey, the prosecutor again noted "her body language and her lack of eye contact." He then emphasized that her short and equivocal answers of "I suppose" and "I think so" to his questions about her ability to focus on the trial created concern regarding "whether or not she could be an engaged juror throughout this process."

¶ 19 Then, the prosecutor addressed his initial mistake regarding to which question Ms. Aubrey had answered "I suppose":

> . . . Your Honor, I'll be the first to tell you that this is the first and only time . . . I've had to address [a *Batson*] challenge. And I was completely flustered when this was brought up during trial. And it did cause me to misspeak with respect to the answer or the question that Ms. Aubrey was answering. And as [defense counsel] pointed out from the record, as part of my race neutral justification for Ms. Aubrey, I said when I asked her if she could be fair and impartial, her answer was "I suppose.". . . I wasn't confident that she was confident that she could be fair and impartial. And that's—that's the State misspeaking. That is a product of simply getting confused. That's a standard question I ask during jury selection; can somebody be fair and impartial. And I also ask can people focus on the proceedings. And that was simply confusing those questions and her answer.

¶ 20 Later, when addressing this same mistake, the prosecutor and the trial court had the following exchange:

> The [c]ourt: I think it's more misremembering than misspeaking. That's all right.
>
> Mr. Wiggs: Right.

> The [c]ourt: I mean, I think you don't—taking it in the light most favorable to you or to the prosecutor—were you the prosecutor?
>
> Mr. Wiggs: I was.
>
> The [c]ourt: Okay. Then taking it in the light most favorable, you didn't remember that the answer was given to another question rather than this question. So it's not misspeaking, it's misremembering.

¶ 21 Finally, the prosecutor noted several previous cases from this Court, the Court of Appeals, and the U.S. Supreme Court, emphasizing the low bar that prosecutors must meet in responding to a *Batson* challenge, and the wide variety of race-neutral reasons that may suffice in meeting that bar. Concluding, the prosecutor asked the trial court to again deny defendant's *Batson* challenge.

¶ 22 On 15 July 2019, the trial court issued its new order on defendant's *Batson* challenge. As requested, the court considered the race-neutral justifications offered by the prosecutor for the two peremptory strikes in question in light of *Foster*, noting that "[t]he Constitution forbids striking even a single prospective juror for a discriminatory purpose."

¶ 23 First, the trial court reviewed the prosecutor's strike of Ms. Jeffreys. The court found that the prosecutor's reasoning regarding Jeffreys's previous employment at Dorothea Dix Hospital "is supported by the record and constitutes an appropriate reason for the strike."

¶ 24 Second, the trial court reviewed the prosecutor's strike of Ms. Aubrey. Here, the court addressed the discrepancy between the prosecutor's stated reasoning and the record regarding Ms. Aubrey's "I suppose" answer:

> 7. It is evident from the record that both the trial court's and the prosecutor's memory of the answers given by Ms. Aubrey was conflated. She did not say "I suppose" in response to a question of whether she could be "fair and impartial." Rather, in answering a question from the [c]ourt as to whether there was "anything going on in your life that would make it difficult or impossible for you to serve," Ms. Aubrey said "other than missing work, no." The [c]ourt then inquired whether Ms. Aubrey worked "daytime," and Ms. Aubrey responded "day and night." Shortly thereafter, the prosecutor asked Ms. Aubrey the following questions:

Prosecutor: Okay. Ms. Aubrey, do you feel confident you can focus on what's going on here?

Ms. Aubrey: I suppose.

Prosecutor: I want you to be confident about it. You just don't want to be a juror, or do you feel like if you were here, you could focus and do what we need you to do?

Ms. Aubrey: I think so.

8. In retrospect, had the prosecutor, in offering his race-neutral basis for exercising the strike of Ms. Aubrey, stated that he was concerned that she had answered "I suppose" to the question of whether she could focus, when coupled with her concern that she worked "day and night" and would miss work, that, in the [c]ourt's view, would have constituted a neutral justification for the strike.

9. However, as it stands, the State's offered reason for striking Ms. Aubrey based on her "I suppose" answer is not supported by the record because the prosecutor associated that answer with whether she could be "fair and impartial," not whether she could focus.

10. The *Foster* Court instructs that when reasons that are offered by a prosecutor as a basis for exercising a strike contradict or mischaracterize the record, those reasons must be rejected in evaluating whether race was a motivating factor in exercising a strike. *Foster*, *supra*, at 1750 (prosecutor's reasons were "contradicted by the record"); 1753 (prosecutor's justifications were "mischaracterization of the record"); 1753 ("[m]any of the State's secondary justifications similarly came undone when subjected to scrutiny").

11. Moreover, a trial court is not permitted to consider race-neutral reasons for exercising a strike that are not articulated by the prosecutor. *Miller-El v. Dretke*, 545 U.S. 231, 250–52 (2005) ("If the stated reason does not hold up, its pretextual significance does not fade because a trial judge, or an appeals court, can imagine a reason that might not have been shown up as false. The Court of Appeals's and the dissent's substitution

> of a reason for eliminating Warren does nothing to satisfy the prosecutors' burden of stating a racially neutral explanation for their own actions.")
>
> 12. Strict application of the rules articulated in *Foster* and *Miller-El* to the race-neutral (but misremembered) reasons provided by the prosecutor justifying Ms. Aubrey's strike would require the [c]ourt to exclude and not consider the reason articulated by the prosecutor – that Ms. Aubrey said that "she supposed" she could be fair and impartial – because that reason is contradicted by the record.

¶ 25 After thus rejecting the "I suppose" rationale for Ms. Aubrey's strike, the trial court then considered "the only [remaining] race-neutral reason articulated by the prosecutor[:] . . . the 'body language' and 'lack of eye contact' rationale." Here, the court noted that "[t]he 'body language' rationale was disputed by trial counsel for the defendant, and the trial court made no specific findings regarding Ms. Aubrey's body language or demeanor." The court then noted that this "circumstance is similar to one that arose in *Snyder v. Louisiana*, 552 U.S. 472 (2008)," in which the U.S. Supreme Court rejected the validity of a peremptory strike of an African-American juror on the basis of alleged "nervousness" when "the record does not show that the trial judge actually made a determination concerning [the potential juror's] demeanor." *Snyder*, 552 U.S. at 479. "Hence," the trial court stated, "without findings of fact by the trial court, the *Snyder* Court appears to instruct that for appellate purposes the 'body language' race-neutral justification offered by the prosecutor cannot be viewed as sufficient." "As such," the trial court ruled, "both race-neutral justifications offered by the prosecutor fail—one because the prosecutor mis-remembered the question to which Ms. Aubrey responded 'I suppose,' and the other because the trial court failed to make sufficient findings of fact to establish a record of Ms. Aubrey's body language."

¶ 26 Next, the trial court reviewed the arguments presented by defendant that the State's peremptory strikes constitute a *Batson* violation. First, the court noted defendant's statistical evidence regarding jury selection in this case. Specifically, the court observed:

> Three of the 22 venire members were non-white. The prosecutor used 4 of 7 peremptory strikes allotted to each party by statute. Among those venire members whom the State struck, 2 were African[-]American women. Hence, the State struck 2 of the 3 non-white

> members of the venire, which also turned out to be all the non-white female venire members. The remaining two peremptory strikes exercised by the State were of white males.

¶ 27 The trial court then considered "[t]he evidence proffered by the [d]efendant relating to statewide disparities in the exercise of peremptory challenges[.]" Specifically, the court observed "that in non-capital cases studied from 2011-2012, [North Carolina] prosecutors struck black venire members at about twice the rate of white" (citing D. Pollitt & B. Warren, *Thirty Years of Disappointment: North Carolina's Remarkable Appellate Batson Record*, 94 N.C. L. Rev. 1957, 1964 (2016)).

¶ 28 Next, the trial court considered defendant's side-by-side comparison of the questioning of white and Black potential jurors regarding their ability to focus during trial. Specifically, regarding the allegedly disparate questioning of Mr. David Williams and Ms. Aubrey on this issue, the court "[did] not find this side-by-side comparison particularly pertinent because Mr. Williams had previously stated that, with respect to his supervisory duties, 'I can juggle things around,' whereas Ms. Aubrey did not indicate any flexibility in her 'day and night' work schedule that might ease her concern about missing work."

¶ 29 Finally, the trial court turned to the third step of the *Batson* analysis: "determin[ing] whether the defendant has shown purposeful discrimination" (internal citation omitted). Again, the trial court ruled that "[d]efendant has shown that the race-neutral justifications offered by the prosecutor cannot be supported by the record—either because the prosecutor mis-remembered the potential juror's answer or because the trial court failed to make an adequate record of the body language of the prospective juror." Further, the court noted that "[t]he [d]efendant has also shown evidence of statistical disparities in the exercise of peremptory challenges by prosecutors in statewide jury selection studies in data collected from 1990 to 2012."

¶ 30 The trial court then stated its ultimate conclusion:

> However, the [c]ourt cannot conclude from this record that in this case, the State has engaged in "purposeful discrimination." As the [d]efendant points out, the applicable standard is, given all relevant circumstances, "whether it was more likely than not that the challenge was improperly motivated." *Johnson v. California*, 545 U.S. 162, 170 (2005). Even on this relaxed "more likely than not" standard, this

> [c]ourt concludes that essential evidence of purposeful discrimination—which is the [d]efendant's burden to prove—is lacking.

¶ 31 In support of this conclusion, the trial court noted that "[t]he cases in which the [U.S.] Supreme Court has found that the state exercised peremptory challenges in a purposefully discriminatory fashion are strikingly different from the case at hand." By way of example, the court noted that both *Foster* and *Miller-El* included glaring evidence of racial discrimination by prosecutors, including: (1) a finding that the prosecutor's explanations were "misrepresentations" and "contradicted by the record," *Foster*, 578 U.S. at 505; (2) "a jury list . . . found in the prosecutor's file with each black prospective juror highlighted in bright green," *id.* at 1744; (3) Black prospective jurors being subjected to a "trick question" that was not asked of white prospective jurors, *Miller-El*, 545 U.S. at 255; and (4) "a specific policy [in the prosecutor's office] of systematically excluding blacks from juries" evidenced by a training manual that "outlined the reasoning for excluding minorities from jury service." *Id.* at 266.

¶ 32 By comparison, the trial court found "this case . . . markedly distinguishable from the facts of this controlling authority." Specifically, the court noted:

> Unlike that authority, here the direct evidence of purposeful discrimination is not a "mischaracterization" of the record with "no grounding in fact." Rather, it appears to be an instance of a prosecutor misremembering whether the prospective juror had said "I suppose" in responding to a question of whether she could be fair and impartial, or whether she could focus given her "day and night" employment and concern about missing work. And, unlike the controlling authority, no evidence has been presented of a systemic policy of the prosecutor's office to exclude black jurors, or of a trial strategy in this specific case to exclude black jurors. In other words, the [c]ourt concludes that the quantum of evidence in this case, both direct and circumstantial, is insufficient to support the conclusion that the prosecutor engaged in purposeful discrimination by excluding 2 of 3 nonwhite jurors.

¶ 33 Therefore, the trial court concluded "that defendant has not established that it is more likely than not that the State engaged in purposeful

discrimination in excluding prospective jurors Jeffreys and Aubrey[.]" Accordingly, "the [c]ourt again order[ed] that [d]efendant's *Batson* objections must be OVERRULED." Finally, in accordance with this Court's 14 August 2018 Order, the trial court forwarded its order to this Court for further proceedings.

¶ 34 On 23 August 2019, defendant filed a supplementary petition for discretionary review with this Court based on the trial court's rehearing order. In this petition, defendant argued that this Court should "summarily reverse the trial court's order, vacate the judgments and order a new trial because the record unequivocally demonstrates that the State failed to meet [its] burden to proffer a race neutral reason" for its peremptory strike of Ms. Aubrey. Alternatively, defendant argued that "this Court should certify the decision below for plenary review because this case presents important principles of *Batson* jurisprudence" and "presents the perfect vehicle to review the appropriate standard [for] evaluating the evidence at trial and [the] standard of review on appeal." On 26 February 2020, this Court denied defendant's request for summary reversal but allowed his petition "for the purpose of affording plenary review of the issues raised in that petition."

¶ 35 Before this Court, defendant argued that the trial court erred in finding that he "failed to meet his burden to show purposeful discrimination because the State failed to articulate a reason for the peremptory strikes of Black jurors that was legitimate, facially valid[,] reasonably specific[,] or related to the case to be tried." Defendant further contended that the trial court clearly erred by "viewing the evidence in the light most favorable to the state," and ignoring or justifying evidence from which improper discriminatory intent could be inferred.

¶ 36 In response, the State argued that: (1) it had given facially valid, race-neutral reasons for its peremptory challenges at step two of the *Batson* test; and (2) the trial court did not clearly err at step three of the *Batson* test by overruling defendant's *Batson* objection. The parties elaborated upon these points at oral arguments before this Court on 6 October 2021.

II. Analysis

¶ 37 **[1]** Now, we must consider whether the trial court's ruling regarding defendant's *Batson* challenge was clearly erroneous. *See Snyder*, 552 U.S. at 477 ("On appeal, a trial court's ruling on the issue of discriminatory intent must be sustained unless it is clearly erroneous"); *State v. Chapman*, 359 N.C. 328, 339 (2005) ("Thus, the standard of review is whether the trial court's [*Batson*] findings are clearly

erroneous"). Such "clear error" is "deemed to exist when, on the entire evidence[,] the Court is left with the definite and firm conviction that a mistake has been committed." *State v. Bennett*, 374 N.C. 579, 592 (2020) (cleaned up). In order to make this determination, we first summarize the applicable history and precedent regarding racial discrimination in jury selection and *Batson* challenges.

A. *Batson* History and Precedent

¶ 38 Juries are at the heart of our constitutional democracy. *See* U.S. Const. amend. VI (establishing the right to a jury in criminal trials); U.S. Const. amend VII (establishing the right to a jury in civil suits); *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968) (noting "that trial by jury in criminal cases is fundamental to the American scheme of justice . . ."). Principally, juries "safeguard[] a person accused of crime against the arbitrary exercise of power by a prosecutor or judge." *Batson*, 476 U.S. at 86 (citing *Duncan*, 391 U.S. at 156). More broadly, though, jury service also "affords ordinary citizens a valuable opportunity to participate in a process of government, an experience fostering, one hopes, a respect for law." *Powers v. Ohio*, 499 U.S. 400, 407 (1991) (citing *Duncan*, 391 U.S. at 187 (Harlan, J., dissenting)). "Indeed, with the exception of voting, for most citizens the honor and privilege of jury duty is their most significant opportunity to participate in the democratic process." *Id.*

¶ 39 Because juries are so fundamental to our system, racial discrimination in jury selection is deeply harmful. "Purposeful racial discrimination in the selection of the venire . . . denies [a criminal defendant] the protection that a trial by jury is intended to secure." *Batson*, 476 at 86; *see also Miller-El*, 545 U.S. at 237 ("Defendants are harmed, of course, when racial discrimination in jury selection compromises the right of trial by impartial jury."). In addition to the defendant, such discrimination also harms the excluded juror, who is unduly denied the civic responsibility and opportunity of jury participation. *See Batson*, 476 U.S. at 87 (noting that "by denying a person participation in jury service on account of his race, the State unconstitutionally discriminated against the excluded juror"). Even more broadly, "[t]he harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community." *Id.* "That is, the very integrity of the courts is jeopardized when a prosecutor's discrimination invites cynicism respecting the jury's neutrality and undermines public confidence in adjudication." *Miller-El*, 545 U.S. at 238 (cleaned up). In short, racial discrimination in jury selection "is at war with our basic concepts of a democratic society and a representative government." *Smith v. Texas*, 311 U.S. 128, 130 (1940).

¶ 40 Accordingly, our courts have long sought to protect the sanctity of juries from the stain of racism. In 1880, the U.S. Supreme Court held that state laws limiting jury service to white men violate the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution. *Strauder*, 100 U.S. at 310. Even after *Strauder*, though, "critical problems persisted." *Flowers v. Mississippi*, 139 S. Ct. 2228, 2239 (2019). Specifically, "[e]ven though laws barring blacks from serving on juries were unconstitutional after *Strauder*, many jurisdictions [still] employed various discriminatory tools to [exclude] black persons from . . . jury service." *Id.*

¶ 41 Peremptory strikes were one such tool. *See id.* ("And when [other] tactics failed, or were invalidated, prosecutors could still exercise peremptory strikes in individual cases to remove most or all black prospective jurors."). "Peremptory strikes have very old credentials . . . traced back to the common law[,]" and "traditionally may be used to remove any potential juror for any reason—no questions asked." *Id.* at 2238. With this unquestioned discretion, though, also comes the potential for veiled discrimination. *See Miller-El*, 545 U.S. at 238 (noting "the practical difficulty of ferreting out discrimination in selections [that are] discretionary by nature"). Indeed, "[i]n the century after *Strauder*, the freedom to exercise peremptory strikes for any reason meant that the problem of racial exclusion from jury service remained widespread and deeply entrenched[,]" putting the practice squarely in conflict with well-established principles of equal protection. *Flowers*, 139 S. Ct. at 2239 (cleaned up).

¶ 42 In *Batson v. Kentucky*, the U.S. Supreme Court resolved this conflict in favor of equal protection. 476 U.S. at 89 (holding that "the State's privilege to strike individual jurors through peremptory challenges[] is subject to the commands of the Equal Protection Clause"). Specifically, the Court held that "[a]lthough a prosecutor ordinarily is entitled to exercise permitted peremptory challenges for any reason at all, . . . the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race." *Id.* (cleaned up). And contrary to a previous ruling suggesting that proof of repeated strikes of Black prospective jurors over a number of cases was necessary to establish an equal protection violation, the *Batson* Court held that "a defendant may [show] purposeful racial discrimination in selection of the venire by relying solely on the facts concerning its selection *in his case*." *Id.* at 95; *cf. Swain v. Alabama*, 380 U.S. 202, 227 (1965) (establishing the systematic discrimination requirement overruled in *Batson*).

¶ 43 The *Batson* Court further established a three-step process by which courts analyze claims of racially motivated peremptory strikes, now

called "*Batson* challenges." First, a defendant bringing a *Batson* challenge must "make out a prima facie case of purposeful discrimination by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose." *Batson*, 476 U.S. at 93–94. "In deciding whether the defendant has made the requisite showing, the trial court should consider all relevant circumstances." *Id.* at 96.

¶ 44 Second, "[o]nce the defendant makes a prima facie showing, the burden shifts to the State to come forward with a [race-]neutral explanation for challenging [the] jurors." *Id.* at 97. Although there may be "any number of bases on which a prosecutor reasonably may believe that it is desirable to strike a juror who is not excusable for cause[,]. . . the prosecutor must give a clear and reasonably specific explanation of his legitimate reasons for exercising the challenges." *Id.* at 98, n.20 (cleaned up).

¶ 45 Third, in light of both parties' submissions, "[t]he trial court then [must] determine if the defendant has established purposeful discrimination." *Id.* at 98. At this step, the judge must assess "whether the prosecutor's proffered reasons are the actual reasons, or whether the proffered reasons are pretextual and the prosecutor instead exercised peremptory strikes on the basis of race." *Flowers*, 139 S. Ct. at 2244.

¶ 46 In the years since *Batson*, the U.S. Supreme Court has further clarified each step of this framework. Several of these clarifications are pertinent to our analysis here. Generally, "[t]he Constitution forbids striking even a single prospective juror for a discriminatory purpose." *Snyder*, 552 U.S. at 478. Next, regarding a step one, defendants may "present a variety of evidence to support a claim that a prosecutor's peremptory strikes were made on the basis of race[,]" including:

> statistical evidence about the prosecutor's use of peremptory strikes against black prospective jurors as compared to white prospective jurors in the case; evidence of a prosecutor's disparate questioning and investigation of black and white prospective jurors in the case; side-by-side comparisons of black prospective jurors who were struck and white prospective jurors who were not struck in the case; a prosecutor's misrepresentations of the record when defending the strikes during the *Batson* hearing; relevant history of the State's peremptory strikes in past cases; or other relevant circumstances that bear upon the issue of racial discrimination.

Flowers, 139 S. Ct. at 2243 (cleaned up).

¶ 47 Regarding step two, the U.S. Supreme Court has noted that a prosecutor's proffered reasoning need not be "persuasive, or even plausible. At this second step of the inquiry, the issue is only the facial validity of the prosecutor's explanation. Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral." *Purkett v. Elem*, 514 U.S. 765, 768 (1995) (cleaned up). However, while a prosecutor may raise demeanor-based rationales for a peremptory strike, without "a specific finding [by the trial judge] on the record concerning [the potential juror's] demeanor," a reviewing court "cannot presume that the trial judge credited the prosecutor's assertion [regarding the potential juror's demeanor]." *Snyder*, 552 U.S. at 479. Likewise, a prosecutor's "shifting explanations" or "misrepresentations of the record" may be considered indications of pretext. *Foster*, 578 U.S. at 512.

¶ 48 Finally, the U.S. Supreme Court has provided useful guidance for both trial courts engaging in *Batson* step three and for appellate courts reviewing *Batson* rulings. First, "in considering a *Batson* objection, or in reviewing a ruling claimed to be *Batson* error, [a court may consult] all of the circumstances that bear upon the issue of racial animosity." *Snyder*, 552 U.S. at 478. Notably, *Batson* analysis "does not call for a mere exercise in thinking up any rational basis. If the stated reason does not hold up, its pretextual significance does not fade because a trial judge, or an appeals court, can imagine a reason that might not have been shown up as false." *Miller-El*, 545 U.S. at 252. Next, appellate courts reviewing a trial court's *Batson* ruling "need not . . . decide that any one [fact] alone would require reversal. All that [it] need[s] to decide . . . is that all of the relevant facts and circumstances taken together establish that the trial court . . . committed clear error in concluding that the State's peremptory strike of [one] black prospective juror . . . was not motivated in substantial part by discriminatory intent." *Flowers*, 139 S. Ct. at 2251. Finally, while a trial court's *Batson* determination is granted significant deference upon review, "deference does not by definition preclude relief." *Miller-El*, 545 U.S. at 240.[1]

¶ 49 This Court has likewise provided clarification of its framework for analyzing claims of racial discrimination in jury selection. Principally,

1. Notably, while the trial court's firsthand ability to assess a prosecutor's demeanor and credibility render this significant appellate deference appropriate, there are also human factors that render an appellate court's removed consideration of a *Batson* challenge useful; namely, while 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, appellate judges enjoy a review of the written record further removed from such immediate interpersonal dynamics.

this Court has adopted the *Batson* test for review of peremptory challenges under the North Carolina Constitution. *See State v. Fair*, 354 N.C. 131, 140 (2001) ("Our courts have adopted the *Batson* test for review of peremptory challenges under the North Carolina Constitution."); *State v. Taylor*, 362 N.C. 514, 527 (discussing the *Batson* test and noting that "this Court subsequently adopted that same test"); *State v. Waring*, 364 N.C. 443, 474 (2010) ("Our review of race-based . . . discrimination during petit jury selection has been the same under both the Fourteenth Amendment to the United States Constitution and Article 1, Section 26 of the North Carolina Constitution"). Regarding the first step, "a prima facie showing of racial discrimination is not intended to be a high hurdle for defendants to cross. Rather, the showing need only be sufficient to shift the burden to the State to articulate race-neutral reasons for its peremptory challenge." *Hobbs*, 374 at 350 (cleaned up). Regarding the second step, "[t]he State's explanation must be clear and reasonably specific, but does not have to rise to the level of justifying a challenge for cause. Moreover, unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral." *Id.* at 352 (internal quotations omitted). Finally, in engaging in our own analysis, this Court seeks to be "sensitive to *Batson*'s requirements" and must align itself with applicable guidance from the U.S. Supreme Court. *Waring*, 364 N.C. at 475.

B. Case at Bar

¶ 50 With this history and precedent as our guide, we now consider defendant's present *Batson* challenge. "On appeal, a trial court's ruling on the issue of discriminatory intent must be sustained unless it is clearly erroneous." *Snyder*, 552 U.S. at 477; *see also Waring*, 364 N.C. at 475 ("The trial court's ruling will be sustained unless it is clearly erroneous."). As noted above, such "clear error" is "deemed to exist when, on the entire evidence[,] the Court is left with the definite and firm conviction that a mistake has been committed." *Bennett*, 374 N.C. at 592 (cleaned up). We are left with such a conviction here, and therefore hold that the trial court's order overruling defendant's *Batson* challenge was clearly erroneous.

1.* Batson *Step One: Prima Facie Showing

¶ 51 In the first step of a *Batson* challenge, "a defendant must make a prima facie showing that a peremptory challenge has been exercised on the basis of race[.]" *Snyder*, 552 U.S. at 476; *see Taylor*, 362 N.C. at 527 ("First, the defendant must make a prima facie showing that the state exercised a race-based peremptory challenge"). "[A] defendant satisfies the requirements of *Batson*'s first step by producing evidence sufficient

to permit the trial judge to draw an inference that discrimination has occurred." *Johnson*, 545 U.S. at 170; *see State v. Hobbs*, 374 N.C. 345, 350 (2020) (quoting *Johnson* for this proposition). "A prima facie showing of racial discrimination is not intended to be a high hurdle for defendants to cross. Rather, the showing need only be sufficient to shift the burden to the State." *Hobbs*, 374 N.C. at 350 (cleaned up).

¶ 52 In response to this initial challenge, the prosecutor may argue that the defendant has failed to establish prima facie showing of discrimination. "However, once a prosecutor has offered a race-neutral explanation for the peremptory challenge and the trial court has ruled on the ultimate question of intentional discrimination, the preliminary issue of whether the defendant had made a prima facie showing becomes moot." *Bell*, 359 N.C. at 12 (cleaned up); *see also Hobb*s, 374 N.C. at 354 ("Where the State has provided reasons for its peremptory challenges, thus moving to *Batson*'s second step, and the trial court has ruled on them, completing *Batson*'s third step, the question of whether a defendant initially established a prima facie case of discrimination becomes moot.").

¶ 53 Here, immediately after the prosecutor completed his questioning of potential jurors, defense counsel raised a *Batson* challenge regarding the prosecutor's peremptory strikes of Ms. Jeffreys and Ms. Aubrey. In support of her challenge, defense counsel noted both the State's disproportionate use of peremptory strikes against Black prospective jurors and the lack of other distinguishing factors between the excluded Black potential jurors and accepted white potential jurors. Specifically, defense counsel stated:

> [S]o far, there have been four challenges by the State and if my numbers are correct, there were two white males and two black females. Ms. Viola Jeffreys who was originally placed in Seat No. 5 and then subsequently Ms. Gwendolyn Aubrey who was placed in Seat No. 5, both women are African-American. They are the only African-Americans seated in the jury box at this point in time.[2] Both have been cut by the State. I'm at a loss as to what it was that caused the State to determine that they should be cut in light of the comparables in the jury pool. The only distinction I see is color. Therefore, we would object to and challenge the State's peremptory challenges made thus far.

2. Later, when asked to self-identify his race, Juror #12 stated "My dad is black and my mom is Chinese . . . [s]o I'm whatever you call that."

¶ 54 The trial court then gave the prosecutor an opportunity to address the *Batson* challenge. Rather than asserting that defendant had not established prima facie showing of discrimination, the prosecutor instead began providing justifications for the challenged peremptory strikes. As the trial court identified in its subsequent response, this moved directly to the second step of the *Batson* analysis:

> All right. This is a three-step process and the first step is for the defense to make a prima facie argument. Mr. Wiggs, you moved directly to the second step, which is fine, which is that you offered neutral—with what you purport to be neutral justification.

Accordingly, step one of defendant's *Batson* challenge was rendered moot, and "we need not examine whether defendant met his initial burden." *Hobbs*, 374 N.C. at 355 (cleaned up). The trial court, therefore, did not err in concluding the same.[3]

2. Batson *Step Two: Race-Neutral Reasoning*

¶ 55 Second, "[o]nce the defendant makes prima facie showing, the burden shifts to the State to come forward with a neutral explanation for challenging black jurors." *Batson*, 476 U.S. at 97; *see Fair*, 354 N.C. at 140 ("If this showing is made, the court advances to the second step, where the burden shifts to the state to offer a facially valid, race-neutral rationale for its peremptory challenge"). As noted above, this step "does not demand an explanation that is persuasive, or even plausible[,]" but only one that is facially race-neutral. *Purkett*, 514 U.S. at 768; *see Fair*, 354 N.C. at 140 (stating this same proposition). "As long as the state's reason appears facially valid and betrays no inherent discriminatory intent, the reason is deemed race-neutral." *Fair*, 354 N.C. at 140.

¶ 56 Here, during the initial *Batson* inquiry before trial, the prosecutor contended that he struck both Ms. Jeffreys and Ms. Aubrey for their body language and lack of eye contact. He further asserted that he struck Ms. Jeffreys because of her potential bias toward defendant arising from her previous employment at Dorothea Dix Hospital, and that he struck Ms. Aubrey because she answered "I suppose" to a question asking whether she could be fair and impartial. The trial court subsequently found that these reasons "constitute neutral justifications for exercising peremptory challenges" in satisfaction of *Batson* step two.

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3. The Court of Appeals also correctly, if implicitly, held step one of the *Batson* inquiry to be moot when it noted that "the trial court heard the State's reasons for striking Jeffreys and Aubrey prior to making a ruling on defendant's *Batson* objections," and subsequently moved to step two. *Clegg*, 2017 WL 3863494 at *3.

¶ 57 Later, at the *Batson* rehearing, the prosecutor offered slightly different reasons for his peremptory strikes of Ms. Jeffreys and Ms. Aubrey. Regarding Ms. Jeffreys, the prosecutor again asserted that the peremptory strike "was based primarily on her stated occupation as being retired from Dorothea Dix Hospital, with the understanding that she was a nurse to mental health patients who were suffering from mental health diseases." Because defendant's "mental health was an underlying issue and concern for the defense," the prosecutor contended, "it was the State's belief [that Ms. Jeffreys] would possibly be sympathetic to the defendant despite overwhelming evidence of his guilt." The prosecutor did not mention Ms. Jeffreys's body language or lack of eye contact at the rehearing.

¶ 58 Regarding his strike of Ms. Aubrey, the prosecutor proffered two rationales at the rehearing. The first was the same as before trial: "her body language and her lack of eye contact." Second, the prosecutor noted that Ms. Aubrey had replied "I suppose" to a question regarding whether she felt confident that she could focus on the trial. The prosecutor further noted that when he asked Ms. Aubrey a follow-up question on this issue, she replied "I think so." These short and equivocal answers, combined with "her body language and her lack of eye contact," the prosecutor asserted, created concern about "whether or not [Ms. Aubrey] could be an engaged juror throughout [the trial]."

¶ 59 The prosecutor then addressed the shift in this reasoning between the initial *Batson* inquiry and the rehearing. Noting that he was "completely flustered when this was brought up during trial[,]" the prosecutor conceded that he "missp[oke] with respect to the…question that Ms. Aubrey was answering." He then confirmed that Ms. Aubrey had in fact answered "I suppose" not to a question about being fair and impartial, but about being confident in her ability to focus on the trial, and that he had "confus[ed] those questions and her answer."

¶ 60 In assessing the prosecutor's proffered reasons at the rehearing, the trial court again accepted the justifications as race-neutral in satisfaction of the State's burden of production under *Batson* step two. Regarding the proffered reason for the strike of Ms. Jeffreys, the trial court stated during the rehearing that her previous employment at Dorothea Dix was a "distinguishing race[-]neutral fact" and "an appropriate ground for a peremptory challenge." The court further stated in its written rehearing order that "[a]s to juror Viola Jeffreys, the State offered a race-neutral reason for exercising the strike."

¶ 61 The trial court likewise found the prosecutor's rehearing reasoning for striking Ms. Aubrey to be race-neutral. Specifically, the

court's rehearing order stated that "had the prosecutor, in offering his race-neutral basis for exercising the strike of Ms. Aubrey, stated that he was concerned that she had answered 'I suppose[]' to the question of whether she could focus, . . . that, in the [c]ourt's view, would have constituted a neutral justification for the strike." The court later likewise described the "body language" and "lack of eye contact" justification as another "race-neutral reason articulated by the prosecutor."

¶ 62 We cannot find that the trial court erred in determining that the prosecutor met his burden of production under *Batson* step two. To be clear, as clarified by the U.S. Supreme Court in *Purkett*, the inquiry here is limited only to whether the prosecutor offered reasons that are race-neutral, not whether those reasons withstand any further scrutiny; that scrutiny is reserved for step three. *See* 514 U.S. at 767–68; *Johnson*, 545 U.S. at 171 ("Thus, even if the State produces only a frivolous or utterly nonsensical justification for its strike, the case does not end—it merely proceeds to step three."). The prosecutor's proffered reasons here—body language and lack of eye contact, concern of bias, concern of partiality, and concern of lack of focus—are all facially race-neutral. Accordingly, the trial court's findings here and subsequent decision to move to step three of the *Batson* analysis was not erroneous.

3. Batson *Step Three: Determining Discrimination*

¶ 63 Under *Batson*'s third and final step, "[t]he trial court…[has] the duty to determine if the defendant has established purposeful discrimination." 476 U.S. at 98; *see Waring*, 364 N.C. at 475 ("Finally, the trial court must then determine whether the defendant has met the burden of proving purposeful discrimination") (cleaned up). At this stage, the trial judge must consider all of the relevant circumstances and reasoning submitted by both parties to "determine whether the prosecutor's stated reasons were the actual reasons or instead were a pretext for discrimination." *Flowers*, 139 S. Ct. at 2241. In conceptualizing this framework as a whole, a common judicial analogy proves illustrative: in step one (and in subsequent rebuttal),[4] the defendant places his reasoning on the scale; in step two (and in subsequent rebuttal),[5] the State places its counter-reasoning on the scale; in step three, the court carefully weighs all of the reasoning from both sides to ultimately "decid[e] whether it

4. After the prosecutor proffers race-neutral reasoning in step two, "[o]ur courts allow the defendant to submit evidence to show that the state's proffered reason is merely a pretext for discrimination." *Fair*, 354 N.C. at 140. Trial courts may subsequently allow the prosecutor an opportunity for surrebuttal before making their ultimate ruling under step three.

5. *See* note 4 above.

was more likely than not that the challenge was improperly motivated." *Johnson*, 545 U.S. at 170; *see Hobbs*, 374 N.C. at 351 (quoting *Johnson* for this proposition). If so, the defendant has established a *Batson* violation.

¶ 64 Here, the trial court's rehearing order carefully described its step three analysis weighing the reasoning submitted by defendant and the prosecutor. First, the court ruled that the prosecutor's peremptory strike of Ms. Jeffreys (on the basis of concern of potential bias) did not constitute a *Batson* violation. Specifically, the court stated:

> The record reflects that, in prior proceedings in this case, the [d]efendant's competency had been called into question and evaluations ordered. The State's stated basis for striking Ms. Jeffreys due to her work history in the mental health field is rationally related to the defendant's potential competency issues, and thus the [c]ourt finds this reason is supported by the record and constitutes an appropriate justification for the strike.

Because we later conclude that the trial court clearly erred in overruling defendant's *Batson* challenge regarding Ms. Aubrey, and "[t]he Constitution forbids striking even a single prospective juror for a discriminatory purpose[,]" we decline to consider whether the trial court's ruling regarding Ms. Jeffreys was also clearly erroneous. *Snyder*, 552 U.S. at 478.

¶ 65 Second, the trial court weighed the reasoning provided by both defendant and the prosecutor regarding the peremptory strike of Ms. Aubrey. After reviewing the transcript from the initial *Batson* inquiry, the trial court stated that "[i]t is evident from the record that both the trial court's and the prosecutor's memory of the answers given by Ms. Aubrey was conflated. She did not say 'I suppose' in response to a question of whether she could be 'fair and impartial.' " Rather, the court went on to observe from the record, she provided that answer in response to the prosecutor's question about whether she felt confident that she could focus on the trial. The trial court then stated the following:

> 8. In retrospect, had the prosecutor, in offering his race-neutral basis for exercising the strike of Ms. Aubrey, stated that he was concerned that she had answered "I suppose" to the question of whether she could focus, when coupled with her concern that she worked 'day and night' and would miss work, that, in the [c]ourt's view, would have constituted a neutral justification for the strike.

> 9. However, as it stands, the State's offered reason for striking Ms. Aubrey based on her "I suppose" answer is not supported by the record because the prosecutor associated that answer with whether she could be "fair and impartial," not whether she could focus.

¶ 66 The trial court then observed that under the U.S. Supreme Court's ruling in *Foster*, "when reasons that are offered by a prosecutor as a basis for exercising a strike contradict or mischaracterize the record, those reasons must be rejected in evaluating whether race was a motivating factor in exercising the strike," citing *Foster*, 578 U.S. at 505, 510. "Moreover," the court continued, "a trial court is not permitted to consider race-neutral reasons for exercising a strike that are not articulated by the prosecutor," citing *Miller-El*, 545 U.S. at 250–52. Accordingly, the trial court ruled that "[s]trict application of the rules articulated in *Foster* and *Miller-El* to the race-neutral (but mis-remembered) reasons provided by the prosecutor justifying Ms. Aubrey's strike . . . require the [c]ourt to exclude and not consider the reason articulated by the prosecutor – that Ms. Aubrey said that 'she supposed' she could be fair and impartial – because that reason is contradicted by the record."

¶ 67 Having thus rejected the prosecutor's "I suppose" rationale, the trial court then moved on to consider what it noted was "the only [remaining] race-neutral reason articulated by the prosecutor[:] . . . the 'body language' and 'lack of eye contact' rationale." However, the trial court found that this reasoning, too, was invalid. Specifically, the court noted that "[t]he 'body language' rationale was disputed by trial counsel for the [d]efendant, and the trial court made no specific findings regarding Ms. Aubrey's body language or demeanor." Under the U.S. Supreme Court's ruling in *Snyder*, the trial court stated, "the 'body-language' race-neutral justification offered by the prosecutor cannot be viewed as sufficient" in the absence of any corroborating findings of fact by the trial court. "As such," the trial court ruled, "both race-neutral justifications offered by the prosecutor fail – one because the prosecutor mis-remembered the question to which Ms. Aubrey responded 'I suppose,' and the other because the trial court failed to make sufficient findings of fact to establish a record of Ms. Aubrey's body language." In other words, the prosecution had placed two reasons on the scale, and the trial court deemed them both weightless.

¶ 68 The trial court then considered the evidence proffered by defendant tending to show racial discrimination. Specifically, the court weighed defendant's statistical evidence "both relating to the trial at issue and [to] North Carolina at large." With respect to this trial, that evidence

identified that of the twenty-two members of the jury pool, three were people of color. Further, of the prosecutor's four peremptory strikes, two were used strike two of those three potential jurors of color, "which also turned out to be all the" women of color. Proportionally, then, the State struck about ten percent of the eligible white jurors and about sixty-six percent of the eligible jurors of color, resulting in a jury of eleven white members and one member of mixed race. When asked by defense counsel to identify their race, none of the selected jurors self-identified as African American.[6]

¶ 69 The trial court then noted defendant's evidence of racial disparities in the exercise of peremptory strikes across North Carolina. Specifically, the court noted that this evidence indicated "that in noncapital cases studied from 2011–12, prosecutors struck black venire members at about twice the rate of white." (citing Pollitt & Warren, 94 N.C. L. Rev. at 1964).

¶ 70 Finally, the trial court weighed defendant's "side-by-side comparison of questioning of white jurors and African[-]American jurors." Specifically, the court considered defendant's comparison of the prosecutor's questioning of Ms. Aubrey with that of fellow prospective juror Mr. David Williams regarding their ability to focus during trial. The court noted the following exchange from the record:

> Prosecutor: I don't need specifics, but, you know, is there a possibility that your mind could drift somewhere else when we need you to be focusing on the proceedings here?
>
> Mr. Williams: I have 11 employees out in the field, so –
>
> Prosecutor: Okay. Ms. Aubrey, do you feel confident you can focus on what's going on here?
>
> Ms. Aubrey: I suppose.
>
> Prosecutor: I want you to be confident about it. You just don't want to be a juror or do you feel like if you were here, you could focus and do what we need you to do?
>
> Ms. Aubrey: I think so.

¶ 71 Upon review, though, the trial court did not find this comparison "particularly pertinent because Mr. Williams had previously stated that,

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6. *See* note 2.

with respect to his supervisory duties, 'I can juggle things around[,]' whereas Ms. Aubrey did not indicate any flexibility in her 'day and night' work schedule that might ease her concern about missing work."

¶ 72 The trial court then moved to its final determination regarding defendant's *Batson* challenge. "Here," the court ruled, "[d]efendant has shown that the race-neutral justifications offered by the prosecutor cannot be supported by the record – either because the prosecutor mis-remembered the potential juror's answer or because the trial court failed to make an adequate record of the body language of the prospective juror." "The [d]efendant has also shown," the court continued, "evidence of statistical disparities in the exercise of peremptory challenges by prosecutors in statewide jury selection studies in data collected from 1990 to 2012." Reaching its ultimate conclusion, though, the court stated:

> However, the [c]ourt cannot conclude from this record that in this case, the State has engaged in "purposeful discrimination." As the [d]efendant points out, the applicable standard is, given all relevant circumstances, "whether it was more likely than not that the challenge was improperly motivated." *Johnson v. California*, 545 U.S. 162, 170 (2005). Even on this relaxed "more likely than not" standard, this [c]ourt concludes that essential evidence of purposeful discrimination—which is the defendant's burden to prove—is lacking.

¶ 73 To support this conclusion, the trial court reasoned that "[t]he cases in which the [U.S.] Supreme Court has found that the state exercised peremptory challenges in a purposefully discriminatory fashion are strikingly different from the case at hand." As examples, the court discussed *Foster* and *Miller-El*, in which the prosecutors had exhibited "smoking-gun" evidence of racial discrimination such as, respectively, highlighting the names of all Black potential jurors on their juror list and asking Black potential jurors a "trick question" not asked of white potential jurors. *See Foster*, 578 U.S. at 493–95; *Miller-El*, 545 U.S. at 255. The trial court reasoned that because this case was "markedly distinguishable" from those cases and involved "an instance of a prosecutor mis-remembering" rather than a " 'mischaracterization' of the record[,]" "the quantum of evidence in this case . . . is insufficient to support the conclusion that the prosecutor engaged in purposeful discrimination."

¶ 74 Our review of the trial court's *Batson* step three analysis reveals several errors that collectively leave this Court "with the definite and

firm conviction that a mistake has been committed[,]" thus rendering the trial court's determination clearly erroneous. *Bennett*, 374 N.C. at 592. As noted above, "[w]e need not and do not decide that any one of those [errors] alone would require reversal. All that we need to decide, and all that we do decide, is that all of the relevant facts and circumstances taken together establish that the trial court committed clear error in concluding that the State's peremptory strike of [a] black prospective juror . . . was not 'motivated in substantial part by discriminatory intent.' " *Flowers*, 139 S. Ct. at 2235 (quoting *Foster*, 578 U.S. at 512). Before discussing the trial court's errors, though, it is first worth noting several points of analysis on which the trial court was correct.

¶ 75 First, the trial court acted properly in rejecting the prosecutor's proffered "I suppose" reasoning. As the U.S. Supreme Court illustrated in *Foster*, proffered reasons that are contradicted by the record are unacceptable in supporting a challenged peremptory strike. *See* 578 U.S. at 505. ("Moreover, several of Lanier's reasons…are similarly contradicted by the record"). Likewise, shifting explanations indicate pretext and should be viewed with suspicion. *See id.* at 507 ("As an initial matter, the prosecutor's principal reasons for the strike shifted over time, suggesting that those reasons may be pretextual.").

¶ 76 Here, the prosecutor's "fair and impartial" reasoning during the initial *Batson* inquiry was contradicted by the record, and his "focus" reasoning during the rehearing amounted to a shifting explanation. Whether the initial misstatement was the product of accidental "misremembering," as the trial court found, or intentional "mischaracterizing" does not change the fact that the proffered reason was plainly unsupported by the record. Accordingly, the trial court properly rejected this rationale.[7] To the extent that the trial court viewed this misstatement "in the light most favorable to the prosecutor," as it offhandedly remarked during the rehearing, though, that would reflect a fundamental misunderstanding of the *Batson* framework and constitute error. However, because the trial court articulated the correct burden of proof in its written order, we do not consider this remark further.

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7. While the dissent claims that "the trial court may have taken the holding in *Miller-El* too literally" in rejecting the State's proffered reasoning here (¶ 142), we understand the trial court to have simply concluded that the U.S. Supreme Court meant what it said when it held that "[i]f the stated reason does not hold up, its pretextual significance does not fade because a trial judge, or an appeals court, can imagine a reason that might not have been shown up as false." *Miller-El*, 545 U.S. at 252. Notably, the Court of Appeals made this same misstep when it provided its own "clarification" to the State's actual proffered reason. *See Clegg*, WL 3863494 at *4.

¶ 77 Second and similarly, the trial court properly rejected the prosecutor's "body language and lack of eye contact" reasoning. As the U.S. Supreme Court indicated in *Snyder*, while demeanor-based reasoning can be rightly credited "where a trial judge has made a finding that an attorney credibly relied on demeanor in exercising a strike[,]" without such corroboration "we cannot presume that the trial judge credited the prosecutor's assertion" regarding the potential juror's demeanor. 552 U.S. at 479. Here, not only did the trial judge not corroborate the prosecutor's assertion regarding Ms. Aubrey's body language and eye contact, defense counsel specifically refuted it. Because the trial court made no specific findings of fact regarding Ms. Aubrey's body language, it properly rejected this reasoning at the rehearing.

¶ 78 What's more, the prosecutor's demeanor-based reasoning here was even less specific—and therefore less credible—than that rejected in *Snyder*. In *Snyder*, the prosecutor claimed that the rejected juror was "nervous," a description that at least minimally invokes a commonly understood set of more specific behaviors. *Id*. Here, the prosecutor merely stated that he struck Ms. Aubrey due to her "body language" without ever specifying anything in particular that might have been concerning about her body language. Further, during the initial pre-trial *Batson* inquiry, the prosecutor never distinguished between Ms. Jeffreys and Ms. Aubrey when discussing body language—he only referred to the two Black women collectively, twice referring to "*their* body language" without any further specification. This complete lack of specificity significantly undermines the credibility of the prosecutor's reasoning.

¶ 79 Historical context provides even more reason for courts engaging in a *Batson* analysis to view generalized "body language and lack of eye contact" justifications with significant suspicion. For example, as recently as 1995, prosecutorial training sessions conducted by the North Carolina Conference of District Attorneys included a "cheat sheet" titled "*Batson* Justifications: Articulating Juror Negatives." *See* Pollitt & Warren, 94 N.C. L. Rev. at 1980 (noting a North Carolina trial court's summary of this document in a 2012 Order on a defendant's motion for appropriate relief). This document provided prosecutors with a list of facially race-neutral reasons that they might proffer in response to *Batson* objections. *See id.*; *see also* Jacob Biba, *Race Neutral*, The Intercept, Nov. 8, 2021, https://theintercept.com/2021/11/08/north-carolina-jury-racial-discrimination/ (describing the prosecutorial training and *Batson* Justification worksheet); Tonya Maxwell, *Black juror's dismissal, death penalty, revisited in double homicide*, The Asheville Citizen-Times, Nov. 3, 2016, https://www.citizen-times.com/story/news/local/

2016/11/03/black-jurors-dismissal-death-penalty-revisited-double-homicide/93168824/ (same). The list included both "body language" and "lack of eye contact," in addition to "attitude," "air of defiance," and "monosyllabic" responses to questions.[8]

¶ 80 Of course, North Carolina is not unique here. When placed within our well-established national history of prosecutors employing peremptory challenges as tools of covert racial discrimination, this historical context cautions courts against accepting overly broad demeanor-based justifications without further inquiry or corroboration. *See Flowers*, 139 S. Ct. at 2239–40 ("And when [other discriminatory] tactics failed, or were invalidated, prosecutors could still exercise peremptory strikes in individual cases to remove most or all black prospective jurors."). Accordingly, the trial court properly rejected the prosecutor's unconfirmed and generalized "body language and lack of eye contact" rationale below.

¶ 81 Third and finally, the trial court acted properly in considering defendant's statistical evidence regarding the disproportionate use of peremptory strikes against Black potential jurors in both this case and statewide. As recently identified by the U.S. Supreme Court in *Flowers*, such data is included among the many types of evidence that a defendant may present, and a court may consider, within a *Batson* challenge. 139 S. Ct. at 2243 (listing examples of the variety of evidence defendants may present in *Batson* challenges).

¶ 82 Despite the areas in which the trial court acted properly, though, several other areas of its *Batson* step three analysis were erroneous. Like the U.S. Supreme Court in *Flowers*, we do not identify any one of the trial court's mistakes as independently requiring reversal. Rather, we determine that "all of the relevant facts and circumstances taken together establish that the trial court committed clear error in concluding that the State's peremptory strike of [Ms. Aubrey] was not motivated in substantial part by discriminatory intent." *Flowers*, 139 S. Ct. at 2251. Specifically, we note four interrelated errors: (1) overruling defendant's *Batson* challenge after rejecting all of the race-neutral reasons provided by the prosecutor; (2) applying an improperly high burden of proof; (3) independently considering reasoning not offered by the prosecutor; and (4) giving inadequate consideration to racially disparate questioning and acceptance of comparable jurors.

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8. Here, in justifying his peremptory strike of Ms. Aubrey, the prosecutor repeatedly noted that her answers were "short."

¶ 83 First, the trial court erred by ruling that defendant had not met his *Batson* burden after determining that "both race-neutral justifications offered by the prosecutor fail." Under the *Batson* framework, after the defendant and the State have offered their reasoning, the trial court must determine, in light of these submissions, "whether it was more likely than not that the [peremptory] challenge was improperly motivated." *Johnson*, 545 U.S. at 170. If the trial court finds that all of the prosecutor's proffered race-neutral justifications are invalid, it is functionally identical to the prosecutor offering no race-neutral justifications at all. In such circumstances, the only remaining submissions to be weighed—those made by the defendant—tend to indicate that the prosecutor's peremptory strike was "motivated in substantial part by discriminatory intent." *Flowers*, 139 S. Ct. at 2251. As a consequence, then, a *Batson* violation has been established.

¶ 84 Here, after careful analysis, the trial court explicitly ruled that "both race-neutral justifications by the prosecutor fail." At that point, the only valid reasoning remaining for the court to consider was evidence presented by defendant tending to show that the peremptory challenge of Ms. Aubrey was motivated in substantial part by discriminatory intent: disparate data, disparate questioning, and disparate acceptance of substantially comparable jurors. Accordingly, after finding that both race-neutral justifications for the prosecutor's peremptory strike of Ms. Aubrey failed, the trial court should have ruled on this record that defendant met his burden under *Batson*. Ruling otherwise was erroneous.

¶ 85 Second, the trial court erred by holding defendant to an improperly high burden of proof. Under *Batson*, defendants must "establish purposeful discrimination." 476 U.S. at 98. The U.S. Supreme Court has described this requirement as showing that a peremptory strike was "motivated in substantial part by discriminatory intent[,]" *Flowers*, 139 S. Ct. at 2251, or "whether it was more likely than not that the challenge was improperly motivated." *Johnson*, 545 U.S. at 170.

¶ 86 Here, while the trial court properly *recited* this burden, it failed to apply it with fidelity. Instead, it looked for smoking-gun evidence of racial discrimination similar to what has been present in previous U.S. Supreme Court cases that have found *Batson* violations, namely *Foster*, 578 U.S. 488, and *Miller-El*, 545 U.S. 231. After noting the glaring evidence of discrimination present in those cases, the trial court found that "[t]his case is markedly distinguishable from the facts of this controlling authority."

¶ 87 While that may be true, it is not the *facts* of those decisions that make them controlling authority—it's the *law*. Highlighted names and trick

questions are not required for a defendant to show that a peremptory was "motivated in substantial part by discriminatory intent."[9] *Flowers*, 139 S. Ct. at 2251. Rather, as defendant did here, a defendant may present a wide variety of direct and circumstantial evidence in supporting a *Batson* challenge. *See id.* at 2243 (listing examples of acceptable evidence); *Hobbs*, 374 N.C. at 356 (same). By implicitly holding defendant to an improperly high burden, the trial court erred in its *Batson* step three analysis.

¶ 88 Third, the trial court erred by considering within its *Batson* step three analysis reasoning not presented by the prosecution on its own accord. In *Miller-El*, the U.S. Supreme Court held that "[a] *Batson* challenge does not call for a mere exercise in thinking up any rational basis. If the stated reason does not hold up, its pretextual significance does not fade because a trial judge, or an appeals court, can imagine a reason that might not have been shown up as false." 545 U.S. at 252. Indeed, the trial court here noted as much both during the rehearing and in its subsequent order. During the rehearing, for instance, the trial court stated:

> [T]he [c]ourt cannot interpose [a] valid basis for the exercise of [a] peremptory challenge when the State fails to raise it . . . I would find that had the State said ["Ms. Aubrey] works day and night . . . and she's sitting there slouching in her chair,["] . . . it would be one thing. But I don't think I can interpose that objection for the prosecutor in this case and say look, [had they] said that, . . . that would have been the basis of my ruling. So I think I'm stuck with what they said.

¶ 89 In its subsequent order, though, the trial court did not "st[i]ck with what they said." For instance, when considering the prosecutor's questioning of Ms. Aubrey and Mr. Williams, the court ruled that the comparison was "not . . . particularly pertinent because Mr. Williams had previously stated that, with respect to his supervisory duties, 'I can juggle things around[,]' . . . whereas Ms. Aubrey did not indicate any flexibility in her 'day and night' work schedule that might ease her concern about missing work." But the prosecution had never advanced this "day and night" argument on its own accord—not at the initial *Batson*

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9. Notably, the jury selections at question in both *Foster* and *Miller-El* took place in the late 1980s, either before or immediately after *Batson* was first decided. *See* 578 U.S. at 492 (summarizing the initial crime and trial process); 545 U.S. at 235–236 (same). Given the historical context noted above, it is unsurprising that *Batson* cases arising from trials in the late twentieth century may reveal more blatant evidence of racial discrimination in jury selection than those arising from trials today.

inquiry, and not the subsequent rehearing. While the prosecution certainly *could* have argued that Ms. Aubrey's "day and night" work schedule might impact her ability to focus during trial, it did not. Accordingly, the trial court erred by considering this reasoning within its step three analysis.

¶ 90 Fourth and finally, the trial court erred by failing to adequately consider the disparate questioning and disparate acceptance of comparable white and Black prospective jurors. *See Flowers*, 139 S. Ct. at 2246 ("We next consider the State's dramatically disparate questioning of black and white prospective jurors in the jury selection process."). As typical during jury selection, the prosecutor in this case collectively asked all of the then-seated jurors whether they felt confident that they could focus during the trial. Specifically, the prosecutor asked:

> [D]o you all feel like you can, if you serve as a juror, . . . pay attention to the testimony and the evidence while you're in the courtroom [and] focus exclusively on what's going on in the courtroom? I know we all have distractions in our lives, but is there anything that's such a major distraction that your mind may be somewhere else when you should be focusing on what's going on? I'm not asking you to tell me exactly what it is, but anybody have any kind of issues like that going on?

Notably, in response to an earlier question from the trial court about "anything going on in [their lives] that would make it difficult or impossible for [them] to serve," several of the jurors had indicated that they had potential work- or family-related logistical challenges, such as having to find coverage at work (Juror #6) or having one or more young children at home (Jurors # 9 and # 12), among others. Nevertheless, when none of the then-seated jurors responded to the prosecutor's question about focus, the prosecutor took them at their word and immediately moved on to another topic without further questioning.

¶ 91 Later, the prosecutor used peremptory strikes to remove three of the initial jurors (including Ms. Jeffreys), leading to the seating of three replacement jurors, including Ms. Aubrey and Mr. David Williams. Like the initial batch of jurors, the trial court asked the three replacements whether they had anything going on in their lives that would make it difficult or impossible for them to serve. Ms. Aubrey responded: "[o]ther than missing work, no[,]" before clarifying in response to a follow-up question by the court that she worked both "[d]ay and night." Mr. Williams

responded: "I'm an irrigation contractor and this is our season, and I'm one of the service techs. But I can juggle things around." Later, the prosecutor asked the three replacement jurors the same question he had previously posed to the initial batch:

> Is there anything going on in your personal life . . . that would maybe take you away mentally from being engaged in what's going on here in the courtroom? Again, I don't need to know specifics, but, you know, is there a possibility that your mind could drift somewhere else when we need you to be focusing on the proceedings here?

In response, like all of the initial jurors previously, Ms. Aubrey remained silent. Then, Mr. Williams spoke up, and the following exchange took place:

> [Mr. Williams]: I have 11 employees out in the field, so —
>
> Mr. Wiggs: Okay. Ms. Aubrey, do you feel confident that you can focus on what's going on here?
>
> [Ms. Aubrey]: I suppose.
>
> Mr. Wiggs: I want you to be confident about it. You just don't want to be a juror or do you feel like if you were here, you could focus and do what we need you to do?
>
> [Ms. Aubrey]: I think so.
>
> Mr. Wiggs: Okay. Thank you.

Later, without asking any further questions to either Ms. Aubrey or Mr. Williams, the prosecutor used a peremptory strike to remove Ms. Aubrey from the jury pool, but did not remove Mr. Williams.

¶ 92 On review, this exchange stands out for two reasons: first for what the prosecutor *did* do, and second for what he did *not* do. First, out of the fifteen potential jurors that the prosecutor had asked about their ability to focus up to this point (twelve initial and three replacements), Ms. Aubrey was the only one the prosecutor singled out for further specific questioning. And while Ms. Aubrey was the only potential juror who noted that she worked both "day and night," she was far from the only one who had substantially similar work- or family-related logistical challenges that might impact her ability to focus. Accordingly,

Ms. Aubrey's "day and night" comment alone cannot bear the weight of justifying this disparate questioning. Indeed, "[a] *per se* rule that a defendant cannot win a *Batson* claim unless there is an exactly identical white juror would leave *Batson* inoperable; potential jurors are not products of a set of cookie cutters." *Miller-El*, 545 U.S. at 247, n.6. In any event, as noted above, if the prosecutor was concerned about Ms. Aubrey working day and night, he never stated as much.

¶ 93 Second, this exchange stands out because of what the prosecutor did *not* do: follow up with Mr. Williams. After the prosecutor asked the question about focus, Mr. Williams, unique among the fifteen jurors up to this point, volunteered information that could most reasonably be understood as indicating that he had a professional obligation that might impact his ability to focus during trial: "I have 11 employees out in the field, so —".[10] Indeed, Mr. Williams had previously noted that he was self-employed and that "this is our season[.]" Instead of following up with Mr. Williams about this comment, though, the prosecutor instead, without explanation, turned immediately to Ms. Aubrey: "Okay. Ms. Aubrey, do you feel confident you can focus on what's going on here?" Ms. Aubrey then replied "I suppose[,]" and later, "I think so[,]" responses that are perfectly normal in jury selection and perhaps even more honest and conversational than a flat "yes." Indeed, if Ms. Aubrey *had* answered with a flat "yes," given the historical context noted above, one can realistically imagine a prosecutor seeking to justify a peremptory strike on the grounds that such an answer was too short, cold, or confident.

¶ 94 While "disparate questioning or investigation alone does not constitute a *Batson* violation[,]" it "can . . . , along with other evidence, inform the trial court's evaluation of whether discrimination occurred." *Flowers*, 139 S. Ct. at 2248. When viewed in the context of the full record, this exchange illustrates disparate questioning and exclusion of Ms. Aubrey compared to substantially comparable white potential jurors who were unquestioned and accepted by the prosecutor. Accordingly, the trial

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10. The State has suggested that it is possible that, instead of indicating why he might *not* be able to focus during trial, Mr. Williams' comment may have been providing a reason why he *could* focus during trial: because he "ha[d] 11 employees out in the field" who might be able to cover for him in his absence. While this explanation is not completely without merit, given the full context of the record (including the fact that none of the other fourteen jurors felt compelled go out of their way to provide the prosecutor with a reason to prove why they *could* focus in response to a question asking for potential reasons why they could not) it appears more likely that Mr. Williams was beginning to suggest that he might not be able to focus. In any event, even accepting both potential meanings as reasonable, the most notable aspect of this exchange is that the prosecutor never followed up with Mr. Williams to clarify what exactly his comment was suggesting.

court should have fully considered this evidence within the totality of defendant's submissions. Its failure to do so was erroneous.

¶ 95 "To reiterate, we need not and do not decide [whether] any of these four [errors] alone would require reversal." *Id.* at 2251. Rather, we determine that when these errors are considered cumulatively and within the context of the full record of this case, we are "left with the definite and firm conviction that a mistake has been committed." *Bennett*, 374 N.C. at 592. Accordingly, we hold that the trial court's ruling overruling defendant's *Batson* challenge was clearly erroneous.

III. Remedy

¶ 96 **[2]** Having determined that a *Batson* violation indeed occurred, we must now consider a just remedy. Because the finding of a *Batson* violation during jury selection necessitates the reversal of a defendant's subsequent conviction by that jury, *see Batson*, 476 U.S. at 100 (noting that the finding of a violation "require[s] that petitioner's conviction be reversed"); *Flowers*, 139 S. Ct. at 2252 (Alito, J., concurring) (agreeing with the majority opinion "that petitioner's capital conviction cannot stand"), it would ordinarily follow that a defendant would receive a new trial.

¶ 97 Here, however, defendant has already served his entire sentence of active imprisonment from his now-reversed conviction, and has been discharged from all post-release supervision. N.C.G.S. 15A-1335 provides that "[w]hen a conviction or sentence imposed in superior court has been set aside on direct review or collateral attack, the court may not impose a new sentence for the same offense, or for a different offense based on the same conduct, which is more severe than the prior sentence less the portion of the prior sentence previously served."

IV. Conclusion

¶ 98 Today, as surely as in 1880 and 1986, racial discrimination in jury selection violates a defendant's constitutional right to equal protection of the law. *See Strauder*, 100 U.S. 303; *Batson*, 476 U.S. 79. Furthermore, it undermines the credibility of our judicial system as a whole, thus tearing at the very fabric of our democratic society. *See Batson*, 476 at 87 ("The harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community."). Accordingly, the *Batson* framework establishes a process through which we seek to root out any remaining vestiges of racial discrimination in jury selection through the use of peremptory strikes.

¶ 99 In reality, the finding of a *Batson* violation does not amount to an absolutely certain determination that a peremptory strike was the product

of racial discrimination. Rather, the *Batson* process represents our best, if imperfect, attempt at drawing a line in the sand establishing the level of risk of racial discrimination that we deem acceptable or unacceptable.[11] If a prosecutor provides adequate legitimate race-neutral explanations for a peremptory strike, we deem that risk acceptably low. If not, we deem it unacceptably high.

¶ 100 Here, that risk was unacceptably high. After the prosecutor struck two Black women from the jury, defendant raised a *Batson* challenge presenting evidence tending to indicate that racial discrimination was a substantial motivating factor. The prosecutor then proffered two race-neutral justifications for each peremptory strike. Upon review of the peremptory strike of Ms. Gwendolyn Aubrey, the trial court found that "both race-neutral reasons offered by the prosecutor fail." At that point, the only valid reasoning remaining for the trial court to consider was defendant's evidence of discrimination. As a consequence, the totality of the evidence presented for the court to consider established that it was sufficiently likely that the strike was motivated in substantial part by discriminatory intent. This constitutes a substantive violation of defendant's constitutional right to equal protection under the Fourteenth Amendment of the United States Constitution, and the trial court clearly erred in ruling to the contrary. Accordingly, the trial court's order overruling defendant's *Batson* objection is reversed, defendant's conviction is vacated, and the case is remanded to the trial court for any further proceedings.

REVERSED AND REMANDED.

Justice EARLS concurring.

¶ 101 I join fully in the majority's opinion. I agree that the prosecutor's use of a peremptory challenge to exclude Ms. Aubrey, an African-American prospective juror, from the jury empaneled to hear this case violated the Equal Protection Clause of the Fourteenth Amendment. Indeed, "[e]qual

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11. *See People v. Gutierrez*, 2 Cal. 5th 1150, 1182–83 (2017) (Liu, J., concurring) ("In most cases, courts cannot discern a prosecutor's subjective intent with anything approaching certainty. But the issue is not whether the evidence of improper discrimination approaches certainty or even amounts to clear and convincing proof. The ultimate issue is whether it was more likely than not that the challenge was improperly motivated. This probabilistic standard is not designed to elicit a definitive finding of deceit or racism. Instead, it defines a level of risk that courts cannot tolerate in light of the serious harms that racial discrimination in jury selection causes to the defendant, to the excluded juror, and to public confidence in the fairness of our system of justice.") (cleaned up).

justice under law requires a criminal trial free of racial discrimination in the jury selection process." *Flowers v. Mississippi*, 139 S. Ct. 2228, 2242 (2019). I also agree that it is proper to reverse the trial court's order overruling Mr. Clegg's *Batson* objection and for his conviction to be vacated. Mr. Clegg has served his sentence and completed post-release supervision. By statute, where a conviction has been set aside "the court may not impose a new sentence for the same offense, or for a different offense based on the same conduct, which is more severe than the prior sentence less the portion of the prior sentence previously served." N.C.G.S. § 15A-1335 (2021). The State's interest in prosecuting and punishing Mr. Clegg for the crimes with which he was charged has already been fully satisfied.

¶ 102 I would further hold that the prosecutor's use of a peremptory challenge to exclude Ms. Jeffreys, another African-American woman, also violated the Fourteenth Amendment under *Batson*. It is important to address this question because the constitutional interest involved here is not simply the Fourteenth Amendment right of the defendant to a trial free from racial discrimination. "The *Batson* decision was grounded in the criminal defendant's right to equal protection of the laws . . . . *Batson* also concluded, however, that race-based exclusion of jurors violates the equal protection rights of the excluded jurors . . . ." Barbara D. Underwood, *Ending Race Discrimination in Jury Selection: Whose Right Is It, Anyway?*, 92 Colum. L. Rev. 725, 726 (1992) (footnote omitted) (citing *Batson v. Kentucky*, 476 U.S. 79, 85–87 (1986)). The United States Supreme Court recently reaffirmed this understanding, which flows directly from the Court's holding in *Strauder*:

> In the words of the *Strauder* Court: 'The very fact that colored people are singled out and expressly denied by a statute all right to participate in the administration of the law, as jurors, because of their color, though they are citizens, and may be in other respects fully qualified, is practically a brand upon them, affixed by the law, an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others.' For those reasons, the Court ruled that the West Virginia statute excluding blacks from jury service violated the Fourteenth Amendment.

Flowers, 139 S. Ct. at 2239 (cleaned up) (quoting *Strauder v. West Virginia*, 100 U.S. 303, 308 (1879)). On numerous other occasions the

United States Supreme Court has made clear that the equal protection rights of excluded jurors are also recognized and can be asserted by third parties. *See, e.g.*, *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 629–30 (1991) (prospective jurors have an equal protection right to be free of race-based jury selection in civil cases as well as criminal cases); *Powers v. Ohio*, 499 U.S. 400, 425 (1991) (rights of excluded jurors can be invoked by one civil litigant against another, and by a criminal defendant of a different race from that of the excluded juror).

¶ 103 In *Powers*, the Court explained that while an individual does not have a right to be chosen to sit on any particular jury, they do have a right not to be excluded from jury service because of their race. *Powers*, 499 U.S. at 409.

> It is suggested that no particular stigma or dishonor results if a prosecutor uses the raw fact of skin color to determine the objectivity or qualifications of a juror. We do not believe a victim of the classification would endorse this view; the assumption that no stigma or dishonor attaches contravenes accepted equal protection principles. Race cannot be a proxy for determining juror bias or competence. "A person's race simply 'is unrelated to his fitness as a juror.' "

Id. at 410 (quoting *Batson*, 476 U.S. at 87). Thus, "[a] venireperson excluded from jury service because of race suffers a profound personal humiliation heightened by its public character." *Id.* at 413–14. Although not evidence in the record of this case, the following material submitted with an amicus brief in the *Batson* case is illustrative of the harm to prospective jurors:

> In November of 1984, a person summoned for jury service in Brooklyn, New York, wrote a letter to the District Attorney complaining about race discrimination in jury selection. The person wrote that in a murder case against a Hispanic defendant, a majority of the prospective jurors were black, but an all-white jury was chosen, and it appeared to the writer that black jurors were being excluded on the basis of race. The writer asked: 'If we Blacks don't have common sense and don't know how to be fair and impartial, why send these summonses to us? Why are we subject to fines of $ 250.00 if we don't appear and told it's our civic duty if we ask to be excused? Why

> bother to call us down to these courts and then overlook us like a bunch of naive or better yet ignorant children? We could be on our jobs or in schools trying to help ourselves instead of in courthouse halls being made fools of.'

Underwood, *Ending Race Discrimination*, at 745. While it is inevitably a burden, "with the exception of voting, for most citizens the honor and privilege of jury duty is their most significant opportunity to participate in the democratic process." *Powers*, 499 U.S. at 407. One of the principal justifications for retaining the jury system is that it provides an opportunity for ordinary citizens "to participate in the administration of justice." *Id.* at 406 (citing *Duncan v. Louisiana*, 391 U.S. 145, 147-58 (1968)). Therefore, to be excluded from that opportunity based on one's race creates a unique kind of irreparable harm. *See also Edmonson*, 500 U.S. at 628 ("If peremptory challenges based on race were permitted, persons could be required by summons to be put at risk of open and public discrimination as a condition of their participation in the justice system. The injury to excluded jurors would be the direct result of governmental delegation and participation.")

¶ 104 Considering this harm, we should examine the parties' arguments and decide whether the prosecutor's decision to use a peremptory challenge to exclude Ms. Jeffreys was an equal protection violation. As the majority explains, on remand the trial court found that the prosecutor had offered a race-neutral reason for excluding Ms. Jeffreys, namely that she was previously employed as a nurse at Dorothea Dix Hospital and therefore may be sympathetic to Mr. Clegg's mental health issues. This is a race-neutral explanation supported by the record and satisfies the State's burden of production under *Batson's* second step.

¶ 105 In examining whether this explanation is persuasive, under *Batson*'s third step, additional facts are significant to provide context. The trial court found that Ms. Jeffreys's employment at Dorothea Dix Hospital was "rationally related to the Defendant's potential competency issues." However, Mr. Clegg's competency issues had already been resolved pre-trial, as the court had already determined that he was competent to stand trial and there was no reason to believe that the jury would hear about or have anything to decide about his competency. Significantly, the prosecutor did not ask any other juror if they had experience with mental health or competency issues. *See Miller-El v. Dretke*, 545 U.S. 231, 246 (2005) ("[T]he State's failure to engage in any meaningful voir dire examination on a subject the State alleges it is concerned about is evidence suggesting that the explanation is a sham and a pretext for

discrimination[.]" (first alteration in original) (quoting *Ex parte Travis*, 776 So. 2d 874, 881 (Ala. 2000))). These facts alone are sufficient to demonstrate that the prosecutor's race-neutral explanation is pretextual.

¶ 106 However, the trial court erred in failing to acknowledge and factor into its analysis statistics cited by Mr. Clegg on remand which showed that prior to his trial in 2016, from 2011 to 2012, Wake County prosecutors struck Black prospective jurors at 1.7 times the rate of white prospective jurors in all jury trials in North Carolina during that year. This information is relevant to determining whether discrimination has occurred in this particular case. *See State v. Hobbs*, 374 N.C. 345, 359–60 (2020) (trial court erred in failing to weigh historical evidence of racial discrimination in jury selection); *see also Flowers v. Mississippi*, 139 S. Ct. at 2245 ("Most importantly for present purposes, after *Batson*, the trial judge may still consider historical evidence of the State's discriminatory peremptory strikes from past trials in the jurisdiction, just as *Swain* had allowed.)

¶ 107 Considering the very localized and specific statistical evidence of the racially disparate use of peremptory challenges by prosecutors, the statewide data that was acknowledged by the trial court, the lack of any documented reason to exclude Ms. Jeffreys beyond a reason that appears to be pretextual, and the fact that the prosecutor here used two of his four peremptory challenges to strike all of the Black female prospective jurors,[1] it was clearly error for the trial court to conclude that Mr. Clegg failed to carry his burden of demonstrating racial discrimination in the prosecutor's use of a peremptory challenge to exclude Ms. Jeffreys from the jury. *Cf. Snyder v. Louisiana*, 552 U.S. 472, 485, 478 (2008) (a trial court's finding of discrimination against one juror is evidence of discrimination against other jurors).

¶ 108 The State also asserted that it excluded Ms. Jeffreys, as it did Ms. Aubrey, because of her "body language and failure to make eye contact" without further elaboration of what about Ms. Jeffreys' body language explained the decision to exclude her from the jury. The trial court concluded that this justification could not be supported by the record because there was not "an adequate record of the body language of the prospective juror."

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1. The State exercised four peremptory strikes: Viola Jeffreys, Gwendolyn Aubrey, Joseph Barello, and Brian Williams. The State struck 10%–11% of eligible white jurors (2/19) and 66% of eligible non-white jurors (2/3). All the women of color called to serve were stricken by the State.

¶ 109 In addition to the inadequate record, I would follow other courts that have found such explanations insufficient to constitute a valid, race-neutral explanation. *See*, *e.g.*, *State v. Giles*, 407 S.C. 14, 20–22 (2014) (explanation provided by proponent of a peremptory challenge at second step of *Batson* process must be clear and reasonably specific to be legally sufficient); *Zakour v. UT Med. Grp., Inc.*, 215 S.W.3d 763, 775 (Tenn. 2007) (finding explanation that six prospective female jurors were stricken because of their body language, without providing more detail, was not clear, reasonably specific, legitimate and reasonably related to the particular case being tried); *Spencer v. State*, 238 So. 3d 708, 712 (Fla. 2018) (under Florida law, second step of *Batson* requires prosecutor to identify "clear and reasonably specific" race-neutral explanation that is related to case being tried (quoting *State v. Slappy*, 522 So.2d 18, 22 (Fla. 1988))), *cert. denied*, 138 S. Ct. 2637. I would therefore hold that that a general reference to a person's body language without more and particularly without documentation of such facts on the record, is not a valid race-neutral explanation of a peremptory challenge that satisfies the second step of *Batson* even under the standard set by the United States Supreme Court in its decision in *Purkett v. Elem*, 514 U.S. 765 (1995).

¶ 110 The *Purkett* Court took a very broad approach to the second step, suggesting that virtually any race-neutral explanation, if "plausible," is satisfactory. *Purkett*, 514 U.S. at 768. However, the Court has also explained that 'seat-of-the-pants instincts' may often be just another term for racial prejudice." *Batson*, 476 U.S. at 106 (Marshall, J., concurring). The Washington Supreme Court has specifically identified "body language" and "failing to make eye contact" as reasons for a peremptory challenge that historically have been "associated with improper discrimination in jury selection" and required that if any party intends to offer such a reason for a peremptory challenge, notice must be provided to the court and the other parties "so the behavior can be verified and addressed in a timely manner." Wash. Gen. R. 37(i). Moreover, "[a] lack of corroboration by the judge or opposing counsel verifying the behavior shall invalidate the given reason for the peremptory challenge." *Id.* Therefore, I agree with the Louisiana Supreme Court and others that have held that a general explanation, such as body language cannot be a satisfactory race-neutral explanation because "[s]uch an all inclusive reason falls far short of an articulable reason that enables the trial judge to assess the plausibility of the proffered reason for striking a potential juror." *Alex v. Rayne Concrete Serv.*, 2005-1457 (La. 1/26/07); 951 So. 2d 138, 153. Indeed, "[i]f trial courts were required to find any reason given not based on race satisfactory, only those who admitted point-blank that

they excluded veniremen because of their race would be found in violation of the Fourteenth Amendment's guarantee of equal protection." *Id.* at 154 (quoting *State v. Collier*, 553 So. 2d 815, 821 (La. 1989)).

¶ 111 More generally, guaranteeing that juries are selected without racial bias is important to the administration of justice not only for the rights of the litigants and the rights of prospective jurors, but also for the legitimacy of the court system itself. *Taylor v. Louisiana*, 419 U.S. 522, 530–31 (1975) (fair representation of juries is essential to (1) guard against the exercise of "arbitrary power" and by invoking the "commonsense judgment of the community as a hedge against the overzealous or mistaken prosecutor," (2) uphold "public confidence in the fairness of the criminal justice system," and (3) share the administration of justice which "is a phase of civic responsibility").

¶ 112 When racial bias infects jury selection, it is an affront to individual dignity and removes important voices from the justice system. Writing nearly one hundred years ago, Chief Justice Taft explained:

> The jury system postulates a conscious duty of participation in the machinery of justice . . . . One of its greatest benefits is in the security it gives the people that they, as jurors actual or possible, being part of the judicial system of the country can prevent its arbitrary use or abuse.

Balzac v. Porto Rico, 258 U.S. 298, 310 (1922). More recently, when expanding *Batson* to the civil context, Justice Kennedy explained why eliminating racial bias in courtroom is fundamental:

> Few places are a more real expression of the constitutional authority of the government than a courtroom, where the law itself unfolds. Within the courtroom, the government invokes its laws to determine the rights of those who stand before it. In full view of the public, litigants press their cases, witnesses give testimony, juries render verdicts, and judges act with the utmost care to ensure that justice is done.
>
> Race discrimination within the courtroom raises serious questions as to the fairness of the proceedings conducted there. Racial bias mars the integrity of the judicial system and prevents the idea of democratic government from becoming a reality.

Edmonson, 500 U.S. at 628. Just four years ago, in overturning a conviction rendered by a jury that was found to have based its decision explicitly on the defendant's race, the Court again explained the significance of the jury in our legal system and our democracy:

> The jury is a central foundation of our justice system and our democracy. Whatever its imperfections in a particular case, the jury is a necessary check on governmental power. The jury, over the centuries, has been an inspired, trusted, and effective instrument for resolving factual disputes and determining ultimate questions of guilt or innocence in criminal cases. Over the long course its judgments find acceptance in the community, an acceptance essential to respect for the rule of law. The jury is a tangible implementation of the principle that the law comes from the people.

Pena-Rodriguez v. Colorado, 137 S. Ct. 855, 860 (2017). Given the importance of fair jury selection processes, it is incumbent on this Court to take reasonable steps to address the obstacles we face. We must acknowledge that this Court's *Batson* jurisprudence has not been effective. This case is the first case where we have reversed a conviction on *Batson* grounds. The record is clear:

> Since 1986, and as of September 6, 2016, the Supreme Court of North Carolina has decided seventy-four cases on the merits in which it adjudicated eighty-one *Batson* claims raised by criminal defendants over alleged racial discrimination against minority jurors in the State's exercise of peremptory challenges at criminal trials. To date, that [C]ourt has not found a substantive *Batson* violation in any of those cases. In seventy-one of those seventy-four cases, that [C]ourt found no *Batson* error whatsoever. In the three remaining cases, that [C]ourt held the trial court erred at *Batson*'s first step in finding no prima facie case existed and conducted or ordered further review. However, none of these three cases has ultimately resulted in the holding of a substantive *Batson* violation.

Daniel R. Pollitt & Brittany P. Warren, *Thirty Years of Disappointment: North Carolina's Remarkable Appellate Batson*

Record, 94 N.C. L. Rev. 1957, 1961 (2016) (footnotes omitted). Faced with a similarly stark record, the Washington Supreme Court observed in 2013 that its experience was "rather shocking and underscores the substantial discretion that is afforded to trial courts under *Batson*. And while this alone does not prove that *Batson* is failing, it is highly suggestive in light of all the other evidence that race discrimination persists in the exercise of peremptories." *State v. Saintcalle*, 178 Wash. 2d 34, 46, 309 P.3d 326, 335, *cert. denied*, 571 U.S. 1113 (2013), *and overruled in part on other grounds by Seattle v. Erickson*, 188 Wash. 2d 721, 398 P.3d 1124 (2017); *see also Miller-El*, 545 U.S. at 268–70 (Breyer, J., concurring) (reviewing the body of evidence showing that *Batson* has done very little to prevent prosecutors from exercising race-based challenges).

¶ 113 Justice Marshall predicted that "[m]erely allowing defendants the opportunity to challenge the racially discriminatory use of peremptory challenges in individual cases will not end the illegitimate use of the peremptory challenge." *Batson*, 476 U.S. at 105 (Marshall, J., concurring). In brief, and perhaps stating the obvious, the *Batson* framework makes it very difficult for litigants to prove intentional discrimination, "even where it almost certainly exists." *Erickson*, 188 Wash. 2d at 735–36, 398 P.3d at 1131–32 (quoting *Saintcalle*, 178 Wash. 2d at 46, 309 P.3d at 335). *Batson* also completely fails to address peremptory strikes that occur due to implicit or unconscious bias,[2] as Marshall pointed out when referencing prosecutors' and judges' "conscious or unconscious" bias. *Batson*, 476 U.S. at 106 (Marshall, J., concurring). Other natural human inclinations also make it difficult for counsel to assert that a member of the bar is acting out of purposeful discrimination[3] and judges are reluctant to sustain such objections. *Cf. People v. Gutierrez*, 2 Cal. 5th 1150, 1183, 395 P.3d 186, 208 (2017) (Liu, J., concurring) ("[I]t is more likely than not that one or more strikes were improperly motivated. But I do not think the finding of a violation should brand the prosecutor a liar or a bigot. Such loaded terms obscure the systemic values that the constitutional prohibition on racial discrimination in jury selection is designed to serve.").

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2. *See*, *e.g.*, Samuel R. Sommers & Michael I. Norton, *Race-Based Judgments, Race-Neutral Justifications: Experimental Examination of Peremptory Use and the Batson Challenge Procedure*, 31 Law & Hum. Behav. 261, 266–67 (2007).

3. Mr. Batson had to insist that his counsel "object anyway" to the prosecutor's use of peremptory challenges during jury selection at his trial. Sean Rameswaram, *Object Anyway*, More Perfect Podcast (July 16, 2016), interview of James Batson, https://www.wnycstudios.org/podcasts/radiolabmoreperfect/episodes/object-anyway.

¶ 114 Appellate judges are similarly uncomfortable overturning jury verdicts, especially when the crimes charged are extremely serious. The fact that the first time this Court has ever vacated a conviction on *Batson* grounds occurs here where Mr. Clegg has already completely served his time is indicative of why the *Batson* framework has failed to adequately address the constitutional violation acknowledged by the United States Supreme Court in *Strauder v. West Virginia*, 100 U.S. 303, 310 (1880).

¶ 115 Indeed, in 1986 Justice Marshall stated that "[t]he decision today will not end the racial discrimination that peremptories inject into the jury-selection process. That goal can be accomplished only by eliminating peremptory challenges entirely." *Batson*, 476 U.S. at 102–03 (Marshall, J., concurring). The Arizona Supreme Court has taken this observation seriously and, by general rule, has eliminated the use of peremptory challenges in 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). Washington State's General Rule 37, adopted by the Washington Supreme Court in 2018, establishes a new standard and identifies presumptively invalid reasons for peremptory challenges that have been associated with improper discrimination in the past. Wash. Gen. R. 37(i); *see also State v. Jefferson*, 192 Wash. 2d 225, 242, 429 P.3d 467, 476 (2018) (identifying *Batson's* deficiencies and asserting the court's "inherent authority to adopt such procedures to further the administration of justice"). The Connecticut Supreme Court established a jury selection task force to review the problems with *Batson* that it carefully outlined in its opinion in *State v. Holmes*, 334 Conn. 202, 221 A.3d 407 (2019), and to propose necessary solutions. *See Holmes*, 334 Conn. at 250, 221 A.3d at 436–37.

¶ 116 Social science research indicates that

> compared to diverse juries, all white juries tend to spend less time deliberating, make more errors, and consider fewer perspectives. In contrast, diverse juries were significantly more able to assess reliability and credibility, avoid presumptions of guilt, and fairly judge a criminally accused. By every deliberation measure heterogeneous groups outperformed homogeneous groups. These studies confirm what seems obvious from reflection: more diverse juries result in fairer trials.

Id. at 235 (cleaned up) (quoting *Saintcalle*, 178 Wash. 2d at 50, 309 P.3d at 337).[4] As in other jurisdictions, "this appeal presents us with an occasion to consider whether further action on our part is necessary to promote public confidence in the perception of our state's judicial system with respect to fairness to both litigants and their fellow citizens." *Id.* at 236. If we are to give more than lip service to the principle of equal justice under the law, we should not bury our heads in the sand and pretend that thirty-five years of experience with *Batson* will magically change. There are a variety of tools at our disposal, we urgently need to use them.

Justice BERGER dissenting.

¶ 117 "[T]he back and forth of a *Batson* hearing can be hurried, and prosecutors can make mistakes when providing explanations [for the use of peremptory challenges]. That is entirely understandable, and *mistaken explanations should not be confused with racial discrimination.*" *Flowers v. Mississippi*, 139 S. Ct. 2228, 2250, 204 L. Ed. 2d 638, 663 (2019) (emphasis added). This is plainly apparent because "*Batson* prohibits purposeful discrimination, not honest, unintentional mistakes." *Aleman v. Uribe*, 723 F.3d 976, 982 (9th Cir. 2013).

¶ 118 Trial court judges are uniquely positioned to consider and evaluate whether peremptory strikes are the product of purposeful discrimination. The Supreme Court has "recognized that these determinations of credibility and demeanor lie peculiarly within a trial judge's province." *Flowers*, 139 S. Ct. at 2244, 204 L. Ed. 2d at 656 (quoting *Snyder v. Louisiana*, 552 U.S. 472, 477, 128 S. Ct. 1203, 1208 (2008)). Because "the trial judge's findings in the context under consideration here largely will turn on evaluation of credibility, a reviewing court ordinarily should give those findings great deference." *Batson v. Kentucky*, 476 U.S. 79, 98 n.21, 106 S. Ct. 1712, 1724 n.21 (1986).

¶ 119 Consistent with precedent, the trial court evaluated the explanations provided by the prosecutor for the strikes of Ms. Viola Jeffreys and Ms. Gwendolyn Aubrey. Based upon the entire record, the trial court

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4. *See, e.g.*, Samuel R. Sommers & Phoebe C. Ellsworth, *How Much Do We Really Know About Race and Juries? A Review of Social Science Theory and Research*, 78 Chi.-Kent L. Rev. 997 (2003); Samuel R. Sommers, *Determinants and Consequences of Jury Racial Diversity: Empirical Findings, Implications, and Directions for Future Research*, 2 Soc. Issues & Pol'y Rev., no. 1, 2008, at 65–102; Samuel R. Sommers, *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations*, 90 J. of Personality & Soc. Psych., no. 4, 2006, at 597–612.

determined that the mistaken explanation provided was indeed "an instance of a prosecutor misremembering," not purposeful discrimination. The majority agrees that the explanation provided by the prosecutor was a mistake, yet reaches its desired result by distorting precedent, and mischaracterizing the record and the trial court order.

¶ 120 The question presented by this case is whether a mistaken explanation offered by an attorney during step two of a *Batson* inquiry is sufficient for the opponent of a peremptory strike to demonstrate purposeful racial discrimination. The mistaken explanation provided by the prosecutor cannot, by definition, be purposeful discrimination.

¶ 121 Because the trial court's order should be affirmed, I respectfully dissent.

I. Factual Background

¶ 122 There is no question in this case as to defendant's guilt.[1] It is uncontroverted that on January 25, 2014, defendant robbed a Wake County business at gun point. Defendant threatened to kill the employee, a black female, and he pointed a firearm at her stomach. After only receiving $85 from the cash register, defendant pressed the firearm against the employee's neck. Defendant then noticed a safe, and he pointed the firearm at the employee's left temple and ordered her to open it. Defendant fled the scene when the employee did not have the combination to the safe.

¶ 123 Defendant was tried and convicted of robbery with a dangerous weapon. During jury selection, defendant objected to use of peremptory challenges by the prosecutor against two black females, Ms. Viola Jeffreys and Ms. Gwendolyn Aubrey. The prosecutor struck Ms. Jeffreys due to her work history with Dorothea Dix Hospital. When the prosecutor explained his strike of Ms. Aubrey, the prosecutor provided a mistaken explanation. The prosecutor said that "when I asked her if she could be fair and impartial, her answer was 'I suppose.' I wasn't confident that she was confident that she could be fair and impartial." The problem, however, is that Ms. Aubrey was not asked if she could be fair and impartial; instead, Ms. Aubrey answered "I suppose" when responding to a question concerning her ability to focus during the trial.

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1. The only two arguments made by defendant in the Court of Appeals concerned the *Batson* argument at issue here, and his contention that the victim-impact testimony was not relevant.

II. Analysis

¶ 124 Peremptory challenges "are challenges which may be made or omitted according to the judgment, will, or caprice of the party entitled thereto[.]" *State v. Smith*, 291 N.C. 505, 526, 231 S.E.2d 663, 676 (1977). "The essential nature of the peremptory challenge denotes that it is a challenge exercised without a reason stated, without inquiry and without being subject to the court's control." *Id.* Peremptory challenges "permit rejection for a real or imagined partiality," *id.*, subject to the limitations set forth in the *Batson* line of cases.

¶ 125 Under *Batson*, "[o]nce the opponent of a peremptory challenge has made out a prima facie case of racial discrimination (step one), the burden of production shifts to the proponent of the strike to come forward with a race-neutral explanation (step two)." *Purkett v. Elem*, 514 U.S. 765, 767, 115 S. Ct. 1769, 1770–71 (1995). "The ultimate inquiry is whether the State was 'motivated in substantial part by discriminatory intent.' " *State v. Hobbs*, 374 N.C. 345, 353, 841 S.E.2d 492, 499 (2020) (quoting *Foster v. Chatman*, 578 U.S. 488, 513, 136 S. Ct. 1737, 1754 (2016)).

¶ 126 It is in step three of the *Batson* analysis that the trial court determines whether purposeful discrimination was the motivation for the peremptory strike. *Flowers*, 139 S. Ct. at 2241, 204 L. Ed. 2d at 655. "It is the honesty of the prosecutor's explanation—and that alone—which a trial judge must assess at the third step of the *Batson* analysis." *Lamon v. Boatwright*, 467 F.3d 1097, 1102 (7th Cir. 2006).

¶ 127 "As in any equal protection case, the 'burden is, of course,' on the defendant who alleges discriminatory selection of the venire 'to prove the existence of purposeful discrimination.' " *Batson*, 476 U.S. at 93, 106 S. Ct. at 1721 (quoting *Whitus v. Georgia*, 385 U.S. 545, 550, 87 S. Ct. 643, 646–47 (1967)). The burden of proof "rests with, and never shifts from, the opponent of the strike." *Johnson v. California*, 545 U.S. 162, 171, 125 S. Ct. 2410, 2417 (2005) (quoting *Purkett*, 514 U.S. at 768, 115 S. Ct. at 1769 (per curiam)).

¶ 128 A "trial judge's assessment of the prosecutor's credibility is often important." *Flowers*, 139 S. Ct. at 2243–44, 204 L. Ed. 2d at 656. The Supreme Court has "recognized that these determinations of credibility and demeanor lie peculiarly within a trial judge's province." *Id.* at 2244, 204 L. Ed. 2d at 656 (quoting *Snyder*, 552 U.S. at 477, 128 S. Ct. at 1208). "On appeal, a trial court's ruling on the issue of discriminatory intent must be sustained unless it is clearly erroneous." *Snyder*, 552 U.S. at 479, 128 S. Ct. 1203; *accord State v. Lawrence*, 352 N.C. 1, 14, 530 S.E.2d 807, 816 (2000). This Court has stated that "where there are two permissible

views of the evidence, the fact-finder's choice between them cannot be clearly erroneous." *State v. Thomas*, 329 N.C. 423, 433, 407 S.E.2d 141, 148 (1991) (quoting *Anderson v. Bessemer City*, 470 U.S. 564, 574, 105 S. Ct. 1504, 1511, 84 L.Ed.2d 518, 528 (1985)); *see also Hobbs*, 374 N.C. at 366–67, 841 S.E.2d at 508 (Newby, J., dissenting).

¶ 129 Because "the trial judge's findings in the context under consideration here largely will turn on evaluation of credibility, a reviewing court ordinarily should give those findings great deference." *Batson*, 476 U.S. at 98 n.21, 106 S. Ct. 1712 n.21; *see also Flowers*, 139 S. Ct. at 2244, 204 L. Ed. 2d at 656 ("The [Supreme] Court has described the appellate standard of review of the trial court's factual determinations in a *Batson* hearing as highly deferential.") (cleaned up); *Foster*, 578 U.S. at 500, 136 S. Ct. at 1747 (the third step "turns on factual determinations, and, in the absence of exceptional circumstances, we defer to state court factual findings unless we conclude that they are clearly erroneous.") (cleaned up); *Hernandez v. New York*, 500 U.S. 352, 364, 368 111 S. Ct. 1859, 1868–69, 1871 (1991) (discussing the Supreme Court's "respect for factual findings made by state courts" and the "deference to state-court factual determinations, in particular on issues of credibility."); and *Lawrence*, 352 N.C. at 14, 530 S.E.2d at 816 (because the third *Batson* step "is essentially a question of fact, the trial court's decision as to whether the prosecutor had a discriminatory intent is to be given great deference[.]").

A. Viola Jeffreys

¶ 130 Again, the two prospective jurors at issue here are Ms. Viola Jeffreys and Ms. Gwendolyn Aubrey. Ms. Jeffreys was struck due to her work history with Dorothea Dix Hospital. The relevant portions of the transcript are set forth below.[2]

> THE COURT: Ms. Jeffreys, can you tell us about yourself, ma'am?
>
> [Ms. Jeffreys]: I live on [REDACTED].
>
> . . . .
>
> THE COURT: And do you work, employed, either at home or outside the home?
>
> [Ms. Jeffreys]: No, retired.

2. The trial court initially questioned prospective jurors before allowing the parties to engage in voir dire.

THE COURT: What type of work did you do before you retired?

[Ms. Jeffreys]: I was a nurse aide at Dorothea Dix.

. . . .

[The State]: Ms. Jeffreys, I'm going to call you out. I wanted to ask you about your work as a nurse's aide, is that right, at Dorothea Dix?

[Ms. Jeffreys]: Dorothea Dix, yes.

[The State]: How long did you do that?

[Ms. Jeffreys]: 14 years.

[The State]: And when did you stop working there?

[Ms. Jeffreys]: I stopped there about seven months ago.

[The State]: You stopped working there about seven months ago?

[Ms. Jeffreys]: It had been about two years. I'm sorry. About two years.

[The State]: About two years ago was when you stopped working at Dorothea Dix? And I guess I kind of know what a nurse's aide does, but can you elaborate a little bit?

[Ms. Jeffreys]: They care of the patient. We give them baths and make sure they take medicine, stuff like that.

[The State]: What type of ailments and –

[Ms. Jeffreys]: Mostly diabetes. . . . Patients that have diabetes or something like that.

¶ 131 It is uncontroverted that defendant argued pretrial motions related to his mental health issues. During voir dire, the prosecutor explained that he struck Ms. Jeffreys because of "the underlying issues that have been brought out so far, I found that maybe she would not be able to fairly assess the evidence in this case." On remand, the prosecutor provided the same basis for use of the peremptory challenge— that based

on mental health issues put forth by defendant, Ms. Jeffreys may be sympathetic to defendant's case because of her work history at a mental health institution.

¶ 132 The trial court found that the prosecutor had provided a race-neutral reason for striking Ms. Jeffreys "based upon [her] employment history as a nurse's aide at Dorothea Dix Hospital." The trial court further found that "[d]efendant's competency had been called into question and evaluations ordered [, and] the State's stated basis for striking Ms. Jeffreys due to her work history in the mental health field is rationally related to [d]efendant's potential competency issues." Finally, the trial court found that the reason for striking Ms. Jeffreys was "supported by the record and constitutes an appropriate justification for the strike."

¶ 133 The prosecutor's questions of Ms. Jeffreys were focused on her work at Dorothea Dix, which was a state-operated psychiatric hospital. Ms. Jeffreys was the only prospective juror who indicated she worked or had worked in a mental health facility.

¶ 134 In overruling defendant's *Batson* challenge as it relates to Ms. Jeffreys, the trial court concluded as a matter of law that defendant "had not established that it is more likely than not that the State engaged in purposeful discrimination[.]" The trial court's determination as to Ms. Jeffreys was not clearly erroneous and should be affirmed.

¶ 135 The majority mentions Ms. Jeffreys more than thirty times in its opinion, but they do not analyze or even consider the legitimate reasons for her strike because doing so destroys their narrative. To be clear, there is no determination by the majority that the prosecutor's strike of Ms. Jeffreys was motivated by race. However, the majority uses carefully selected portions of the record, including Ms. Jeffreys's demographic information, to lump her in with the discussion of Ms. Aubrey, implying that both strikes were based on race. While the cherry-picked facts and circumstances may be helpful to their desired result, analysis of Ms. Jeffreys' strike is required for a proper review. *See Flowers*, 139 S. Ct. at 2251, 204 L. Ed. 2d at 664 (in a *Batson* analysis, an appellate court is to review "all of the relevant facts and circumstances taken together."); *see also State v. Bennett*, 374 N.C. 579, 339 (2005) ("clear error" review is based "on the entire evidence.").[3] The majority's failure to include an intellectually honest analysis of Ms. Jeffreys' strike demonstrates just one reason why the opinion is jurisprudentially suspect.

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3. The majority actually quotes this portion of *Bennett* in its analysis, yet declines to analyze the strike of Ms. Jeffreys.

B. Gwendolyn Aubrey

¶ 136 Similarly, defendant has failed to demonstrate purposeful discrimination in the use of a peremptory challenge for prospective juror Ms. Gwendolyn Aubrey. When the prosecutor explained his strike of Ms. Aubrey, the prosecutor provided a mistaken explanation. The prosecutor said that "when I asked her if she could be fair and impartial, her answer was 'I suppose.' " I wasn't confident that she was confident that she could be fair and impartial." The voir dire of Ms. Aubrey is set forth below.[4]

> THE COURT: Ms. Aubrey, can you tell us a little bit about yourself, ma'am?
>
> [Ms. Aubrey]: I live in south Raleigh. I work in the food service industry. I've not served on a jury before.
>
> THE COURT: Married? Single?
>
> [Ms. Aubrey]: Single.
>
> . . . .
>
> THE COURT: And anything going on in your life that would make it difficult or impossible for you to serve?
>
> [Ms. Aubrey]: Other than missing work, no.
>
> THE COURT: Missing work. Yes, ma'am. You work daytime?
>
> [Ms. Aubrey]: Day and night.
>
> THE COURT: Yes, ma'am. All right. There will be more questions about that, I'm sure, but thank you for bringing that concern to our attention.
>
> . . . .
>
> [The State]: As far as the new potential jurors, any of you ever been the victim of a crime before? Friends or family ever been the victim of any crime? . . .
>
> [Ms. Aubrey]: I had my car broken into once.
>
> [The State]: And you said you did or somebody—

4. As with Ms. Jeffreys, the trial court initially questioned prospective jurors before allowing the parties to engage in voir dire.

[Ms. Aubrey]: I did.

[The State]: Can you say when that was?

[Ms. Aubrey]: I don't know. Maybe like late '90s.

[The State]: Okay. Did you have any of your belongings taken from you?

[Ms. Aubrey]: Yes, sir, I did.

[The State]: Do you know if anybody was charged?

[Ms. Aubrey]: No.

[The State]: Did you ever get any of your belongings back?

[Ms. Aubrey]: No.

[The State]: Was it reported to law enforcement?

[Ms. Aubrey]: No, sir, it wasn't.

[The State]: It was not reported? Okay.

. . . .

[The State]: Can you tell me just a little bit about how you're familiar with firearms?

[Ms. Aubrey]: I had an ex-boyfriend who was a gun enthusiast and taught me how to shoot a gun.

[The State]: Do you own any firearms now?

[Ms. Aubrey]: No, sir.

[The State]: Do you ever shoot or handle weapons, firearms, now?

[Ms. Aubrey]: No, sir.

. . . .

[The State]: Okay. And Judge Ridgeway asked you about things going on in your life, and I just want to kind of follow up on that. We all have our normal responsibilities in life. Is there anything going on in your personal life—and I don't need to know specifically—you know, that would maybe take you away mentally from being engaged in what's going on here

> in the courtroom? Again, I don't need to know specifics, but, you know, is there a possibility that your mind could drift somewhere else when we need you to be focusing on the proceedings here?
>
> . . . .
>
> [The State]: Okay. Ms. Aubrey, do you feel confident you can focus on what's going on here?
>
> [Ms. Aubrey]: I suppose.
>
> [The State]: I want you to be confident about it. You just don't want to be a juror or do you feel like if you were here, you could focus and do what we need you to do?
>
> [Ms. Aubrey]: I think so.
>
> [The State]: Okay. Thank you.

¶ 137 The State then excused Ms. Aubrey from the panel. Defense counsel objected to the use of peremptory challenges against Ms. Jeffreys and Ms. Aubrey, stating, "[t]he only distinction I see is color."

¶ 138 The prosecutor then argued to the trial court:

> Judge, what I would tell you, first of all, I want to note that I think it's very offensive that there's an allegation being made that I'm excusing jurors for racial reasons. What I can tell you is that both the potential jurors in Seat No. 5, body language to me, they would not look at me. The most recent juror, Ms. Jeffreys—excuse me. Ms. Jeffreys was the first juror. The most recent juror, when I asked her if she could be fair and impartial, her answer was "I suppose." I wasn't confident that she was confident that she could be fair and impartial. The first juror, Ms. Jeffreys, talked about her experience as a nurse's aide with Dorothea Dix. With some of the underlying issues that have been brought out so far, I found that maybe she would not be able to fairly assess the evidence in this case.
>
> As Ms. Darrow pointed out, there's been an equal number of white jurors and African-American jurors that have been excused. Based on their answers, based on their body language, based on their failure to look at me when I was trying to communicate with

> them, and also based on their answers with respect to the last juror, her not being confident that she could be fair and impartial, frankly, I think that would be potential reason to challenge her for cause.
>
> Other than that, Judge, that's how the State is viewing the excusal of those jurors.

¶ 139 At trial, the objection lodged by defense counsel was overruled. Upon remand, the trial court found that "[i]t is evident from the record that both the trial court and the prosecutor's memory of the answers given by Ms. Aubrey [were] conflated." The trial court further found that

> [i]n retrospect, had the prosecutor, in offering his race-neutral basis for exercising the strike of Ms. Aubrey, stated that he was concerned that she had answered "I suppose" to the question of whether she could focus, when coupled with her concern that she worked "day and night" and would miss work, that, in the Court's view, would have constituted a neutral justification for the strike.

¶ 140 In other words, the prosecutor and the trial court were mistaken about the question posed by the State and the response given by Ms. Aubrey, and that but for the mistaken explanation, the record revealed that there was a race-neutral explanation for the strike of Ms. Aubrey. This portion of the trial court's order is far different from what the majority characterizes as the trial court "rejecting the 'I suppose' rationale." Nonetheless, the trial court, citing *Miller-El v. Dretke*, 545 U.S. 231, 125 S. Ct. 2317 (2002), determined that it could not consider the incorrectly stated, but plainly apparent, reason for striking Ms. Aubrey.

¶ 141 The trial court then analyzed other reasons proffered by the prosecutor for the strike, including body language and lack of eye contact by Ms. Aubrey, purported disparities in use of peremptory challenges,[5] and a comparison of the questions posed to white and black prospective

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5. The trial court also referenced a study of peremptory challenges in capital trials from 1990 to 2010 and non-capital cases from 2011–2012 in paragraphs 18 and 22. One could argue that this data is stale. Both of these studies are more than ten years old, and, presumably, some of the data used in the capital case study is more than thirty years old. Certainly, North Carolina's people, population, and attitudes have changed over the last thirty years. The majority seemingly acknowledges this point in footnote 9. Perhaps it is time for an updated, independent study of jury selection commissioned by the Administrative Office of the Courts.

jurors.[6] As to body language and lack of eye contact, the trial court made no findings of fact during the original trial. Citing *Snyder v. Louisiana*, 552 US 472 (2008), the trial court determined that in the absence of a finding of fact on a prospective juror's demeanor, the State's race-neutral explanation for striking Ms. Aubrey had to fail.

¶ 142 While the trial court may have taken the holding in *Miller-El* too literally when it determined that it could not consider the mistaken explanation provided by the prosecutor, the trial court's ultimate conclusion was correct. The trial court clearly set forth its reasoning, making the types of credibility determinations contemplated by the Supreme Court of the United States and by this Court, and the trial court's decision is entitled to great deference.

¶ 143 The majority acknowledges what is plainly apparent from the record and the trial court's order - that the prosecutor's explanation for the strike of Ms. Aubrey was a "mistake." If "*Batson* and its progeny direct trial judges to assess the *honesty*-not the accuracy-of a proffered race-neutral explanation," *Lamon*, 467 F.3d at 1101(emphasis in original), and the majority acknowledges this was a mistake, the strike cannot be the result of purposeful discrimination. *See Bethea v. Commonwealth*, 297 Va. 730, 754, 831 S.E.2d 670, 682 (2019) (a "prosecutor's race-neutral reason cannot at the same time be both an unintentional mistake and a pretextual, purposeful misrepresentation.").

¶ 144 Defendant has not shown purposeful discrimination or bad faith in the prosecutor's mistaken explanation; it is only theorized by the majority. Yet, the majority finds the prosecutor's mistaken explanations here were "shifting" and "plainly unsupported by the record." The majority then erroneously postulates that because the race-neutral explanations failed, the only remaining evidence must be given weight and that it must be assigned to defendant. It is the factfinder that assigns weight to evidence, and the factfinder can assign as much or as little weight as it determines appropriate. That is not a higher burden.

¶ 145 Moreover, the majority's disparate questioning analysis is internally inconsistent. The majority here expressly recognizes that there is an explanation for the prosecutor's questioning of Mr. Williams that "is not

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6. It seems obvious, but jury selection typically involves general questioning of prospective jurors to probe basic information. Based on responses, individual prospective jurors may, not shall, receive follow-up questions. The majority focuses on disparate questioning in its findings. However, "disparate questioning or investigation alone does not constitute a *Batson* violation." *Flowers v. Mississippi*, 139 S. Ct. 2228, 2248, 204 L. Ed. 2d 638, 661 (2019). The proper standard is "dramatically disparate questioning" *id.*, which is not present here.

completely without merit." Indeed, the trial court found that the side-by-side comparison between Mr. Williams and Ms. Aubrey was not "particularly pertinent" as Mr. Williams had previously mentioned he could juggle things around while Ms. Aubrey "did not indicate any flexibility in her 'day and night' work schedule that might ease her concern about missing work." This should be dispositive as to any further analysis given the well-established deferential standard of review that this Court is required to apply. But, the majority again impermissibly speculates and draws its own inferences from the cold record rather than deferring to the findings of the trial court. In so doing, the majority encroaches on the authority vested in the trial court.

¶ 146 To be sure, "[e]qual justice under law requires a criminal trial free of racial discrimination in the jury selection process." *Flowers*, 139 S. Ct. at 2242, 204 L. Ed. 2d at 655. But this Court is not equipped, nor is it our role, to find facts and weigh evidence. Even if one were to assume this is a close case, which it is not, "where there are two permissible views of the evidence, the fact-finder's choice between them cannot be clearly erroneous." *State v. Thomas*, 329 N.C. 423, 433, 407 S.E.2d 141, 148 (1991) (quoting *Anderson v. Bessemer City*, 470 U.S. 564, 574, 105 S.Ct. 1504, 1511, 84 L.Ed.2d 518, 528 (1985)); *see also Hobbs*, 374 N.C. at 366–67, 841 S.E.2d at 508 (Newby, J., dissenting).

III. Conclusion

¶ 147 From its unique position, the trial court observed the strikes of Ms. Jeffreys and Ms. Aubrey and heard the explanations for the strikes offered by the State. In a comprehensive order, the trial court made detailed findings of fact and conclusions of law, ultimately overruling defendant's objections to the peremptory strikes. The majority, however, declines to give the trial court any measure of deference, adopting its own view of the evidence. In so doing, the majority ignores the caution advised by the Supreme Court that "mistaken explanations should not be confused with racial discrimination." *Flowers*, 139 S. Ct. at 2250, 204 L. Ed. 2d at 663.

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

STATE v. McLYMORE

[380 N.C. 185, 2022-NCSC-12]

STATE OF NORTH CAROLINA
v.
DATORIUS LANE McLYMORE

No. 270PA20

Filed 11 February 2022

1. Homicide—jury instructions—self-defense—common law right—replaced by statutory right

The trial court in a murder prosecution properly instructed the jury that N.C.G.S. § 14-51.4 precluded defendant from invoking his right to self-defense where he was committing a felony (possession of a firearm by a felon) at the time he used defensive force against the victim. Although defendant claimed that he had asserted his common law right to self-defense at trial and that section 14-51.4 only disqualified him from invoking his statutory right to self-defense codified in section 14-51.3, the General Assembly's enactment of section 14-51.3 clearly abrogated and replaced the common law right such that defendant could have only claimed his statutory right.

2. Appeal and Error—preservation of issues—jury instruction—self-defense—specific grounds for objection

In a murder prosecution, where the trial court instructed the jury that N.C.G.S. § 14-51.4 precluded defendant from claiming self-defense because he was committing a felony (possession of a firearm by a felon) at the time he used defensive force against the victim, defendant preserved for appellate review his argument that the court erred by not instructing the jury that section 14-51.4 only applied if the State could prove an immediate causal nexus between defendant's use of defensive force and his commission of the felony. Defendant's objection at trial—that the court erred in delivering an instruction on section 14-51.4 and, alternatively, the court misstated the scope and applicability of the felony disqualifier—encompassed defendant's argument on appeal and therefore met the specificity requirement of Appellate Rule 10 (parties must state the specific grounds for their objection unless those grounds were apparent from the context).

3. Homicide—jury instruction—self-defense—section 14-51.4—applicability—prejudice analysis

In a murder prosecution, where the trial court instructed the jury that N.C.G.S. § 14-51.4 precluded defendant from claiming self-defense because he was committing a felony (possession of a

firearm by a felon) at the time he used defensive force against the victim, the court erred by failing to add that section 14-51.4 only applied if the State could prove an immediate causal nexus between defendant's use of defensive force and his commission of the felony. However, the court's error did not prejudice defendant where the evidence showed he had committed a different felony (robbery with a dangerous weapon) immediately after his fatal confrontation with the victim; the jury's verdict convicting defendant of both murder and the robbery charge indicated that the immediate causal nexus between defendant's use of force and the disqualifying felonious conduct had been established at trial.

Chief Justice NEWBY concurring in the result.

Justice BARRINGER joins in this concurring opinion.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, No. COA19-428, 2020 WL 2130670 (N.C. Ct. App. May 5, 2020) (unpublished), finding no error in a judgment entered on 26 July 2018 by Judge Claire V. Hill in Superior Court, Cumberland County. Heard in the Supreme Court on 1 September 2021.

Joshua H. Stein, *Attorney General*, *by Marc X. Sneed*, *Special Deputy Attorney General*, *for the State-appellee.*

Glenn Gerding, *Appellate Defender*, *by Sterling Rozear*, *Assistant Appellate Defender*, *for defendant-appellant.*

EARLS, Justice.

¶ 1 This case requires us to decide whether the trial court committed reversible error in instructing the jury that the defendant, Datorius Lane McLymore, could not claim self-defense to justify his use of deadly force because he was also in violation of N.C.G.S. § 14-415.1, which makes it a Class G felony for an individual with a prior felony conviction to possess a firearm. In answering this question, we must interpret the scope and meaning of certain provisions of North Carolina's "Stand Your Ground" Law. Specifically, we must interpret a provision which states in relevant part that a defendant may not claim self-defense if he or she "used defensive force and . . . [w]as attempting to commit, committing, or escaping after the commission of a felony." N.C.G.S. § 14-51.4 (2021). We conclude

that this provision requires the State to prove an immediate causal nexus between a defendant's attempt to commit, commission of, or escape after the commission of a felony and the circumstances giving rise to the defendant's perceived need to use force.

¶ 2 Because it failed to instruct the jury on this causal nexus requirement, the trial court's jury instructions were erroneous. Further, although McLymore admitted that he had previously been convicted of a felony offense and was possessing a firearm at the time he used deadly force, the trial court's failure to properly instruct the jury denied him the opportunity to dispute the existence of a causal nexus between his violation of N.C.G.S. § 14-415.1 and his use of force and to assert any affirmative defenses. Because we do not interpret N.C.G.S. § 14-51.4(1) to categorically prohibit individuals with a prior felony conviction from ever using a firearm in self-defense, we cannot say that the trial court's failure to instruct on the causal nexus requirement was not prejudicial with respect to McLymore's purported violation of N.C.G.S. § 14-415.1.

¶ 3 However, at trial, McLymore was also convicted of another felony offense, robbery with a dangerous weapon. This outcome and the uncontroverted facts conclusively establish that McLymore's commission of robbery with a dangerous weapon immediately followed the confrontation during which he used deadly force. Under these circumstances, McLymore could not have been prejudiced by the trial court's issuance of the erroneous jury instruction because, based on the jury's verdict, the immediate causal nexus between his use of force and his commission of the disqualifying felony of robbery with a dangerous weapon was established. Thus, under N.C.G.S. § 14-51.4(1), he was disqualified from claiming the justification of self-defense. Accordingly, we modify and affirm the decision of the Court of Appeals.

I. Background.

¶ 4 In April 2014, McLymore was working as a door-to-door magazine salesman. After completing a sale, he used the proceeds to purchase laundry detergent and food. Shortly thereafter, he quit his job with the sales company. Later that day, his supervisor at the sales company, David Washington, met McLymore at a local hotel. The two left together in Washington's vehicle. When Washington asked McLymore about the proceeds from his magazine sale, McLymore responded that he "spent it on food and washing powder." According to McLymore, while the vehicle was stopped at a traffic light, Washington punched McLymore in his jaw, grabbed him by the shirt, and pushed him against the door. In response, McLymore pulled out a gun, "closed [his] eyes[,] and fired two"

shots at Washington, killing him. McLymore then pulled Washington's body out of the driver's seat, left it on the ground, and fled the scene in Washington's vehicle. McLymore evaded police for over an hour before being apprehended.

¶ 5 On 5 January 2015, McLymore was indicted for the first-degree murder of Washington, felonious speeding to elude arrest, and robbery with a dangerous weapon for taking Washington's vehicle. At trial, McLymore admitted that he had previously been convicted of multiple felony offenses including common law robbery, larceny of a firearm, and assault inflicting serious bodily injury. The trial court also admitted evidence that twenty days before McLymore shot Washington, McLymore was involved in another alleged robbery, during which he entered the victim's house, fought with the victim over money, and then took the victim's gun and shot him. The State presented evidence that McLymore used this same gun to shoot Washington.

¶ 6 At trial, McLymore did not dispute that he killed Washington. Instead, he claimed that he justifiably used deadly force in self-defense. During the charge conference, the trial court explained that it would instruct the jury on self-defense but that "it is disqualifying for self-defense under *State [v.] Crump* that he was a felon in possession of a firearm, which is a disqualifying felony [under N.C.G.S. § 14-51.4(1)]." McLymore objected, arguing that N.C.G.S. § 14-51.4(1) did not apply because he was claiming perfect self-defense under the common law, and that even if N.C.G.S. § 14-51.4(1) did apply, it would violate his rights to interpret this provision to categorically bar individuals with prior felony convictions from ever using a firearm in self-defense. The trial court overruled his objection and instructed the jury, in relevant part, that

> [t]he Defendant is not entitled to the benefit of self-defense if he was committing the felony of possession of a firearm by a felon. . . . [T]he State must prove beyond a reasonable doubt, among other things, that the Defendant did not act in self-defense, or that the Defendant was committing the felony of possession of a firearm by felon if the Defendant did act in self-defense.

The jury found McLymore guilty of all charged offenses. He was sentenced to life without the possibility of parole.

¶ 7 On appeal, the Court of Appeals rejected McLymore's argument that N.C.G.S. § 14-51.4 "only applies to statutory self-defense" as created by N.C.G.S. § 14-51.3 and not "common law self-defense," which

McLymore attempted to invoke at trial.[1] *State v. McLymore*, No. COA19-428, 2020 WL 2130670, at *6 (N.C. Ct. App. May 5, 2020) (unpublished). According to the Court of Appeals, while another provision of the statutory law of self-defense expressly provided that it was "not intended to repeal or limit any other defense that may exist under the common law," the General Assembly chose not to "carve out a [ ] common law exception" to sections 14-51.3 and 14-51.4. *Id.* at *7. Therefore, the Court of Appeals concluded that sections 14-51.3 and 14-51.4 wholly "supplant[ ]" the common law of self-defense

> in situations where (1) the defendant "was attempting to commit, committing, or escaping after the commission of a felony"; (2) the defendant "[i]nitially provokes the use of force against himself or herself" unless he or she was "in imminent danger of death or serious bodily harm"; or (3) "the person who was provoked continues or resumes the use of force" after the defendant withdraws.

Id. (alteration in original) (quoting N.C.G.S. § 14-51.4 (2019)). Applying the precedent it had established in *State v. Crump*, 259 N.C. App. 144 (2018), in which the Court of Appeals held that N.C.G.S. § 14-51.4(1) only required proof that a defendant was committing a felony at the time he or she used assertedly defensive force, the Court of Appeals concluded that McLymore was not entitled to invoke the statutory right to self-defense because "when [McLymore] shot Washington, he was committing the offense of possession of a firearm by a felon which is punishable as a Class G felony under N.C.[G.S. §] 14-415.1." *McLymore*, 2020 WL 2130670, at *7.

¶ 8 This Court allowed McLymore's petition for discretionary review.

II. Sections 14-51.3 and 14-51.4 supplant the common law of self-defense.

¶ 9 **[1]** McLymore first argues that the Court of Appeals erred in concluding that N.C.G.S. § 14-51.4(1) applies in his case. McLymore contends that he invoked the *common law* right to self-defense, which he argues continues to exist separate and apart from the *statutory* right to self-defense created by N.C.G.S. § 14-51.3. Thus, in McLymore's view,

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1. The Court of Appeals also held that the trial court did not plainly err when it admitted evidence relating to the earlier incident when McLymore allegedly shot a man during a robbery. *State v. McLymore*, No. COA19-428, 2020 WL 2130670, at *6 (N.C. Ct. App. May 5, 2020) (unpublished). This issue, however, is not before this Court.

even if N.C.G.S. § 14-51.4(1) bars him from invoking the statutory right to self-defense, it does not disqualify him from justifying the use of defensive force by invoking what he asserts is his still-existing common law right to self-defense. In response, the State contends that the General Assembly has exercised its authority to displace the common law through statutory enactment and that once the General Assembly chose to codify the right to self-defense, the common law right to self-defense was entirely extinguished.

¶ 10 No one disputes that the General Assembly possesses the authority to displace the common law through legislative action. As we have previously explained, "the General Assembly is the policy-making agency of our government, and when it elects to legislate in respect to the subject matter of any common law rule, the statute supplants the common law rule and becomes the public policy of the State in respect to that particular matter." *McMichael v. Proctor*, 243 N.C. 479, 483 (1956). Instead, the question is whether the General Assembly intended to add to the common law right to perfect self-defense or abrogate it in its entirety.

¶ 11 Although not expressly stated, the General Assembly's intention to abolish the common law right to perfect self-defense is unmistakable. Our caselaw describes the common law of perfect self-defense as follows:

> The law of perfect self-defense excuses a killing altogether if, at the time of the killing, these four elements existed:
>
> (1) it appeared to defendant and he believed it to be necessary to kill the deceased in order to save himself from death or great bodily harm; and
>
> (2) defendant's belief was reasonable in that the circumstances as they appeared to him at the time were sufficient to create such a belief in the mind of a person of ordinary firmness; and
>
> (3) defendant was not the aggressor in bringing on the affray, *i.e.*, he did not aggressively and willingly enter into the fight without legal excuse or provocation; and
>
> (4) defendant did not use excessive force, *i.e.*, did not use more force than was necessary or reasonably appeared to him to be necessary under the

> circumstances to protect himself from death or great bodily harm.

State v. Norris, 303 N.C. 526, 530 (1981). Section 14-51.3 closely tracks this earlier common law definition of the right to self-defense in providing that an individual may use force "against another when and to the extent that the person reasonably believes that the conduct is necessary to defend himself or herself or another against the other's imminent use of unlawful force." N.C.G.S. § 14-51.3(a) (2021). Further, as the Court of Appeals correctly explained, section 14-51.3 notably lacks a "carve out" explicitly conveying the General Assembly's intention to preserve the common law. *McLymore*, 2020 WL 2130670, at *7. Together, these facts indicate that the General Assembly meant to replace the existing common law right to perfect self-defense with a new statutory right.

¶ 12 Accordingly, we conclude that after the General Assembly's enactment of N.C.G.S. § 14-51.3, there is only one way a criminal defendant can claim perfect self-defense: by invoking the statutory right to perfect self-defense. Section 14-51.3 supplants the common law on all aspects of the law of self-defense addressed by its provisions.[2] Section 14-51.4 applies to "[t]he justification described in . . . [N.C.]G.S. [§] 14-51.3." N.C.G.S. § 14-51.4 (2021). Therefore, when a defendant in a criminal case claims perfect self-defense, the applicable provisions of N.C.G.S. § 14-51.3—and, by extension, the disqualifications provided under N.C.G.S. § 14-51.4—govern. Because McLymore claimed perfect self-defense, and the only right to perfect self-defense available in North Carolina was the right provided by statute, the trial court did not err in delivering an instruction on the felony disqualifier contained in N.C.G.S. § 14-51.4(1), which applies under the circumstances of this case.

III. The trial court erroneously stated the law of self-defense, but this error could not have prejudiced McLymore.

¶ 13 Because we interpret subsection 14-51.4(1) to apply to McLymore's claim of perfect self-defense, we next consider the scope of the felony disqualifier. According to McLymore, the trial court erred in failing to instruct the jury that the State was required to prove an immediate causal nexus between his commission of a felony offense and the circumstances giving rise to his perceived need to use defensive force. In his view, it

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2. However, to the extent the relevant statutory provisions do not address an aspect of the common law of self-defense, the common law remains intact. *See McMichael v. Proctor*, 243 N.C. 479, 483 (1956) ("So much of the common law as has not been abrogated or repealed by statute is in full force and effect within this State.").

would be absurd and contrary to the General Assembly's intent to interpret N.C.G.S. § 14-51.4(1) to categorically bar any individual previously convicted of a felony from ever using a firearm in self-defense. In response, the State argues first that McLymore failed to preserve the causal nexus argument and second that N.C.G.S. § 14-51.4(1), by its plain terms, does not require the State to prove anything more than that McLymore was committing a felony offense when he used defensive force. In the alternative, the State argues that even if N.C.G.S. § 14-51.4(1) incorporates a causal nexus requirement, McLymore could not have been prejudiced by the trial court's misstatement of the law of self-defense.

¶ 14 We conclude that McLymore has preserved the causal nexus argument and that N.C.G.S. § 14-51.4(1) does incorporate a causal nexus requirement. The Court of Appeals' decision to the contrary in *State v. Crump*, 259 N.C. App. 144 (2018) and subsequent decisions relying on *Crump's* causal nexus holding are overruled. Accordingly, the trial court committed an instructional error when it misstated the requirements of the felony disqualifier at McLymore's trial. However, for the reasons described below, we agree with the State that McLymore could not have been prejudiced.

A. McLymore preserved his causal nexus argument.

¶ 15 **[2]** At trial, McLymore objected to the trial court's issuance of a jury instruction addressing the requirements of N.C.G.S. § 14-51.4(1). Broadly, he offered two grounds for his objection. First, he asserted that it was inappropriate to *deliver* any instruction on the felony disqualifier because he was invoking the common law right to self-defense, rather than the statutory right to self-defense. We have already rejected this argument. Second, he asserted that the trial court *misstated* the law of self-defense by instructing the jury that if it found he was violating N.C.G.S. § 14-415.1 when he used force against Washington, he was disqualified from attempting to justify his use of force by claiming self-defense. McLymore's objection to the substance of the trial court's self-defense instruction was sufficient to preserve the causal nexus argument for appellate review.

¶ 16 Rule 10 of the North Carolina Rules of Appellate Procedure contains a "specificity requirement." *State v. Bursell*, 372 N.C. 196, 199 (2019). "In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." N.C. R. App. P. 10(a)(1). Accordingly, if a party fails to state the grounds

for an objection and the grounds are not "apparent from the context," *id.*, a party's objection does not preserve an issue for appellate review. Applying Rule 10, we have held that an issue was unpreserved when the substance of a party's objection at trial was either irreconcilable with or unrelated to the substance of the defendant's argument on appeal. *See, e.g.*, *State v. Fair*, 354 N.C. 131, 152 (2001) (holding that the defendant failed to preserve issue for appellate review because "defendant stated in no uncertain terms at trial that the evidence proffered was not character evidence, [yet] he now seeks to establish error on appeal by asserting that the evidence was indeed character evidence"); *State v. Jones*, 342 N.C. 523, 535 (1996) (holding that "a general objection to the admission of" certain evidence did not preserve entirely unrelated argument raised on appeal asserting that the "chain of custody of the [evidence] was broken").

¶ 17 Rule 10's specificity requirement serves two purposes. First, the specificity requirement "encourage[s] the parties to inform the trial court of errors in its instructions so that it can correct the instructions and cure any potential errors before the jury deliberates on the case and thereby eliminate the need for a new trial." *State v. Odom*, 307 N.C. 655, 660 (1983); *see also Bursell*, 372 N.C. at 199 ("The specificity requirement in Rule 10(a)(1) prevents unnecessary retrials by calling possible error to the attention of the trial court so that the presiding judge may take corrective action if it is required."). Second, the specificity requirement helps to "contextualize[ ] the objection for review on appeal, thereby enabling the appellate court to identify and thoroughly consider the specific legal question raised by the objecting party." *Bursell*, 372 N.C. at 199. However, Rule 10 does not bind a party on appeal only to arguments identical to the ones offered in support of an objection at trial. If a party's objection puts the trial court and opposing party on notice as to what action is being challenged and why the challenged action is thought to be erroneous—or if the what and the why are "apparent from the context," N.C. R. App. P. 10(a)(1)—the specificity requirement has been satisfied.

¶ 18 In this case, the grounds McLymore offered in support of his objection at trial were related to and fairly encompass the causal nexus theory he advances on appeal. McLymore did not fail to "bring [this alleged error] to the trial court's attention." *State v. Wiley*, 355 N.C. 592, 615 (2002). At trial and at every subsequent stage of this proceeding, McLymore has argued that the trial court erred in delivering an instruction on N.C.G.S. § 14-51.4. In the alternative, he has consistently argued that if delivering an instruction on N.C.G.S. § 14-51.4 were appropriate,

then the trial court misstated the scope and applicability of the felony disqualifier. This objection put the trial court on notice that McLymore believed (1) that the trial court would err if it delivered an instruction explaining the felony disqualifier in the way it had proposed, and (2) that this instruction was erroneous because it would mean that McLymore, and all individuals with a prior felony conviction, were categorically prohibited from ever using a firearm in self-defense. The trial court was afforded an opportunity to reconsider how it was characterizing N.C.G.S. § 14-51.4, and the State was afforded an opportunity to explain why it believed the trial court's description of the law was accurate.

¶ 19 Further, the trial transcript demonstrates that the connection between McLymore's objection and the existence (or lack thereof) of the causal nexus requirement was readily "apparent from the context." N.C. R. App. P. 10(a)(1). At trial, in response to McLymore's objection, the State argued that "based on recent case law, the *State v. Crump* [decision], the statutory disqualification would apply since the Defendant was a felon in possession of a firearm at the time of the offense." The trial court then expressly relied on the holding of *Crump* to justify its decision to instruct the jury that "if they find that [McLymore] was committing the felony of possession of a firearm by a felon, then that disqualifies him from the self-defense." These explicit references to *Crump's* holding make clear that the parties and the trial court were all on notice at trial of the argument that N.C.G.S. § 14-51.4(1) incorporates a causal nexus requirement.

¶ 20 Accordingly, the requirements of N.C. R. App. P. 10(a)(1), including the specificity requirement, were met in this case. McLymore preserved the causal nexus argument for appellate review.

B. Subsection 14-51.4(1) incorporates a causal nexus requirement.

¶ 21 **[3]** Having determined that McLymore preserved the causal nexus argument, we next consider whether N.C.G.S. § 14-51.4(1) requires the State to prove an immediate causal nexus between the defendant's commission of a felony offense and the circumstances giving rise to his or her use of force. We conclude that it does.

¶ 22 Section 14-51.4 provides that "[t]he justification described in [N.C.]G.S. [§] 14-51.2 and [N.C.]G.S. [§] 14-51.3 is not available to a person who used defensive force and who . . . [w]as attempting to commit, committing, or escaping after the commission of a felony." N.C.G.S. § 14-51.4 (2021). Admittedly, the plain language of the statute does not support McLymore's position. However, "where a literal interpretation of the language of a statute will lead to absurd results, or contravene the

manifest purpose of the Legislature, as otherwise expressed, the reason and purpose of the law shall control and the strict letter thereof shall be disregarded." *State v. Holloman*, 369 N.C. 615, 628 (2017) (quoting *State v. Barksdale*, 181 N.C. 621, 625 (1921)). A literal interpretation of N.C.G.S. § 14-51.4(1) would produce absurd consequences inconsistent with the General Assembly's "manifest purpose."

¶ 23 Subsection 14-51.4(1) was enacted by the General Assembly in 2011 as part of a statute titled in relevant part "An Act to Provide When a Person May Use Defensive Force." S.L. 2011-268, 2011 N.C. Sess. Laws 1002. Commonly known as the "Stand Your Ground" Law, the Act "restate[d] the law [of self-defense] in some respects and broaden[ed] it in others." John Rubin, *The New Law of Self Defense?*, North Carolina Criminal Law: A UNC School of Government Blog (Aug. 17, 2011), https://nccriminallaw.sog.unc.edu/the-new-law-of-self-defense. Notably, the Act established that an individual who is lawfully in his or her home, motor vehicle, or workplace "does not have a duty to retreat from an intruder," even before using deadly force, under most circumstances. N.C.G.S. §§ 14-51.2(f). Similarly, under most circumstances there is no duty for a person to retreat "in any place he or she has the lawful right to be." 14-51.3(a) (2021); *see also State v. Coley*, 375 N.C. 156, 161 (2020) ("Under [the Act] a person does not have a duty to retreat but may stand his ground against an intruder."). The overall consequence of the Act was to make self-defense more widely available as a justification for the use of force in North Carolina.

¶ 24 The State contends that a literal interpretation of the felony disqualifier reflects "a sensible broadening of the common-law defensive force concept of fault, with the intended purpose being to limit the protections of the Act to the law-abiding." The State is correct that the common law of self-defense required consideration of a defendant's "fault" when determining if the defendant could justify his or her use of force as self-defense. However, a literal interpretation of the felony disqualifier is fundamentally inconsistent with common law principles.

¶ 25 At common law, a defendant's "fault" was assessed solely by reference to that defendant's role in precipitating the confrontation during which he or she used force. A defendant was entitled to use self-defense only "if he has not himself *created the necessity for the assault or brought the trouble upon himself* by some unlawful act." *State v. Pollard*, 168 N.C. 116, 122 (1914) (emphases added). Thus, with very few exceptions, a defendant whose actions led to the confrontation during which he or she used force was precluded from claiming that his or her use of force was justified as an exercise of the right to

self-defense. *See State v. Bell*, 338 N.C. 363, 387 (1994). But, at common law, no group of defendants was categorically prohibited from invoking the right to self-defense—a defendant was prohibited from invoking self-defense only if it was in some sense the defendant's "fault" that the confrontation occurred.

¶ 26 In this light, McLymore's proposed interpretation of N.C.G.S. § 14-51.4(1) is the one that reflects "a sensible broadening of the common-law defensive force concept of fault." It reflects the reasonable presumption that a defendant who uses force in a confrontation which resulted from his or her "attempting to commit, committing, or escaping after the commission of a felony" contributed to the circumstances giving rise to the need to use force. N.C.G.S. § 14-51.4(1). This interpretation would expand the common law while adhering to its basic principles. By contrast, the State's proposed interpretation of N.C.G.S. § 14-51.4(1) would reflect a profound rupture with the common law. The State's proposed interpretation would transform the meaning of "fault" by eliminating the need to examine the defendant's culpability for creating the circumstance giving rise to the defendant's need to use defensive force.

¶ 27 Under the State's proposed interpretation, "a woman in possession of a little more than one and a half ounces of marijuana, a felony in North Carolina, could not rely on self-defense to justify the use of defensive force if her abusive boyfriend, for reasons unrelated to her marijuana possession, began to beat and threaten to kill her." John Rubin, *The Statutory Felony Disqualification for Self-Defense*, North Carolina Criminal Law: A UNC School of Government Blog (June 7, 2016), https://nccriminallaw.sog.unc.edu/statutory-felony-disqualification-self-defense. An individual who had previously been convicted of a felony and kept an antique rifle in his or her attic could not rely on self-defense to justify the use of defensive force if he or she was threatened by an armed intruder, even if the individual did not use that rifle or any other firearm in repelling the intrusion. In each of these cases, the individual claiming self-defense would in no way be at "fault" as that concept was understood at common law. Nonetheless, absent a causal nexus requirement, each individual would be required to choose between submitting to an attacker and submitting to a subsequent criminal conviction.

¶ 28 Of course, the General Assembly does possess the authority to alter or abrogate even fundamental common law principles through statutory enactment. Still, statutes which alter common law rules should be interpreted against the backdrop of the common law principles being displaced. *See Seward v. Receivers of Seaboard Air Line Ry.*, 159 N.C. 241, 245–46 (1912) ("Whether the statute affirms the rule of the common

law on the same point, or whether it supplements it, supersedes it, or displaces it, the legislative enactment must be construed with reference to the common law, for in this way alone is it possible to reach a just appreciation of its purpose and effect." (quoting Henry Campbell Black, Handbook on the Construction and Interpretation of the Laws (1886))). It is doubtful that the General Assembly intended to completely disavow a fundamental common law principle in a statute which otherwise closely hews to the common law.

¶ 29 The State's proposed interpretation of N.C.G.S. § 14-51.4(1) also raises substantial constitutional concerns. If self-defense is an "inherent right," *State v. Holland*, 193 N.C. 713, 718 (1927), a statute which precludes defendants from claiming self-defense for reasons entirely unconnected to the circumstances giving rise to their need to use force would potentially tread upon rights guaranteed by the North Carolina Constitution. *See* N.C. Const. art. I, § 1 ("[A]ll persons . . . are endowed by their Creator with certain inalienable rights[ ] . . . among these are life, liberty, the enjoyment of the fruits of their own labor, and the pursuit of happiness."); *Cf. Perkins v. State*, 576 So. 2d 1310, 1314 (Fla. 1991) (Kogan, J., concurring) ("The right to fend off an unprovoked and deadly attack is nothing less than the right to life itself."). Although "[t]he state clearly has a compelling state interest in disallowing the use of self defense when a person's own unprovoked, aggressive, and felonious acts set in motion an unbroken chain of events leading to a killing or other injury," an interpretation of N.C.G.S. § 14-51.4(1) which allowed the State to deprive an individual of "the right to defend life and liberty" for other less compelling reasons would be on much shakier constitutional ground. *Perkins*, 576 So. 2d at 1314–15 (Kogan, J., concurring).

¶ 30 The State's proposed categorical bar on the use of self-defense for those engaged in the commission of any felony is inconsistent with longstanding common law principles, incongruous with legislative intent, raises significant constitutional issues, and would produce absurd results. *Cf. Mayes v. State*, 744 N.E.2d 390, 393 (Ind. 2001) ("A literal application of the contemporaneous crime exception would nullify claims for self-defense in a variety of circumstances and produce absurd results in the process."). Accordingly, we hold that in order to disqualify a defendant from justifying the use of force as self-defense pursuant to N.C.G.S. § 14-51.4(1), the State must prove the existence of an immediate causal nexus between the defendant's disqualifying conduct and the confrontation during which the defendant used force. The State must introduce evidence that "but for the defendant" attempting to commit, committing, or escaping after the commission of a felony, "the confrontation

resulting in injury to the victim would not have occurred." *Mayes*, 744 N.E.2d at 394. Here, the trial court did not instruct the jury on this causal nexus requirement. Therefore, the jury instructions it delivered were erroneous.

C. The trial court's error was not prejudicial because the jury necessarily established an immediate causal nexus between McLymore's use of force and his commission of a felony offense.

¶ 31 To establish that the trial court's instructional error requires vacating his first-degree murder conviction, McLymore must demonstrate "a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises." N.C.G.S. § 15A-1443(a) (2021). Ordinarily, due process requires allowing the jury to determine whether or not a defendant was engaged in disqualifying conduct bearing an immediate causal nexus to the circumstances giving rise to his or her use of force. *See Apprendi v. New Jersey*, 530 U.S. 466, 477 (2000) (explaining every criminal defendant's right to a have a jury determine "every fact necessary to constitute the crime with which he is charged"). However, under the circumstances of this case, we are able to conclude that the trial court's instructional error could not have prejudiced McLymore.

¶ 32 The State's primary argument is that McLymore could not have been prejudiced because he had previously been convicted of a felony offense and was in possession of a firearm when he shot Washington. Under North Carolina law, it is a Class G felony for "any person who has been convicted of a felony to purchase, own, possess, or have in his custody, care, or control any firearm or any weapon of mass death and destruction." N.C.G.S. § 14-415.1(a) (2021). McLymore does not dispute that he had previously been convicted of multiple felony offenses and that he was possessing the firearm he used to shoot Washington. Still, these facts do not conclusively establish that McLymore could not have been prejudiced by the trial court's failure to instruct the jury on the causal nexus requirement.

¶ 33 McLymore was not indicted for violating N.C.G.S. § 14-415.1. He was not afforded the opportunity to raise any affirmative defenses to the State's assertion that he was committing a felony offense, such as the defense of necessity. *See State v. Mercer*, 373 N.C. 459, 463 (2020) ("[I]n narrow and extraordinary circumstances, justification may be available as a defense to a charge under N.C.G.S. § 14-415.1."). Further, the jury was not afforded the opportunity to decide whether McLymore's

possession of the firearm was causally connected to the initiation of a confrontation between himself and Washington, which is the operative question under N.C.G.S. § 14-51.4(1). To accept the State's argument on this ground would be to effectively hold that all individuals with a prior felony conviction are forever barred from using a firearm in self-defense under any circumstances. This would be absurd.

¶ 34 However, the jury did determine beyond a reasonable doubt that McLymore was engaged in the commission of a different felony offense when he shot Washington: robbery with a dangerous weapon in violation of N.C.G.S. § 14-87. At trial, the trial court instructed the jury that

> [i]f you find from the evidence beyond reasonable doubt that on or about the alleged date the Defendant had in the Defendant's possession a firearm and took and carried away property from the person or presence of a person without that person's voluntary consent by endangering or threatening that person—threatening that person's life with the use or threatened [use] of a firearm, the Defendant knowing that the Defendant was not entitled to take the property and intending to deprive the person of its use permanently, it would be your duty to return a verdict of guilty. If you do not so find or have a reasonable doubt as to one or more of these things, it would be your duty to return a verdict of not guilty.

The jury found McLymore guilty of robbery with a dangerous weapon.[3] Because one of the elements of robbery with a dangerous weapon was McLymore's use or threatened use of a firearm, the jury finding McLymore guilty of this offense meant that the jury determined beyond

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3. "The essential elements of robbery with a dangerous weapon are: '(1) an unlawful taking or an attempt to take personal property from the person or in the presence of another, (2) by use or threatened use of a firearm or other dangerous weapon, (3) whereby the life of a person is endangered or threatened.' " *State v. Haselden*, 357 N.C. 1, 17 (2003) (quoting *State v. Call*, 349 N.C. 382, 417 (1998)); *see also* N.C.G.S. § 14-87 (2021). Further, "[t]o be found guilty of robbery with a dangerous weapon, the defendant's threatened use or use of a dangerous weapon must precede or be concomitant with the taking, or be so joined by time and circumstances with the taking as to be part of one continuous transaction." *State v. Olson*, 330 N.C. 557, 566 (1992). Thus, because self-defense is not a defense to this charge, and because the jury's determination of guilt necessarily means the jury found McLymore's use of a firearm temporally and causally connected to the felony offense, McLymore cannot argue that there is a reasonable possibility that a properly instructed jury would have returned a different verdict on the charge of robbery with a dangerous weapon.

a reasonable doubt that McLymore's felonious conduct was immediately causally connected to the circumstances giving rise to his shooting Washington. Based upon the outcome of McLymore's trial, it is indisputable that there existed an immediate causal nexus between his felonious conduct and the confrontation during which he used assertedly defensive force, and the felony disqualifier applies to bar his claim of self-defense.

¶ 35 Stated another way, while the jury instruction the trial court gave on this issue was erroneous, a permissible jury instruction would state:

> the Defendant is not entitled to the benefit of self-defense if he was attempting to commit, committing, or escaping after the commission of, the felony of robbery with a dangerous weapon. . . . [T]he State must prove beyond a reasonable doubt, among other things, that the Defendant did not act in self-defense, or that the Defendant was attempting to commit, committing, or escaping after the commission of the felony of robbery with a dangerous weapon if the Defendant did act in self-defense but that there was an immediate causal connection between Defendant's use of force and his felonious conduct.

Because the State did prove to the jury's satisfaction that McLymore committed the felony offense of robbery with a deadly weapon, and based on the uncontroverted facts, McLymore cannot establish that he was prejudiced in any way by the trial court's issuance of the legally erroneous jury instruction.

IV. Conclusion.

¶ 36 The trial court misstated the law of self-defense by failing to instruct the jury that the felony disqualifier contained in N.C.G.S. § 14-51.4(1) requires the State to prove an immediate causal nexus between the defendant's disqualifying felonious conduct and the circumstances giving rise to the defendant's use of defensive force. Nonetheless, McLymore cannot prove prejudice in this case because the jury determined beyond a reasonable doubt that his commission of robbery with a dangerous weapon was immediately causally connected to his shooting Washington. Accordingly, we modify and affirm the decision of the Court of Appeals.

MODIFIED AND AFFIRMED.

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

Chief Justice NEWBY concurring in the result.

¶ 37 I agree with the majority's determination that sections 14-51.3 and 14-51.4 supplant the common law with respect to perfect self-defense. However, because defendant failed to preserve his causal nexus argument for appellate review, this Court should not address it. Further, even if defendant did preserve his causal nexus argument, section 14-51.4 does not require the State to prove a causal nexus between a defendant's commission of a felony and his use of self-defense. Therefore, I do not join the portion of the majority's opinion that places a causal nexus element into section 14-51.4.

¶ 38 "In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." N.C. R. App. P. 10(a)(1).

> The specificity requirement in Rule 10(a)(1) prevents unnecessary retrials by calling possible error to the attention of the trial court so that the presiding judge may take corrective action if it is required. Moreover, a specific objection discourages gamesmanship and prevents parties from allowing evidence to be introduced or other things to happen during a trial as a matter of trial strategy and then assigning error to them if the strategy does not work. Practically speaking, Rule 10(a)(1) contextualizes the objection for review on appeal, thereby enabling the appellate court to identify and thoroughly consider the specific legal question raised by the objecting party.

State v. Bursell, 372 N.C. 196, 199, 827 S.E.2d 302, 305 (2019) (citations, internal quotation marks, and alterations omitted). Further, "[t]his Court has long held that where a *theory* argued on appeal was not raised before the trial court, 'the law does not permit parties to swap horses between courts in order to get a better mount in the Supreme Court.' " *State v. Sharpe*, 344 N.C. 190, 194, 473 S.E.2d 3, 5 (1996) (emphasis added) (quoting *Weil v. Herring*, 207 N.C. 6, 10, 175 S.E. 836, 838 (1934)).

¶ 39 During the charge conference in the present case, defendant made the following objection to the trial court's proposed jury instructions:

> [Defendant] has a common-law right of self-defense. It's not abdicated by the statute. The statute speaks

> of a justification under the statute of self-defense under common law is not abdicated by that statute. We'd also object under that [defendant] has a constitutional right to defend his own life and under the due process clause of the Fifth Amendment and the 14th Amendment, we believe that the limitation of his right to defend his own life with that application—with the Court's application—or interpretation and application of the statute would infringe upon that due process right. And finally, that to do so is a constitutional violation of that right.

¶ 40 Defendant's objection provided two specific theories for why the trial court should instruct the jury on common-law self-defense: (1) section 14-51.4 does not disqualify the use of common-law self-defense; and (2) if section 14-51.4 does supplant the common law, then the trial court's application of section 14-51.4 to limit defendant's right to defend his own life would violate the Due Process Clause of both the Fifth and Fourteenth Amendments.

¶ 41 On appeal, however, defendant now asserts a new theory: the trial court's instruction was erroneous because it did not state that section 14-51.4 requires the State to prove a causal nexus between defendant's commission of a felony and his use of defensive force. The majority's conclusion that this new theory was either encompassed within defendant's broad due process argument or apparent from the context is unfortunate. Based upon the majority's reasoning, a defendant could generally assert before the trial court that an instruction violates his due process rights and later present on appeal any number of theories to support the overbroad challenge. This is precisely what Rule 10's specificity requirement seeks to avoid. *See* N.C. R. App. P. 10(a)(1); *Sharpe*, 344 N.C. at 194, 473 S.E.2d at 5. Therefore, since defendant's causal nexus argument is not preserved for appellate review, the Court should not address it.

¶ 42 Even if defendant's causal nexus argument were preserved, it is without merit. The primary endeavor of courts in construing a statute is to give effect to legislative intent. *Liberty Mut. Ins. Co. v. Pennington*, 356 N.C. 571, 574, 573 S.E.2d 118, 121 (2002); *Stevenson v. City of Durham*, 281 N.C. 300, 303, 188 S.E.2d 281, 283 (1972). If the statutory language is clear and unambiguous, a court should give the words their plain and definite meaning. *Fowler v. Valencourt*, 334 N.C. 345, 348, 435 S.E.2d 530, 532 (1993). When, however, "a statute is ambiguous, judicial construction must be used to ascertain the legislative will."

Burgess v. Your House of Raleigh, Inc., 326 N.C. 205, 209, 388 S.E.2d 134, 136–37 (1990). Furthermore, "where a literal interpretation of the language of a statute will lead to absurd results, or contravene the manifest purpose of the Legislature, as otherwise expressed, the reason and purpose of the law shall control and the strict letter thereof shall be disregarded." *Mazda Motors of Am., Inc. v. Sw. Motors, Inc.*, 296 N.C. 357, 361, 250 S.E.2d 250, 253 (1979) (quoting *State v. Barksdale*, 181 N.C. 621, 625, 107 S.E. 505, 507 (1921)).

¶ 43 The relevant portion of section 14-51.4 states that "[t]he justification described in . . . [N.C.]G.S. [§] 14-51.3 is not available to a person who used defensive force and who . . . [w]as attempting to commit, committing, or escaping after the commission of a felony." N.C.G.S. § 14-51.4 (2021). This language is unambiguous and clearly does not include a causal nexus requirement. Nonetheless, the majority claims that it would be absurd to interpret section 14-51.4 literally because it would effectively bar all convicted felons from ever using a firearm in self-defense. The majority, however, ignores the fact that section 14-51.4 in no way prevents felons from legally defending themselves with other weapons. This result is not absurd.[1] Rather, it reflects a policy decision to limit the use of self-defense to the law-abiding. Such an intent is certainly sensible given the State's substantial interests in protecting its citizens and deterring recidivism. *See State v. Hilton*, 378 N.C. 692, 2021-NCSC-115, ¶ 27; *Mazda Motors of Am., Inc.*, 296 N.C. at 361, 250 S.E.2d at 253 ("If the language of a statute is free from ambiguity and expresses a single, definite, and sensible meaning, judicial interpretation is unnecessary and the plain meaning of the statute controls.").

¶ 44 Here defendant's behavior was far from law-abiding. At trial, defendant admitted that he was a convicted felon due to his previous convictions of common-law robbery, larceny of a firearm, and assault inflicting serious bodily injury. He also admitted that on 24 March 2014, he entered Andre Womack's house, engaged in an altercation with Womack over money, took Womack's gun, and shot Womack. The next month, defendant used the same gun to rob[2] and kill David Washington. Defendant's unlawful possession of the gun enabled him to commit murder.

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1. While this result, on the facts before us, is not so absurd as to require an interpretation of the statute different than its plain language, we note that defendant did not preserve any constitutional arguments. Accordingly, we express no opinion on whether this interpretation violates any federal or state constitutional rights.

2. The jury found defendant guilty of robbery with a dangerous weapon.

¶ 45 At the time that defendant killed Washington, he was committing the felonies of possession of a firearm by a felon, *see* N.C.G.S. § 14-415.1(a) (2021), and robbery with a dangerous weapon, *see* N.C.G.S. § 14-87(a) (2021). Section 14-51.4 thus disqualifies defendant's use of perfect self-defense. Therefore, I concur in the result only.

Justice BARRINGER joins in this concurring opinion.

STATE OF NORTH CAROLINA
v.
JAMES CLAYTON CLARK, JR.

No. 286A20

Filed 11 February 2022

1. Evidence—expert testimony—that victim was "sexually abused"—impermissible vouching of child victim's credibility

The trial court committed plain error in a trial for taking indecent liberties with a child by allowing testimony from the State's expert witness—a nurse tendered as an expert in child abuse and forensic evaluation of abused children—that the minor victim had been "sexually abused" where there was no physical evidence of the crime and the statements of the victim were the only direct evidence. Pursuant to the standard set forth in *State v. Towe*, 366 N.C. 56 (2012), where the improper testimony bolstered the victim's credibility upon which the case turned, it had a probable impact on the jury's guilty verdict and therefore constituted fundamental error.

2. Evidence—expert testimony—indecent liberties—identifying defendant as perpetrator—impermissible vouching of victim's credibility

The trial court committed plain error in a trial for taking indecent liberties with a child by allowing the State's expert witness to implicitly identify defendant as the perpetrator of the crime when describing her treatment recommendations for the victim (including that the victim should have no contact with defendant). Where there was no physical evidence of the crime and the case therefore hinged on the statements of the victim, the admission improperly vouched for the victim's credibility.

Chief Justice NEWBY dissenting.

Justice BARRINGER joins in this dissenting opinion.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the unpublished decision of a divided panel of the Court of Appeals, No. COA 19-634, 2020 WL 1274899 (N.C. Ct. App. Mar. 17, 2020), finding no error in part in a judgment entered on 18 July 2018 by Judge Jeffrey B. Foster Jr. in Superior Court, Pitt County. On 14 August 2020, the Supreme Court allowed, in part, defendant's petition for discretionary review. Heard in the Supreme Court on 19 May 2021.

Joshua H. Stein, Attorney General, by Lisa B. Finkelstein, Assistant Attorney General, for the State-appellee.

Paul F. Herzog for defendant-appellant.

HUDSON, Justice.

¶ 1 James Clayton Clark, Jr. (defendant) appeals from a divided decision of the Court of Appeals, arguing the majority erred in upholding his conviction for taking indecent liberties with a child on the basis that the trial court erred in allowing the State's expert to testify that the minor child was "sexually abused" in the absence of physical evidence confirming her opinion. Defendant further argues that testimony by the State's expert identifying defendant as the perpetrator of the charged offense constituted plain error and that the dissenting opinion in the Court of Appeals correctly determined that the record of this case is sufficient to determine that Mr. Clark's trial counsel committed ineffective assistance of counsel. For the reasons stated, we affirm in part and reverse in part the decision of the Court of Appeals, and remand for a new trial.

I. Factual and Procedural Background

¶ 2 In the summer of 2015, six-year-old "Jane"[1] started bed-wetting, having nightmares, and withdrawing socially. Around a year later, Jane told her stepmother that defendant, Jane's aunt's boyfriend at the time, called Jane into the bathroom, "grabbed her forcefully by her arm," and "attempted to put her hand inside of his underwear in his pants." The alleged incident occurred in the summer of 2015 while Jane was staying with her aunt.[2] Jane told her stepmother that she was "afraid of

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

2. The charging indictment alleged the date of the offense to be "BETWEEN 06-01-2015 and 8-31-2015."

[defendant]" because "he had tried to force her to do something that she felt like was wrong."

¶ 3 Jane's stepmother reported the incident to law enforcement the following day, and the Pitt County Sheriff's Office interviewed Jane. The sheriff's office scheduled an appointment for Jane with the TEDI Bear Children's Advocacy Center (CAC) and subsequently recommended she receive trauma-based therapy. In her testimony, Jane's stepmother stated that Jane's behavioral problems "improved greatly" after over one year of therapy, yet there remained "a distance that wasn't there before."

¶ 4 At trial, Jane testified that defendant "called [her] into the bathroom…grabbed [her] hand...tried to make -- make [her] touch his private…was pulling [her] hand to his pants." According to Jane's testimony, she eventually got loose from defendant's grip and returned to playing with her cousins. Defendant was the only adult present at the time of the incident, but Jane could not remember how he reacted after the incident. Jane also testified that she informed her aunt and biological mother about the alleged abuse, but neither took any action. A year later, Jane told her stepmother about the incident.

¶ 5 Andora Hankerson testified about her experience as a forensic interviewer and that she interviewed Jane at CAC on 12 September 2016 about the alleged abuse. Ms. Hankerson testified to the following brief summary of the interview based on the written report from CAC:

> Rapport was established with [Jane] and she was able to engage in the process. [Jane] was able to demonstrate the difference between truth and lie. She promised to discuss true things during her interview. The alleged offender, she stated the alleged offender called [Jane] into the bathroom, grabbed her hand, and tried to make her touch his private part. The incident occurred at her Aunt['s] house.

Ms. Hankerson also testified about her training to recognize whether a child had been "coached" by a parent or another person and, over defendant's objection, testified that she saw no indications Jane had been "coached" based on the 12 September 2016 interview.

¶ 6 The nurse who evaluated Jane at CAC, Ann Parsons, also testified. Ms. Parsons was tendered as an expert witness in child abuse and forensic evaluation of abused children. Ms. Parsons testified that after performing a physical examination, she determined Jane "was healthy" and "looked normal for [her] age from head to toe." In her evaluations, Ms.

Parsons considered "questions about [Jane's] behaviors, how was she doing at school, how's she sleeping, does she seem afraid of anything, how's her appetite, has she been more aggressive," and emphasized that "[a]fter having been dry for a period of time, she was wetting the bed." Ms. Parsons testified that she determined "[Jane] had been sexually abused." She testified the diagnosis was based "predominantly [on] the history of her disclosures to family, law enforcement and Ms. [ ] Hankerson at TEDI Bear, and her behavioral change."

¶ 7 Defendant did not object to Ms. Parson's testimony about her diagnosis of Jane as "sexually abused." Ms. Parsons also testified, again without objection, about her treatment recommendations for Jane, specifically that Jane have (1) "primary care with her regular doctor, mental health evaluation," (2) "an evidence-based trauma-focused treatment program," (3) "no contact with [defendant] during the investigation, and [(4)] any future contact with [defendant] only to address therapeutic needs as determined by [Jane's] therapist." A report summarizing these recommendations was published to the jury without objection.

¶ 8 At the conclusion of the evidence, the jury found the defendant guilty of taking indecent liberties with a child. Defendant was sentenced to twenty-nine months in prison and required to register as a sex offender for thirty years. Defendant appealed.

¶ 9 In a divided opinion authored by then-Judge Berger, the North Carolina Court of Appeals held that the trial court did not commit plain error by permitting Ms. Parsons to use the word "disclosure" in describing Jane's allegations, by permitting her to testify regarding treatment recommendations that identified defendant, and by permitting her to testify that, in her opinion, Jane had been sexually abused. *State v. Clark*, No. COA 19-634, 2020 WL 1274899, at *2–5 (Mar. 17, 2020) (unpublished). The majority further held the trial court did not commit plain error by allowing Ms. Hankerson to testify that Jane had not been "coached." Finally, the majority dismissed defendant's ineffective assistance of counsel claim without prejudice. *Id.* at *5.

¶ 10 First, the majority found no plain error in the trial court's admission of Ms. Parsons's use of the term "disclosure" in her testimony. *Id.* at *3. The majority reasoned "[t]here is nothing about use of the term 'disclose,' standing alone, that conveys believability or credibility." *Id.* at *3 (citing *State v. Betts*, 267 N.C. App. 272, 281 (2019)). Second, the majority determined that Ms. Parsons's recommendations identifying defendant "in no way amounted to an assertion that Defendant was, in fact, responsible for Jane's alleged sexual abuse," but merely that Jane

"subjectively believes defendant to be her abuser." *Id.* Finally, the majority held it was improper to allow Ms. Parsons's testimony stating "[Jane] had been sexually abused" but concluded defendant failed to establish the error sufficiently prejudiced him so as to constitute plain error. *Id.* at *4. The majority concluded the admission of Ms. Parsons's improper testimony did not result in plain error because "the State presented substantial evidence from which the jury could find Defendant guilty,"[3] and the jury had ample opportunity to assess Jane's credibility. *Id.*

¶ 11 The majority also addressed defendant's argument that the trial court erred in permitting Ms. Hankerson to testify that Jane showed no indication of having been "coached." *Id.* Again, the majority found no abuse in the trial court's discretion, explaining that Ms. Hankerson provided "helpful [testimony] in assisting the trier of fact and did not improperly bolster Jane's testimony." *Id.* at *5.

¶ 12 Finally, the majority declined to address the ineffective assistance of counsel claim on direct appeal, dismissing the claim without prejudice to defendant's right to assert the claim in a subsequent motion for appropriate relief. *Id.*

¶ 13 Judge Arrowood dissented from the majority's dismissal of defendant's ineffective assistance of counsel claim, arguing the claim could be determined on the face of the record and that, in his view, defendant is entitled to a new trial. *Id.* at *6 (Arrowood, J., dissenting). In dissent, Judge Arrowood asserted that defendant satisfied this standard, citing to his counsel's failure to object to Ms. Parsons's testimony that "[Jane] had been sexually abused" and "her implication of defendant as the perpetrator of the abuse." *Id.* Judge Arrowood further maintained that trial counsel's failure to object prejudiced defendant because Jane was the only direct witness of the alleged abuse and, absent any physical evidence, her credibility was "crucial to the outcome of the case." *Id.* at *7. Accordingly, the dissenting opinion would have held that there was a reasonable probability that but for trial counsel's failure to object to expert testimony that impermissibly bolstered the victim's credibility, there is a reasonable probability there would have been a different result at trial. Thus, in his view, defendant was entitled to a new trial.

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3. The majority cited to the following evidence: "(1) Jane's testimony at trial; (2) a video-recorded interview with Jane at the CAC; (3) evidence of Jane's lasting behavioral problems after the incident—including bed-wetting, nightmares, and social withdrawal; and (4) the consistency of Jane's accounts of the incident to her family, law enforcement, and medical personnel at the CAC." *Clark*, 2020 WL 1274899 at *4.

¶ 14 Defendant timely appealed as of right on the basis of the dissenting opinion under N.C.G.S. § 7A-30. This Court allowed discretionary review of two further issues pursuant to N.C.G.S. § 7A-31.

II. Analysis

¶ 15 Defendant argues three issues on appeal: (1) testimony by the State's expert, Ann Parsons, that Jane was "sexually abused," with respect to the absence of physical evidence confirming Parsons's opinion, constituted plain error in violation of *State v. Towe*, 366 N.C. 56 (2012), (2) testimony by the State's expert witness, Ms. Parsons, identifying Jamie Clark as the perpetrator of the charged offense, constituted plain error, and (3) the dissenting opinion correctly determined that the record of this case is sufficient to determine that Mr. Clark's trial counsel provided ineffective assistance of counsel. We agree in part, specifically in issues (1) and (2), and reverse the decision of the Court of Appeals on those issues.

A. Testimony of the State's expert that Jane was "sexually abused"

¶ 16 **[1]** Defendant first argues that testimony by the State's expert, Ms. Parsons, that Jane was "sexually abused," in the absence of physical evidence confirming Parsons's opinion, constituted plain error under this Court's decision in *State v. Towe*, 366 N.C. 56 (2012). When trial counsel fails to object to the admission of evidence, the trial court's admission of the evidence is reviewed for plain error. *State v. Lee*, 348 N.C. 474, 482 (1998) "[T]o establish plain error defendant must show that a fundamental error occurred at his trial and that the error had a probable impact on the jury's finding that the defendant was guilty." *Towe*, 366 N.C. at 62 (cleaned up). We agree and conclude that the Court of Appeals misapplied our decision in *Towe*.

¶ 17 We first consider whether Ms. Parsons's testimony was improper. Rule 702 of the North Carolina Rules of Evidence provides that experts may testify in the form of an opinion when they have "scientific, technical or other specialized knowledge [which] will assist the trier of fact to understand the evidence or to determine a fact in issue . . . ." N.C.G.S. § 8C-1, Rule 702 (2019). However, this Court has repeatedly held that "[i]n a sexual offense prosecution involving a child victim, the trial court should not admit expert opinion that sexual abuse has *in fact* occurred because, absent physical evidence supporting a diagnosis of sexual abuse, such testimony is an impermissible opinion regarding the victim's credibility." *Stancil*, 355 N.C. 266, 266–67 (2002) (emphasis in original) (cleaned up).

> Moreover, even when physical evidence of abuse existed and was the basis of an expert's opinion, where the expert added that she would have determined a child to be sexually abused on the basis of the child's story alone even had there been no physical evidence, we found this additional testimony inadmissible. However, if a proper foundation has been laid, an expert may testify about the characteristics of sexually abused children and whether an alleged victim exhibits such characteristics.

Towe, 366 N.C. at 61–62 (cleaned up).

¶ 18 Here, Ms. Parsons testified that there were no injuries or physical symptoms of sexual abuse. Rather, Ms. Parsons testified that she based her diagnosis of sexual abuse "predominantly [on] the history of [Jane's] disclosures to family, law enforcement and Ms. [ ]Hankerson at TEDI Bear, and her behavioral change." But evidence of the victim's history of disclosures to family, social workers, and others in the absence of physical evidence is precisely the evidentiary basis we held in *Towe* was "insufficient to support an expert opinion that a child was sexually abused." *Id.* at 62. The Court of Appeals unanimously concluded this testimony was improper vouching and hence its admission by the trial court was improper. We agree.

¶ 19 Nevertheless, the State argues that this Court should hold that Ms. Parsons's expert testimony about the diagnosis of sexual abuse was admissible because it was "based on her examination of the child and based on her expert knowledge concerning abused children in general." The State relies upon *State v. Bailey*, 89 N.C. App. 212 (1988), a decision of the Court of Appeals that is not binding on this Court and that precedes our decision in *Towe* by over twenty years. In *Bailey*, the defendant was convicted of sex offenses against a child, and, on appeal, the defendant argued the trial court erred in admitting the expert testimony of a social worker and a pediatrician who both testified that the victim had been sexually abused, based on the contention that their testimony was impermissible vouching. *Id.* at 219. The Court of Appeals rejected that argument on the basis that "cases in which the disputed testimony concerns the credibility of a witness's accusation of a defendant must be distinguished from cases in which the expert's testimony relates to a diagnosis based on the expert's examination of the witness," citing cases from this Court in which the expert's testimony to diagnoses of assault was admissible where the diagnosis was on the basis of physical evidence. *See id.* at 219 (citing *State v. Smith*, 315 N.C.

76 (1985); *State v. Stanley*, 310 N.C. 353 (1984); *State v. Starnes*, 308 N.C. 720 (1983)). The *Bailey* decision did not indicate whether the expert opinions of sexual abuse expressed therein were based on physical evidence. Nevertheless, in both the decisions of this Court relied on in *Bailey* and those decided since, this Court has permitted an expert to testify to a diagnosis of sexual abuse only where there has been some physical evidence upon which to base the opinion. *See*, *e.g.*, *Stancil*, 355 N.C. at 266–67 ("In a sexual offense prosecution involving a child victim, the trial court should not admit expert opinion, that sexual abuse has *in fact* occurred because, absent physical evidence supporting a diagnosis of sexual abuse, such testimony is an impermissible opinion regarding the victim's credibility."); *Towe*, 366 N.C. at 57–58; *State v. Chandler*, 364 N.C. 313, 318 (2010); *State v. Hammett*, 361 N.C. 92, 94 (2006). Accordingly, whether *Bailey* is entirely consistent with these decisions or not, it cannot support the State's position. We hold the trial court erred in permitting Ms. Parsons to testify that she diagnosed Jane as sexually abused on the evidence before us.[4]

¶ 20 We must next consider whether admission of this testimony was plain error.

> To establish plain error, defendant must show that a fundamental error occurred at his trial and that the error had a probable impact on the jury's finding that the defendant was guilty. Moreover, because plain error is to be applied cautiously and only in the exceptional case, the error will often be one that seriously affects the fairness, integrity or public reputation of judicial proceedings.

Towe, 366 N.C. at 62 (cleaned up). "Thus, we must consider whether the erroneous admission of expert testimony had the 'prejudicial effect necessary to establish that the error was a fundamental error.' " *Id.* at 62–63 (quoting *State v. Lawrence*, 365 N.C. 506, 519 (2012)).

¶ 21 In *Towe*, the victim testified that the defendant, her father, sexually assaulted her by rubbing her vagina and by penetrating her with his

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4. Notably, the State does not argue in its brief that Jane's subsequent behaviors, including bed-wetting, nightmares, and social withdrawal, could form an independent basis for the expert's diagnosis of sexual abuse, either because they are psychological and hence physical evidence, or because behavioral evidence taken alone is sufficient. Even if that argument were made, however, there is no support in our caselaw for the proposition that such evidence is sufficient, absent other physical evidence, to render an expert's testimony admissible and not impermissible vouching for the victim's credibility.

fingers three times and with his penis at least twice. *Id.* at 57. A pediatrician testified that the victim's vagina was red and inflamed, and the victim relayed through her mother that the defendant had been touching her private parts all the time. *Id.* A detective testified that the victim told him that her father had touched her genitals with his fingers and penis and had asked if he could put his penis in her vagina. *Id.* at 58. Although this Court noted that the mother testified to the victim's behavior, and the victim's aunt testified to a similar prior assault on her by the defendant under N.C.G.S. § 8C–1, Rule 404(b), we reasoned that *Towe* "turned on the credibility of the victim, who provided the only direct evidence against defendant." *Id.* at 63. In particular, we noted there were "discrepancies in the record" that impacted the evaluation of the improper expert testimony on the jury's verdict. *Id.* We held that, due to the expert's testimony that "even absent physical symptoms, the victim had been sexually abused, we [were] satisfied that [the expert]'s testimony stilled any doubts the jury might have had about the victim's credibility or defendant's culpability, and thus had a probable impact on the jury's finding that [the] defendant [was] guilty." *Id.* at 64.

¶ 22 Here, as in *Towe*, the only direct evidence of sexual abuse was the statements of the victim from her testimony at trial and her video-recorded interview, as well as corroborative evidence through testimony regarding her accounts to family, law enforcement, and medical personnel. Accordingly, the evidence in this case "turned on the credibility of the victim." *Id.* at 63.

¶ 23 The Court of Appeals majority held and the State on appeal argues that evidence of changes in Jane's behavior following the incident, namely "bed-wetting, nightmares, and social withdrawal," *Clark*, 2020 WL 1274899 at *4, is substantial evidence that is a sufficient substitute for physical evidence of sexual abuse. But bedwetting, nightmares, and social withdrawal and other behavioral or psychological changes may have causes besides sexual abuse. As one of our sister supreme courts has reasoned, "[m]any of the symptoms considered to be indicators of sexual abuse, such as nightmares, forgetfulness, and overeating, could just as easily be the result of some other problem, or simply may be appearing in the natural course of the children's development." *New Hampshire v. Cressey*, 137 N.H. 402, 408 (1993). While behavioral change such as bedwetting, nightmares, and social withdrawal is relevant circumstantial evidence of sexual abuse, it can have many other causes; therefore, it cannot serve as substantial evidence that supports a verdict for a sexual offense independent of testimony of the victim or other direct evidence of abuse. In contrast, physical evidence of sexual

abuse of a child can be substantial evidence of abuse even independent of testimony alleging abuse. Circumstantial evidence in the form of testimony about changes in a victim's behavior must be coupled with some other direct evidence, either physical evidence or testimony from the victim or another alleging that abuse occurred that causally links the behavior changes to abuse.

¶ 24 In summary, where, as here, the sole direct evidence of sexual abuse is testimony from the victim, the case necessarily "turn[s] on the credibility of the victim," and expert opinion to the effect that the victim was sexually abused based on a combination of the victim's testimony and behaviors of the victim in the absence of "definitive" physical evidence is likely to weigh heavily on the jury's assessment of the victim's credibility. *Towe*, 366 N.C. at 64; *Chandler*, 364 at 318. Thus, admission of the improper testimony here had a probable impact on the jury's finding that defendant was guilty of taking indecent liberties with a child, and we must conclude the error had the "prejudicial effect necessary to establish that the error was a fundamental error." *Lawrence*, 365 N.C. at 519. Accordingly, we hold that permitting Ms. Parsons to testify that Jane was "sexually assaulted" in the absence of definitive physical evidence, irrespective of testimony concerning the victim's behavioral changes, constituted plain error.

B. The State's expert's opinion identifying defendant as the perpetrator

¶ 25 **[2]** Defendant next argues the Court of Appeals erred in holding admission of Ms. Parsons's expert testimony identifying defendant as the perpetrator of the victim's assault while describing her treatment recommendations was not plain error. Again, we agree.

¶ 26 In *State v. Aguallo*, this Court held that an expert opinion by a doctor that the physical trauma to the genitals revealed by physical examination "was consistent with the abuse the child alleged had been inflicted upon her" was admissible. 322 N.C. 818, 822 (1988). In so holding, we distinguished that circumstance from one in which the expert states "that the victim is 'believable' or 'is not lying.' " *Id.* Our reasoning for this distinction was that "[t]he important difference in the two statements is that the latter implicates the accused as the perpetrator of the crime by affirming the victim's account of the facts. The former does not." *Id.*

¶ 27 In *State v. Hammett*, this Court relied on *Aguallo* to hold that a doctor's expert opinion diagnosing the victim with sexual abuse based in part on a physical examination was admissible where the doctor "testified that her findings were consistent with abuse, though not necessarily

by defendant," although a subsequent statement by the doctor that she would hold the same opinion without considering the physical examination was held to be improper. 361 N.C. 92, 96–97 (2006). We specifically summarized the rationale in *Aguallo* as follows: "Because the expert's opinion never implicated the defendant as the perpetrator, we held the opinion that the trauma was consistent with the victim's story was not the same as an opinion that the witness was telling the truth." *Id.* at 96 (citing *Aguallo*, 322 N.C. at 822–23). The Court of Appeals has similarly held that an expert opinion that victims were sexually abused by the defendant in particular was inadmissible because it "did not relate to a diagnosis derived from his expert examination of the prosecuting witnesses in the course of treatment," and, accordingly, "constituted improper opinion testimony as to the credibility of the victims' testimony." *State v. Figured*, 116 N.C. App. 1, 9 (1994). More recently, in *State v. Ryan*, the Court of Appeals held that an expert's testimony expressing the opinion that "there was no evidence of any other perpetrators" other than the defendant, based on the witness's interview with the child, amounted to plain error. 223 N.C. App. 325, 340–41 (2012).

¶ 28 Here, Ms. Parsons not only testified that she diagnosed Jane as "sexually abused" but also testified about medical recommendations for treatment that included as recommendations that Jane have "no contact with [defendant] during the investigation," and have "any future contact with [defendant] only to address therapeutic needs as determined by [Jane's] therapist." Moreover, a written report summarizing these recommendations was published to the jury. While we have held that permitting Ms. Parsons to testify to the diagnosis of sexual abuse in the absence of physical evidence was error, testimony and a written report identifying defendant as the perpetrator whether explicitly or by implication compounds that error. Under *Aguallo* and its progeny, this testimony is precisely the sort that we have held is impermissible because it "implicates the accused as the perpetrator of the crime by affirming the victim's account of events." 322 N.C. at 822. As in *Figured*, this testimony "constituted improper opinion testimony as to the credibility of the victims' testimony." *Figured*, 116 N.C. App. at 9.

¶ 29 The State argues *Aguallo*, *Hammett*, and *Figured* are inapplicable because the expert here did not expressly identify defendant as the perpetrator. But the distinction between an explicit identification of the defendant as the perpetrator and an implicit one is not a distinction recognized by our caselaw. In both cases, the statement "*implicates* the accused as the perpetrator of the crime" and hence runs afoul of the prohibition against vouching for the victim. *Aguallo*, 322 N.C. at 822 (emphasis added).

¶ 30 The Court of Appeals majority similarly rejected defendant's argument by reasoning that the medical recommendations "in no way amounted to an assertion that Defendant was, in fact, responsible for Jane's alleged sexual abuse," and "[a]t most, this testimony implies that Jane should not have continued contact with Defendant because she subjectively believes Defendant to be her abuser." *Clark*, 2020 WL 1274899 at *3. We believe the Court of Appeals misconstrues the import of this testimony. Even if one implication of the recommendation is that Jane believed defendant to be her abuser, another reasonable implication is that Ms. Parsons believed Jane's allegation enough to recommend she not see defendant out of concern for her health and safety. In *Aguallo*, we held this sort of implication impermissible. Moreover, since this case turns on the credibility of the victim, even an implicit statement that the defendant is the one who committed the crime is plain error necessitating a new trial. *See Ryan*, 223 N.C. App. at 341. Accordingly, we hold the trial court also committed plain error in permitting Ms. Parsons to testify to the medical recommendations identifying defendant as the perpetrator and in publishing the same recommendations to the jury.

C. Ineffective assistance of counsel

¶ 31 Finally, defendant argues, following Judge Arrowood in his dissent, that the record of this case is sufficient to determine that Mr. Clark's trial counsel committed ineffective assistance of counsel by failing to object. Whether a defendant was denied the effective assistance of counsel is a question of law that is reviewed de novo. *State v. Braswell*, 312 N.C. 553 (1985).

> To successfully assert an ineffective assistance of counsel claim, defendant must satisfy a two-prong test. First, he must show that counsel's performance fell below an objective standard of reasonableness. Second, once defendant satisfies the first prong, he must show that the error was so serious that a reasonable probability exists that the trial result would have been different absent the error.

State v. Blakeney, 352 N.C. 287, 307–08 (2000) (cleaned up). Although ineffective assistance of counsel (IAC) claims are generally litigated in a motion for appropriate relief, we have held admissible that:

> IAC claims brought on direct review will be decided on the merits when the cold record reveals that no further investigation is required, i.e., claims that may be developed and argued without such ancillary

> procedures as the appointment of investigators or an evidentiary hearing. This rule is consistent with the general principle that, on direct appeal, the reviewing court ordinarily limits its review to material included in "the record on appeal and the verbatim transcript of proceedings, if one is designated."

State v. Fair, 354 N.C. 131, 166 (cleaned up) (quoting N.C. R. App. P. 9(a)).

¶ 32 Here, the majority determined that defendant's IAC claim was premature and dismissed it without prejudice to defendant's ability to file a later motion. *Clark*, 2020 WL 1274899 at *5. Defendant asks this Court to instead adopt Judge Arrowood's approach in his dissenting opinion, in which he would have held that the face of the record showed sufficient evidence of ineffective assistance of counsel to decide the claim. *Id.* at *6 (Arrowood, J., dissenting). After reviewing the record, we conclude that the majority did not err in dismissing defendant's IAC claim without prejudice to defendant's right to file a subsequent motion for appropriate relief, and in light of our disposition of the case, we decline to address the issue further. Accordingly, we affirm the Court of Appeals majority on this issue.

III. Conclusion

¶ 33 We conclude the Court of Appeals majority erred in part in holding there was no plain error below. First, we hold that the trial court committed plain error in permitting Ms. Parsons to testify in the absence of physical evidence that Jane was "sexually abused." Second, we hold the trial court also committed plain error by permitting Ms. Parsons to implicitly identify defendant as the perpetrator of the alleged abuse. However, we affirm the Court of Appeals' dismissal of defendant's IAC claim. For the foregoing reasons, we conclude defendant is entitled to a new trial. Accordingly, we affirm in part and reverse in part the decision of the Court of Appeals.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

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

Chief Justice NEWBY dissenting.

¶ 34 This case requires us to determine whether the trial court plainly erred when it permitted Ann Parsons—a qualified nurse practitioner—to

testify based on her education, training, and experience that she diagnosed the seven-year-old Jane as sexually abused. To demonstrate plain error, defendant must show that the error deprived him of a fair trial and that it prejudiced the outcome—i.e., that the error had a probable impact on the jury's verdict. When viewed as a whole, the record shows the physical and psychological evidence corroborates the victim's consistent account of the sexual abuse she suffered. Thus, defendant cannot show that the alleged error in admitting Parsons's testimony had a probable impact on the jury's verdict. I respectfully dissent.

¶ 35 Where a defendant does not object to an error at trial, appellate review is limited to determining whether the trial court committed plain error. *See State v. Hammett*, 361 N.C. 92, 98, 637 S.E.2d 518, 522 (2006) (holding claimed error in admission of expert vouching testimony was subject to plain error review). "[P]lain error is to be 'applied cautiously and only in the exceptional case.' " *State v. Towe*, 366 N.C. 56, 65, 732 S.E.2d 564, 569 (2012) (Newby, J., dissenting) (alteration in original) (quoting *State v. Lawrence*, 365 N.C. 506, 516, 723 S.E.2d 326, 333 (2012)). "Under *Lawrence* 'a defendant must demonstrate that a fundamental error occurred at trial' and 'must establish prejudice.' " *Id.*, 732 S.E.2d at 570 (quoting *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334). A fundamental error is "something so basic, so prejudicial, so lacking in its elements that justice cannot have been done," or that "amounts to a denial of a fundamental right of the accused." *Id.* (quoting *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983)). A fundamental error "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." *Id.* (alteration in original) (quoting *Odom*, 307 N.C. at 660, 300 S.E.2d at 378). Moreover, the error must be prejudicial to the defendant. To demonstrate prejudice, a defendant must show "that, after examination of the entire record, the error 'had a probable impact on the jury's finding that the defendant was guilty.' " *Id.* (quoting *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334).

¶ 36 Given the consistency of Jane's testimony during the investigation and at trial, as well as the physical and psychological evidence, Parsons's challenged testimony did not rise to the level of plain error. The jury's verdict did not hinge on Parsons's allegedly erroneous testimony. Rather, a review of the record shows Jane's credibility was well established through other means. Jane, seven years old at the time, gave a consistent account of the abuse in multiple conversations with her stepmother, law enforcement, and two different experts in forensic child abuse investigation at the Child Advocacy Clinic. Then, three years after the abuse, Jane's testimony at trial was consistent with this

account. Jane's stepmother also testified that when Jane originally told her of the abuse, her stepmother "could see that [Jane] was troubled and worried about something." Andora Hankerson, the forensic interviewer at the Child Advocacy Center, testified that Jane did not appear to be "coached" as to the details of the story. The State published Hankerson's report and played a video recording of Hankerson's interview of Jane for the jury, which were also consistent with Jane's account.

¶ 37 The jury also heard significant evidence regarding Jane's physical and psychological symptoms that supported her account. Though Jane was an outgoing, confident child, when the abuse occurred, Jane's behavior changed drastically. She became "fearful around strangers" and would "cling to [her stepmother] more in public," behaviors her stepmother "hadn't noticed before." Jane also began "wetting her bed four and five times a week. She became withdrawn. She had nightmares. She would wake up crying sometimes." Though Jane had successfully overcome bedwetting in the past and had experienced "a long stretch of time where she wasn't wetting the bed," her bedwetting began again after the sexual abuse. After receiving trauma therapy, Jane's symptoms subsided, though not completely.

¶ 38 Parsons, on the other hand, testified for approximately ninety minutes during the two-and-a-half-day trial. When asked "what was [her] diagnosis" of Jane, Parsons stated that she diagnosed Jane as "sexual[ly] abuse[d]." After discussing the foundation for her diagnosis, Parsons again stated that her finding was "that [Jane] had been sexually abused." Moreover, Parsons testified that her treatment report recommended that Jane have "[n]o contact with [defendant] during the investigation" and that "any future contact with [defendant be] only to address therapeutic needs as determined by [Jane]'s therapist." Parsons's report was admitted into evidence and published to the jury. Even assuming these portions of Parsons's testimony were admitted in error,[1] defendant cannot

1. While the Court of Appeals and the majority of this Court have determined that Parsons's testimony regarding Jane's diagnosis is error, this is a unique case. Here the State laid the proper foundation for expert opinion testimony by demonstrating Parsons's education, training, and experience in "child maltreatment and the healthcare needs and requirements of children in that circumstance." The trial court then admitted Parsons to testify on "child abuse and forensic evaluation of children that have been abused." Parsons, along with Jane's stepmother, testified that Jane's psychological symptoms manifested physically in the form of Jane's bedwetting. Thus, it is questionable whether Parsons's testimony about Jane's diagnosis constitutes error. *See State v. Stancil*, 355 N.C. 266, 266–67, 559 S.E.2d 788, 789 (2002) (holding that expert witness may testify as to sexual abuse diagnosis when there is physical evidence of the abuse). Notably, however, the State did not petition this Court for review of that issue.

demonstrate plain error because he cannot show prejudice—i.e., that these alleged errors had a probable impact on the jury's verdict.

¶ 39 The majority mischaracterizes this record and holds this case turned on Jane's credibility alone because there was no "direct evidence of sexual abuse." Therefore, the majority concludes that Parsons's testimony "stilled any doubts" in the jury's mind and had a probable impact on the jury's verdict. In so concluding, the majority erroneously relies on *State v. Towe*, which is distinguishable from this case. In *Towe*, this Court stated that the case "turned on the credibility of the victim" because the victim's "recitations of defendant's actions were not entirely consistent" and there was no physical evidence of the abuse. *Towe*, 366 N.C. at 63, 732 S.E.2d at 568. Here, however, Jane's testimony was consistent every time she recounted the events; her testimony did not raise the issue of credibility in the same manner as the victim's inconsistent testimony in *Towe*. Moreover, Jane's consistent testimony was supported by testimony about her physical symptoms—i.e., bedwetting—as well as psychological symptoms, including fearfulness, social withdrawal, and nightmares. Thus, *Towe* presented a different factual scenario than the case here.

¶ 40 When the evidence is viewed as a whole, taking into account the several witnesses who testified and the nature of Jane's symptoms, it is unlikely that Parsons's isolated statements regarding Jane's diagnosis or the treatment recommendations in her report had a probable impact on the jury's verdict. As such, defendant cannot demonstrate prejudice and these alleged errors did not amount to plain error. Therefore, the opinion of the Court of Appeals should be affirmed. I respectfully dissent.

Justice BARRINGER joins in this dissenting opinion.

The majority of this Court also concludes that admission of Parsons's written report containing her treatment recommendations, along with Parsons's testimony about those recommendations, is error because Parsons's recommendations identified "defendant [a]s the one who committed the crime." As the Court of Appeals correctly noted, however, "[t]hat Jane alleged [d]efendant of the abuse cannot reasonably be disputed." *State v. Clark*, No. COA19-634, 2020 WL 1274899, at *3 (N.C. Ct. App. March 17, 2020) (unpublished). Simply put, it was not disputed at trial that Jane alleged defendant was the person who committed the sexual abuse. Thus, Parsons's testimony purportedly identifying defendant as the perpetrator cannot be error.

STATE v. CROMPTON

[380 N.C. 220, 2022-NCSC-14]

STATE OF NORTH CAROLINA
v.
JUSTIN BLAKE CROMPTON

No. 180A20

Filed 11 February 2022

Probation and Parole—probation revocation—absconding—sufficiency of allegations

Where probation violation reports alleged that defendant had absconded in violation of N.C.G.S. § 15A-1343(b)(3a) during a specifically alleged time period by failing to report, failing to return phone calls, failing to provide a certifiable address, and failing to make himself available, the violation reports sufficiently alleged defendant's commission of the revocable violation of absconding supervision. The trial court did not abuse its discretion by revoking defendant's probation upon defendant's admission to the violations.

Justice EARLS dissenting.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, *State v. Crompton*, 270 N.C. App. 439 (2020), affirming six judgments revoking defendant's probation entered on 25 October 2018 by Judge Marvin P. Pope Jr. in Superior Court, Buncombe County. Heard in the Supreme Court on 17 May 2021.

Joshua H. Stein, *Attorney General*, *by Brenda Eaddy*, *Special Deputy Attorney General*, *and Caden W. Hayes*, *Assistant Attorney General*, *for the State-appellee.*

Glenn Gerding, *Appellate Defender*, *by Sterling Rozear*, *Assistant Appellate Defender*, *for defendant-appellant.*

MORGAN, Justice.

¶ 1 Defendant challenges the sufficiency of the allegations against him, contained in six probation violation reports, that he committed the revocable probation violation of absconding. Defendant also disputes the sufficiency of the State's factual basis for its absconding allegation, contending that even if the charge is taken as true, it cannot serve as the basis for a finding that defendant had in fact absconded. In this case,

we determine that the probation violation reports at issue effectively pleaded that defendant absconded probation and that the trial court did not abuse its discretion in revoking defendant's probation upon concluding that defendant had, in fact, absconded his probation. We therefore affirm the trial court's decision.

I. Background

¶ 2 Defendant pleaded guilty to one count each of felony breaking and entering, felony larceny after breaking and entering, felony breaking and entering a motor vehicle, felony altering the serial number of a firearm, and misdemeanor carrying a concealed gun, along with three counts of felony obtaining property by false pretenses, on 24 April 2017. The Superior Court, Buncombe County entered six consecutive judgments sentencing defendant to a minimum of 36 months and a maximum of 102 months of imprisonment, but suspended the activation of this sentence in favor of 36 months of supervised probation. Among the terms of defendant's probation were his requirements to (1) report regularly as instructed by the probation officer; (2) answer the reasonable inquiries of the officer; (3) report and obtain approval for any change in address; (4) report and obtain approval before leaving the jurisdiction of the trial court; (5) abstain from using drugs; and (6) "not abscond, by willfully avoiding supervision or by willfully making the defendant's whereabouts unknown to the supervising probation officer."

¶ 3 Defendant soon began to violate the terms of his probation, resulting in his supervising probation officer issuing violation reports on each of defendant's cases two months later on 28 June 2017. The probation violation reports alleged that defendant missed curfew on several dates, left the jurisdiction of the trial court without permission on multiple dates, and admitted to the usage of marijuana while on probation. The violation reports were called for consideration by the trial court on 7 September 2017; defendant admitted that he violated the conditions of his probation as alleged. The trial court found defendant to be in willful violation of his probation and ordered him to serve a 90-day term of confinement with the North Carolina Division of Adult Correction and to complete 90 days of house arrest upon release from his prison confinement.

¶ 4 Defendant tested positive for marijuana again in April of 2018, after completing his period of confinement and subsequent house arrest as the consequences for the probation violations which he admitted on 7 September 2017. On 14 May 2018, which was the day that defendant was scheduled to report to the probation office for an appointment, defendant called his supervising probation officer Jamie Harris by telephone

and left a voicemail message that defendant would be unable to keep the day's appointment due to an altercation which occurred on the previous night between defendant and defendant's brother with whom the probationer lived. Officer Harris returned defendant's telephone call and left a voicemail message instructing defendant to provide updated information concerning defendant's residential situation and to report to the probation office on 16 May 2018. Contrary to Officer Harris' directive, defendant did not contact the probation officer again. Defendant's whereabouts were unknown to the State until defendant's arrest almost three months later on 8 August 2018.

¶ 5 Officer Harris conducted an absconding investigation in which the probation officer visited defendant's last known address on two occasions, called all of the references and telephone contact numbers that defendant had provided during defendant's term of probation, called the local hospital by telephone to determine if defendant had been admitted, reviewed law enforcement databases to ensure that defendant was not in custody, and called a vocational rehabilitation program in which defendant was enrolled in order to determine if the program providers had any knowledge of defendant's whereabouts. Having exhausted all available avenues of contacting defendant, and being cognizant of defendant's earlier probation violation which Officer Harris considered to have put defendant on notice of "the ramifications of absconding," on 23 May 2018 defendant's probation officer issued another probation violation report and accompanying order for arrest in each of defendant's cases. The probation violation report in each case alleged that defendant had willfully violated the following conditions of probation:

> 1. Regular Condition of Probation: General Statute 15A-1343(b)(3a) "Not to abscond, by willfully avoiding supervision or willfully making the supervisee's whereabouts unknown to the supervising probation officer" in that, THE DEFENDANT HAS FAILED TO REPORT[] AS DIRECTED BY THE OFFICER, HAS FAILED TO RETURN THE OFFICER[']S PHONE CALLS, AND HAS FAILED TO PROVIDE THE OFFICER WITH A CER[T]IFIABLE ADDRESS. THE DEFENDANT HAS FAILED TO MAKE HIMSELF AVAILABLE FOR SUPERVISION AS DIRECTED BY HIS OFFICER, THEREBY ABSCONDING SUPERVISION. THE OFFICER[']S LAST FACE TO FACE CONTACT WITH THE OFFENDER WAS DURING A HOME CONTACT ON 4/16/18.

> 2. Condition of Probation "Not use, possess or control any illegal drug or controlled substance unless it has been prescribed for the defendant by a licensed physician and is in the original container with the prescription number affixed on it . . ." in that THE DEFENDANT TESTED POSITIVE FOR MARIJUANA ON 4/16/18.
>
> 3. "Report as directed by the Court, Commission or the supervising officer to the officer at reasonable times and places . . ." in that THE DEFENDANT FAILED TO REPORT AS DIRECTED ON 5/14/18, 5/16/18, AND 5/23/18.
>
> 4. Condition of Probation "The defendant shall pay to the Clerk of Superior Court the "Total Amount Due" as directed by the Court or probation officer" in that THE DEFENDANT HAS FAILED TO MAKE ANY PAYMENTS TOWARD HIS COURT INDEBTEDNESS AND RESTITUTION.[1]

¶ 6 Defendant was arrested on 8 August 2018 and his alleged probation violations came on for hearing on 25 October 2018. At the hearing, Officer Harris provided the trial court with a synopsis of the investigation which he conducted, along with a factual basis for the non-absconding alleged probation violations listed on the violation reports. Defendant admitted his commission of all of the alleged probation violations as detailed—including the allegation of absconding supervision—and represented that he had turned himself in for the purposes of arrest and for "the sake of . . . his family." Defendant offered these explanations to the trial court in an effort to persuade the trial court to allow defendant to serve his underlying sentences concurrently, rather than consecutively as the initial sentencing trial court had ordered. In accepting defendant's admission to a revocable probation violation, the trial court revoked defendant's probation, denied defendant's request that his sentences be served concurrently, and activated defendant's sentences as originally determined. Defendant verbally noticed his appeal.

¶ 7 The Court of Appeals issued a divided opinion in which the majority held that the State had met its burden of proof to show that

1. While five of defendant's cases of probation had associated court-ordered fees and restitution, defendant's sixth case, which concerned his conviction for felony larceny after breaking and entering, did not have associated fees or restitution; therefore, the corresponding violation report omitted allegation #4.

defendant willfully violated a revocable condition of probation and that the trial court's revocation of defendant's probation was not an abuse of discretion. *State v. Crompton*, 270 N.C. App. 439, 448–49 (2020). The dissenting opinion considered the absconding allegation in the probation violation reports to allege only violations of regular conditions of probation found in N.C.G.S. § 15A-1343(b)(3), and therefore the absconding allegation itself was insufficient here to allege a revocable condition of probation under N.C.G.S. § 15A-1343(b)(3a), pursuant to the Court of Appeals decision in *State v. Williams*, 243 N.C. App. 198, 199–200 (2015). *Crompton*, 270 N.C. App. at 454–55 (McGee, C.J. dissenting). Even assuming that the alleged facts contained within the claimed absconding violation were not limited to violations of N.C.G.S. § 15A-1343(b)(3), the dissent deemed that the allegations "taken together[ ] still do not establish a violation of N.C.G.S. § 15A-1343(b)(3a)[ ] because they do not adequately allege willfulness by [d]efendant" as required by the Court of Appeals opinion in *State v. Melton*, 258 N.C. App. 134, 139 (2018). *Id.* at 455. The dissent reasoned that, although defendant admitted to the absconding violation as alleged and Officer Harris testified to exhausting all methods of contact with defendant, nonetheless the allegations in the probation violation report failed to charge that defendant actually knew that his supervising officer was trying to contact him. *Id.* Consequently, the dissenting view would have decided that "the State's evidence was insufficient to support a finding of absconding." *Id.* at 457. Defendant appealed to this Court as a matter of right based upon the issues raised in the dissent.

II. Analysis

¶ 8 The trial court's decision to revoke a defendant's term of probation pursuant to a valid probation violation report is reviewed for abuse of discretion on appeal. *State v. Murchison*, 367 N.C. 461, 464 (2014).

¶ 9 Defendant argues that the absconding allegation contained within each of the probation violation reports was "merely an assertion that [defendant] failed to report, failed to return phone calls, and failed to provide a certifiable address," which merely amount to violations of the regular conditions of probation codified in N.C.G.S. § 15A-1343(b)(3) (2019). According to defendant's construction of *Williams*, *Melton*, and *State v. Krider*, 258 N.C. App. 111, *aff'd per curiam in part*, *disavowed per curiam in part*, 371 N.C. 466 (2018)[2], these allegations fail as a matter of law to allege a revocable probation violation. Defendant also

2. Our per curiam affirmance of *Krider* is inapplicable to the case at bar. In *Krider*, the defendant denied absconding probation and testified at the probation violation hearing about his attempts to contact his supervising officer "plenty of times" during the time

argues that "[c]onsidering N.C.G.S. § 15A-1343 as a whole and construing its various subsections *in pari materia*, it is clear the legislature intended 'absconding' to have a unique, limited, and heightened meaning – separate and apart from violations of other conditions of probation."

¶ 10 First, this Court must determine whether the probation violation reports sufficiently alleged that defendant absconded supervision. Our analysis is guided by our discussion in *State v. Moore*, 370 N.C. 338 (2017), in which this Court addressed whether a probation violation report sufficiently alleged that the defendant had committed the revocable violation of committing a new criminal offense while on probation as prohibited by N.C.G.S. § 15A-1343(b)(1). The defendant in *Moore* had been placed on probation for the commission of two different sets of identical criminal offenses which he perpetrated in two consecutive months. *Moore*, 370 N.C. at 338–39. The judgments in that defendant's cases contained many of the "regular conditions of probation" found in N.C.G.S. § 15A-1343(b) and included the condition that defendant must "commit no criminal offense in any jurisdiction." *Id.* at 339. Subsequently, the State filed two probation violation reports—one for each of the crimes which caused the defendant to be placed on probation—with each of the probation violation reports alleging violations of the monetary conditions of probation and the following "Other Violation":

> The defendant has the following pending charges in Orange County. 15CR 051315 No Operators License 6/8/15, 15CR 51309 Flee/Elude Arrest w/MV 6/8/15. 13CR 709525 No Operators License 6/15/15, 14CR 052225 Possess Drug Paraphernalia 6/16/15, 14CR 052224 Resisting Public Officer 6/16/15, 14CR 706236 No Motorcycle Endorsement 6/29/15, 14CR 706235 Cover Reg Sticker/Plate 6/29/15, and 14CR 706234 Reg Card Address Change Violation.

Id.

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period in which the probation officer accused the defendant of absconding. The supervising officer testified that the defendant maintained regular contact with the officer following the defendant's arrest for absconding, during which time the defendant made progress on several conditions of his probation. *Krider*, 258 N.C. App. at 112, 116–17. In vacating the trial court's orders in *Krider* revoking the defendant's probation, the Court of Appeals' reasoning—which we endorsed—was predicated on the conclusion that "the State's *evidence* was insufficient to support [the] allegation" of absconding. *Id.* at 118. However, at issue in the present case is the sufficiency of the probation violation report's allegation of the revocable offense of absconding. In addition to this essential distinction between the current case and *Krider*, defendant here admitted the absconding allegation, and the State therefore was under no burden of production of evidence where defendant waived formal reading of the violation report and a formal hearing.

¶ 11 At the probation violation hearing, the defendant Moore's probation officer testified about the probationer's alleged criminal offenses that were identified in each of the probation violation reports. *Id.* at 339–40. Additionally, two law enforcement officers offered testimony about the defendant's alleged commission of one of the identified offenses among those listed in the probation violation reports; namely, fleeing to elude arrest. *Id.* at 340. The trial court found that the defendant had violated the condition of his probation to "commit no criminal offense." Based upon the defendant's commission of this revocable violation, the trial court revoked his probation and activated both original suspended sentences. *Id.*

¶ 12 Just like defendant in the instant case, the defendant in *Moore* contended on appeal that "the probation violation reports did not give him adequate notice because they did not specifically state the condition of probation that he allegedly violated." Here, defendant claims that there was not sufficient notice of an absconding allegation which was "separate and apart from violations of other conditions of probation"; in *Moore,* the defendant contended that "because the probation violation reports did not specifically list the 'commit no criminal offense' condition as the condition violated, the reports did not provide the notice . . . require[d]." *Id.* In upholding the trial court's revocation of the defendant's probation in *Moore*, we explained that

> "a statement of the violations alleged" refers to a statement of what a probationer *did* to violate his conditions of probation. It does not require a statement of the underlying conditions that were violated . . . [N.C.G.S. § 15A-1345(e)] requires only a statement of the actions that violated the conditions, not of the conditions that those actions violated.

Id. at 341.

¶ 13 The absconding allegation in the case at bar satisfies the notice requirement for probation violation reports established in *Moore.* Each report alleged that defendant willfully (1) failed to report to the office as directed by his supervising officer, (2) failed to return his supervising officer's telephone calls, (3) failed to provide a certifiable address, and (4) generally failed to make himself available for supervision as directed by his officer. The absconding allegation in each violation report provided further notice to defendant of the details of the charge by specifying the time period of defendant's alleged conduct by alerting him and the trial court that defendant was last seen in person on 16 April 2018,

and therefore he could not be held accountable for absconding prior to that date. Defendant's admission to all of the probation violations as alleged connotes the effectiveness of the sufficiency of the notice to defendant. More specifically, defendant's admission that he willfully failed to make himself available for supervision demonstrates that defendant absconded "by willfully avoiding supervision or by willfully making the defendant's whereabouts unknown to the supervising officer." N.C.G.S. § 15A-1343(b)(3a).

¶ 14 Defendant's argument that his failures to report to his probation officer as directed, to return his probation officer's telephone calls, and to provide a legitimate address could not independently serve as the bases for both violating the regular conditions of probation as codified in N.C.G.S. § 15A-1343(b)(3) and the revocable violation of absconding supervision is meritless. As the Court of Appeals majority reasoned in its opinion, such an interpretation as submitted by defendant

> would also operate to eliminate absconding as a ground for probation revocation. As a practical matter, those conditions laid out in Section 15A-1343(b)(3) make up the necessary elements of "avoiding supervision" or "making [one's] whereabouts unknown." A defendant cannot avoid supervision without failing to report as directed to his probation officer at reasonable times and places. Neither can a defendant make his whereabouts unknown without failing to answer reasonable inquiries or notify his probation officer of a change of address.

Crompton, 270 N.C. App. at 446. This Court is constrained from interpreting N.C.G.S. § 15A-1343(b)(3a) to reach such an absurd result. *State v. Beck*, 359 N.C. 611, 614–15 (2005) (rejecting a criminal defendant's interpretation of a statute that "could lead to absurd results.").

¶ 15 In applying the principles espoused and established in *Moore* to the present case, there was no abuse of discretion committed by the trial court in its decision to revoke defendant's probation and to activate his suspended sentences upon defendant's admission of his commission of the revocable violation of absconding probation. Sufficient notice of the absconding allegations was provided to defendant in the probation violation reports; the fact that defendant's alleged violations of "regular conditions of probation" likewise served to constitute grounds for his commission of the expressly alleged probation violation of absconding did not prevent these violations from operating in such a dual capacity.

Similarly, the State's factual basis for its absconding allegation constituted sufficient notice to defendant of the basis for the State's claim of a revocable violation of probation. Defendant's admission of the probation violations as alleged, including the absconding allegation, confirms the effectiveness of the notice which informed defendant of the individual absconding allegation. Defendant's knowledge of the individual allegation of absconding through the notice provided to him in the probation violation reports is buttressed by his awareness of the trial court's ability to activate his suspended sentences upon defendant's admission to absconding, as defendant capably addressed the trial court in an unsuccessful effort to convert his multiple terms of incarceration to concurrent sentences rather than consecutive sentences. In compliance with this Court's determinations in *Moore*, defendant here was sufficiently and properly informed by the probation violation reports of his alleged violations and his alleged conduct which constituted the alleged violations, including the alleged absconding behavior which defendant admitted.

III. Conclusion

¶ 16 The trial court did not abuse its discretion in revoking defendant's probation. The Court of Appeals opinion upholding the trial court's judgments is affirmed.

AFFIRMED.

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

Justice EARLS dissenting.

¶ 17 In 2011, the General Assembly passed the Justice Reinvestment Act (JRA) as "part of a national criminal justice reform effort" the purpose of which was to reduce corrections spending and reinvest the savings in strategies that reduce recidivism and improve public safety. *State v. Johnson*, 246 N.C. App. 139, 143 (2016) (quoting Jeff Welty, *Overcriminalization in North Carolina*, 92 N.C. L. Rev. 1935, 1947 (2014)). Among other changes, the JRA "made it more difficult to revoke offenders' probation and send them to prison." *Id.* The General Assembly was seeking to address a significant problem: "Before the JRA was enacted, over half of the individuals entering North Carolina prisons were doing so because of violations of conditions of probation." *State v. Moore*, 370 N.C. 338, 344 (2017) (citing James M. Markham, *The North Carolina Justice Reinvestment Act* 1 (2012)).

¶ 18 With today's decision, the Court potentially takes an unwarranted step toward rolling back a critical part of those reforms. By failing to sharply distinguish between "absconding," which permits a trial court to immediately revoke a defendant's probation, and other probation violations, which do not, the majority's opinion in this case could be seen to be changing the law to permit the revocation of probation for failing to report, failing to answer a probation officer's phone calls, and failing to notify a probation officer of a change in address. I am sure that is not the course this Court intends to take. I dissent from the application of the JRA in this case and write separately to observe that prior precedents enforcing the distinction embodied in the JRA between failing to report and willfully absconding remain good law.

¶ 19 The defendant, Justin Blake Crompton, pleaded guilty to breaking and/or entering, larceny after breaking and/or entering, three counts of obtaining property by false pretenses, breaking or entering a motor vehicle, possessing a firearm with an altered or removed serial number, and carrying a concealed gun on 24 April 2017. The trial court imposed six consecutive sentences of 6 to 17 months' imprisonment, each of which was suspended and subject to a 36-month period of supervised probation. Following probation violations in May and June of 2017, Mr. Crompton was ordered to complete a 90-day period of confinement in response to violation (CRV) pursuant to N.C.G.S. § 15A-1344(d2), followed by a 90-day period of house arrest.

¶ 20 Approximately a year into his probation, on 14 May 2018, Mr. Crompton called his probation officer. Mr. Crompton told his probation officer that he had gotten into a fight with his brother and would not be able to attend his appointment that day. The officer called back and left a message, saying "let me know what you work out for housing and report two days later." The probation officer did not hear back from Mr. Crompton and initiated an absconding investigation.[1]

¶ 21 On 23 May 2018, the probation officer filed violation reports against Mr. Crompton. The reports alleged that Mr. Crompton had absconded supervision, used a controlled substance, failed to report to his probation officer, and failed to make mandatory payments. The factual allegations

1. The majority details the extent of the investigation as support for its conclusion that the trial court did not err in determining that Mr. Crompton had, in fact, absconded within the meaning of the statute. However, in the instant case the relevant question is not the extent of the investigation conducted by the probation officer—it is what the defendant did. By focusing on the extent of the investigation, the majority suggests that we can infer that a defendant absconded in violation of N.C.G.S. § 15A-1343(b)(3a) because a probation officer conducted a thorough investigation. However, neither the existence nor the quality of an investigation is evidence of guilt.

in the reports that supported the allegation of absconding were that Mr. Crompton had "failed to report[ ] as directed by the officer," "failed to provide the officer with a cer[t]ifiable address," "failed to make himself available for supervision as directed by his officer," and that "the officer[']s last face to face contact with [Mr. Crompton] was during a home contact on 4/16/18." At a hearing on 22 October 2018, Mr. Crompton admitted the violations. The trial court found that Mr. Crompton "willfully and intentionally violated the terms and conditions of the probationary sentencing by absconding" and activated his sentences.

¶ 22 The majority holds that the trial court did not err in finding that Mr. Crompton had absconded and activating Mr. Crompton's sentences. However, doing so based on the factual allegations in the probation violation report is, at best, inferring evidence of willfulness that is not in the report itself.

¶ 23 There are two categories of probation violations relevant to the instant case. In the first category, consisting of most probation violations, "[t]he court may not revoke probation unless the defendant has previously received a total of two periods of confinement under this subsection. [CRVs]." N.C.G.S. § 15A-1344(d2) (2019). However, if a defendant commits a criminal offense or absconds from supervision while on probation, the two probation violations which are in the second category, then the court may revoke probation regardless of whether the defendant has received two CRVs. N.C.G.S. § 15A-1344(a); *see also State v. Moore*, 370 N.C. 338, 344 (2017) ("The changes to the law that the JRA effected were consistent with these concerns because subsection 15A-1344(a), as amended by the JRA, now makes only committing a new criminal offense or absconding revocation-eligible unless a defendant has already served two periods of confinement for violating other conditions of probation.").

¶ 24 The violation reports filed by Mr. Crompton's probation officer only allege, and Mr. Crompton therefore only admitted to, conduct which amounts to violations of Section 15A-1343(b)(3)—a violation in the first category, for which a court "may not revoke probation unless the defendant has previously received" two CRVs. N.C.G.S. § 15A-1344(d2); *see also* N.C.G.S. § 15A-1344(a) ("The Court may only revoke probation for a violation of a condition of probation under [N.C.]G.S. 15A-1343(b)(1) or [N.C.]G.S. 15A-1343(b)(3a), except as provided in [N.C.]G.S. 15A-1344(d2)."). The violation reports alleged that Mr. Crompton "failed to report[ ] as directed by the officer." However, this is a violation of Section 15A-1343(b)(3), which requires that a defendant "[r]eport as

directed by the court or his probation officer." The violation reports also allege that Mr. Crompton "failed to return the officer['s] phone calls," which is a violation of the requirement in Section 15A-1343(b)(3) that a defendant "answer all reasonable inquiries by the officer." The violation reports further allege that Mr. Crompton "failed to provide the officer with a [certifiable] address."[2] This is a violation only of Section 15A-1343(b)(3)'s directive that a defendant must "obtain prior approval from the officer for, and notify the officer of, any change in address."

¶ 25 While the facts alleged are violations of Subsection 15A-1343(b)(3), they are alleged as violations of Subsection 15A-1343(b)(3a), absconding. This misapprehension of the statutory provisions does not, however, somehow transform Mr. Crompton's conduct into absconding. *See*, *e.g.*, *State v. Williams*, 243 N.C. App. 198, 205 (2015) ("Although the report alleged that Defendant's actions constituted 'abscond[ing] supervision,' this wording cannot convert violations of [N.C.G.S.] §§ 15A-1343(b)(2) and (3) into a violation of [N.C.G.S.] § 15A-1343(b)(3a)."). The majority notes that Mr. Crompton relies on *Williams*, but the majority does not distinguish that case or explain why its holding is wrong. In fact, *Williams* has been followed at least seven other times on this same point. *See State v. McAbee*, No. COA18-25, 2018 WL 6613936 (N.C. Ct. App. Dec. 18, 2018) (unpublished) (holding the evidence did not support a conclusion defendant absconded where violations of regular conditions of probation did not authorize revocation based upon violations of those conditions); *State v. Melton*, 258 N.C. App. 134 (2018) (emphasizing that there was insufficient evidence that defendant willfully refused to make herself available for supervision merely because she failed to attend scheduled meetings and the probation officer was unable to reach defendant after two days of attempts); *State v. Krider*, 258 N.C. App. 111 (2018) (reasoning that the State's allegations and supporting evidence were very similar to those rejected in *Williams* because defendant's actions only amounted to a violation of N.C.G.S. § 15A-1343(b)(3) and did not rise to the distinct violation of absconding supervision); *State v. Booker*, No. COA 16-1142, 2017 WL 3863881 (N.C. Ct. App. Sept. 5, 2017) (holding that defendant's actions, without more, did not violate N.C.G.S. § 15A–1343(b)(3a) when those actions violated the explicit language of "a wholly separate" regular condition of probation which did

2. The violation reports also state that "[t]he defendant has failed to make himself available for supervision as directed by his officer, thereby absconding supervision. The officer's last face to face contact with the offender was during a home contact on 4/16/18." A review of the hearing transcript reveals no facts other than those listed above on which these statements might be based, suggesting that they are merely a summary of the facts above.

not allow probation revocation and activation of a suspended sentence); *State v. Batiste*, No. COA16-1186, 2017 WL 3863538 (N.C. Ct. App. Sept. 5, 2017) (concluding that because defendant's alleged violations of probation could not be meaningfully distinguished from those at issue in *Williams*, the evidence failed to support the trial court's conclusion that defendant willfully absconded from supervision); *State v. Brown*, No. COA 15-847, 2016 WL 4608187 (N.C. Ct. App. Sept. 6, 2016) (holding that the trial court was not authorized to revoke defendant's probation based on allegations in the violation report which were virtually identical to those in the *Williams* report; allegations tracked the language of N.C.G.S. § 15A-1343(b)(2) and (b)(3) but not statutory absconding); *State v. Johnson*, 246 N.C. App. 139 (2016) (relying on its interpretation of *Williams* and *Tindall*, the court held that defendant's actions without more could not serve as a basis to revoke defendant's probation).

¶ 26 The only possible conclusion from the majority's silence on this point is that these cases remain good law. A defendant absconds by "willfully avoiding supervision or by willfully making the defendant's whereabouts unknown to the supervising probation officer, if the defendant is placed on supervised probation." N.C.G.S. § 15A-1343(b)(3a). Because a violation of this provision permits the revocation of probation while a violation of Subsection 1343(b)(3) does not, *see* N.C.G.S. § 15A-1344(a), logically, it must be true that absconding is something different than a violation of Subsection 1343(b)(3)—it cannot be true that the same conduct both prohibits a trial court from revoking probation and permits the trial court to revoke probation.

¶ 27 The majority errs by concluding in this case that the alleged conduct will support a finding that Mr. Crompton has absconded. Allowing actions which explicitly violate a regular condition of probation other than those found in N.C.G.S. § 15A-1343(b)(3a) to also serve, without the State showing more, as a violation of that very same provision, renders portions of the statutory language in § 15A-1343 superfluous. The General Assembly did not intend for a violation of a condition of probation other than absconding to result in revocation. The probation violation report's use of the term "absconding" to describe Mr. Crompton's noncompliance with the regular condition of probation under § 15A-1343(b)(3) has the effect of overstepping the trial court's limited revocation authority under the JRA, which does not include this condition.

¶ 28 The majority's logic is that if the allegations in this case do not suffice to establish absconding, then no allegations could achieve that end because such conduct is the only possible way to prove a defendant

absconded within the meaning of the statute. However, the distinction between failing to report and willfully avoiding supervision gives legal significance to the differences between negligence and intent; accident and willfulness. These are common distinctions throughout civil and criminal law. And in this context, other cases provide clear examples of allegations that are sufficient to show willful avoidance of supervision. *See*, *e.g.*, *State v. West*, No. COA18-242, 2019 WL 190239 (N.C. Ct. App. Jan 15, 2019) (unpublished). In *West*, the probation violation report alleged that, among other things, defendant was aware his probation officer was looking for him, demonstrably lied about whether he had transportation, and was instructed by his probation officer to remain at his house until she could arrive. Instead, defendant disregarded that instruction and the urging of his family by leaving before his probation officer got to his home. The trial court correctly concluded that "the violation reports filed by [the probation officer] expressly alleged willful conduct distinct from Defendant's mere failure to report." *Id.* at *4.

¶ 29 In contrast, there are no allegations in this case that Mr. Crompton willfully avoided supervision, only that he failed to call, he failed to provide an address, he failed to report, and he failed to make mandatory payments. Following established and well-reasoned precedent from the Court of Appeals on this point, and understanding the logic of the statutory structure, I would conclude that these allegations are not sufficient to establish willful absconding.

¶ 30 "The JRA's purpose was 'to reduce prison populations and spending on corrections and then to reinvest the savings in community-based programs.' " *Moore*, 370 N.C. at 343 (quoting James M. Markham, *The North Carolina Justice Reinvestment Act* 1 (2012)). It accomplished this objective by restricting the situations for which a defendant's probation could be revoked to those wherein a defendant has committed a new criminal offense, absconded supervision, or already served two CRVs for other probation violations. *Id.* at 344; *see also* N.C.G.S. § 15A-1344(a). The General Assembly has defined absconding to mean "willfully avoiding supervision" or "willfully making the defendant's whereabouts unknown to the supervising probation officer," N.C.G.S. § 15A-1343(b)(3a), and it separated that violation from other probation violations. N.C.G.S. § 15A-1344(a). The allegations in this case did not sufficiently allege willfulness and therefore, I dissent.

STATE OF NORTH CAROLINA
v.
MITCHELL ANDREW TUCKER

No. 385PA20

Filed 11 February 2022

Domestic Violence—violation of protective order—knowledge of order—sufficiency of evidence

In a trial for multiple charges including violating a domestic violence protective order (DVPO) while in possession of a deadly weapon, the trial court properly denied defendant's motion to dismiss where substantial evidence supported a reasonable inference that defendant had knowledge of a valid DVPO when he broke into his girlfriend's apartment and assaulted her. The Court of Appeals' determination that the evidence was too tenuous to support the knowledge element—including defendant's response "Yeah, I know you did" when the victim told him "I got a restraining order"—improperly evaluated the weight, and not the sufficiency, of the evidence.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a divided decision of the Court of Appeals, 273 N.C. App. 174 (2020), reversing in part and vacating in part judgments entered on 30 May 2018 by Judge Jesse B. Caldwell III in Superior Court, Mecklenburg County. Heard in the Supreme Court on 9 November 2021.

Joshua H. Stein, Attorney General, by Bethany A. Burgon, Assistant Attorney General, for the State-appellant.

Guy J. Loranger for defendant-appellee.

BARRINGER, Justice.

¶ 1 In this matter, we consider whether the Court of Appeals erred by reversing several of defendant's convictions for insufficient evidence. After careful review, we conclude the Court of Appeals erred. Thus, we reverse the decision of the Court of Appeals.

I. Procedural Background

¶ 2 Defendant was indicted by a grand jury for violating a civil domestic violence protective order while in possession of a deadly weapon,

felonious breaking or entering, assault with a deadly weapon, and assault on a female. The grand jury subsequently indicted defendant for the status offenses of habitual breaking and entering and habitual felon.

¶ 3 During trial, defendant twice moved to dismiss the charges relating to the violation of the civil domestic violence protective order. Defendant argued that the State had failed to prove that defendant had knowledge of the 6 September 2017 domestic violence protective order (6 September 2017 DVPO) in effect at the time of the alleged crimes. The trial court denied the motions to dismiss.

¶ 4 The jury returned verdicts finding defendant guilty of violating a civil domestic violence protective order while in possession of a deadly weapon, felonious breaking or entering in violation of a valid domestic violence protective order, assault with a deadly weapon, and assault on a female. Defendant pleaded guilty to attaining habitual felon status, and the trial court dismissed the habitual breaking and entering charge pursuant to the plea arrangement.

¶ 5 The trial court consolidated the convictions of violating a civil domestic violence protective order while in possession of a deadly weapon, felonious breaking or entering, and habitual felon and sentenced defendant to a minimum of 95 months and a maximum of 126 months of imprisonment. The trial court separately sentenced defendant to 60 days for assault with a deadly weapon and 30 days for assault on a female, both to be served consecutive to the first sentence. All time was to be served in the custody of the North Carolina Department of Adult Correction and Juvenile Justice.

¶ 6 Defendant appealed. On appeal, defendant presented two issues:

> I. Did the trial court err by denying [defendant's] motion to dismiss the charge of violating a domestic violence protective order while in possession of a deadly weapon where the State failed to present evidence that [defendant] had knowledge of the 6 September 2017 [DVPO]?
>
> II. Did the trial court err or commit plain error in violation of [defendant's] right to a unanimous verdict by instructing the jury that it could find him guilty of felony breaking and entering based on one alternative theory of guilt[ ]—[defendant] intended to commit a felony domestic violence protective order violation—which the evidence failed to support?

¶ 7 The Court of Appeals majority opinion concluded that the State "presented no evidence that defendant received notice or was otherwise aware of the [6 September 2017] DVPO." *State v. Tucker*, 273 N.C. App. 174, 178 (2020). The Court of Appeals viewed defendant's statement—"I know" in response to the victim's statement, "I got a restraining order"[1] —to be "evidence" that "is simply too tenuous to form a basis for a reasonable inference by the jury," *id.* at 179. The Court of Appeals therefore concluded that the trial court erred by "denying defendant's motions to dismiss the charge of violation of a protective order while in possession of a deadly weapon, as the State failed to present sufficient evidence of defendant's knowledge of the [6 September 2017] DVPO." *Id.* at 180.

¶ 8 Since the COA concluded that the State did not present sufficient evidence of defendant's knowledge of the 6 September 2017 DVPO, the Court of Appeals additionally determined that the trial court plainly erred in permitting the jury to convict defendant of felonious breaking or entering in violation of the 6 September 2017 DVPO. *Id.* at 180–81. The Court of Appeals thus reversed defendant's convictions for violation of a protective order while in possession of a deadly weapon and felonious breaking or entering. *Id.* at 181. As these charges formed the basis of defendant's habitual felon plea, the Court of Appeals also vacated the plea. *Id.*

¶ 9 The State petitioned for discretionary review pursuant to N.C.G.S. § 7A-31, arguing that the Court of Appeals erred by reversing the aforementioned convictions for insufficient evidence. This Court allowed discretionary review.

II. Standard of Review

¶ 10 "Whether the State presented substantial evidence of each essential element of the offense is a question of law; therefore, we review the denial of a motion to dismiss de novo." *State v. Crockett*, 368 N.C. 717, 720 (2016). The question for a court on a motion to dismiss for insufficient evidence "is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense."

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1. This Court has ordered that State's Exhibit 14 be added to the record on appeal, pursuant to Rule 9(b)(5)(b) of the North Carolina Rules of Appellate Procedure. State's Exhibit 14 is the recording played to the jury capturing the exchange between the victim, Pasquarella, and defendant. The recording is from the responding officer's body camera. The Court of Appeals used slightly different quotes in its opinion when describing the exchange, *State v. Tucker*, 273 N.C. App. 174, 177–78 (2020), but the Court of Appeals does not appear to have requested or had access to State's Exhibit 14.

State v. Powell, 299 N.C. 95, 98 (1980). "If so, the motion is properly denied." *Id.* Substantial evidence is the same as more than a scintilla of evidence. *Id.* at 99.

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

State v. Barnes, 334 N.C. 67, 75–76 (1993) (cleaned up). In making this determination, a court "is to consider all evidence actually admitted, competent or incompetent, which is favorable to the State, disregarding defendant's evidence unless favorable to the State." *State v. Baker*, 338 N.C. 526, 558–59 (1994). "When ruling on a motion to dismiss, the trial court should be concerned only about whether the evidence is sufficient for jury consideration, not about the weight of the evidence." *State v. Fritsch*, 351 N.C. 373, 379 (2000).

III. Analysis

¶ 11 To sustain a charge of violating a civil domestic violence protective order while in possession of a deadly weapon, the State must present substantial evidence that a defendant:

> while in possession of a deadly weapon on or about his or her person or within close proximity to his or her person, knowingly violate[d] a valid protective order as provided in subsection (a) of this section by failing to stay away from a place, or a person, as so directed under the terms of the order.

N.C.G.S. § 50B-4.1(g) (2021). In this matter, the valid protective order is the civil domestic violence protective order entered on 6 September 2017.

¶ 12 Defendant argued before the trial court, the Court of Appeals, and now this Court that the State failed to present substantial evidence of defendant's knowledge—namely, his knowledge of the 6 September 2017 DVPO. We disagree. Under the well-established standard of review, substantial evidence existed from which the jury could infer that defendant "knowingly violate[d]" the 6 September 2017 DVPO. *See* N.C.G.S. § 50B-4.1(g).

¶ 13 The State's evidence at trial showed the following: Deanna Pasquarella and defendant were girlfriend and boyfriend for about six- or seven-months. They were both homeless when they met in 2016.

¶ 14 In August 2017, Pasquarella applied for and obtained an ex parte domestic violence protective order (ex parte DVPO) after defendant repeatedly struck her with an umbrella as they were crossing the street at the Lynx light rail station. The ex parte DVPO was effective until 6 September 2017. An employee of the Sheriff's Office Domestic Violence Enforcement Team read the ex parte DVPO to defendant; answered defendant's questions; and served defendant with the ex parte DVPO, the civil summons, and the Notice of Hearing on Domestic Violence Protective Order. The Notice states that the hearing would be held on 6 September 2017 at 1:30 p.m. in Courtroom 4110, Mecklenburg County Courthouse, and "[a]t that hearing[,] it will be determined whether the Order will be continued."

¶ 15 At the 6 September 2017 hearing, Pasquarella obtained the 6 September 2017 DVPO. This DVPO was issued on 6 September 2017 and effective until 6 September 2018. Pasquarella attended the hearing, but defendant was not present.

¶ 16 On the morning of 7 September 2017, Pasquarella heard a knock on her apartment door. She looked through the peephole on her door and saw that defendant was there. Pasquarella called the police and locked herself in the closet. Defendant broke a window in her apartment, climbed through the window into the apartment, and opened the door to the closet where Pasquarella was hiding. Defendant grabbed her cell phone and then started hitting her, punching her, and grabbing her by the collar of her shirt. Eventually, he retrieved a knife from his backpack. Defendant then put the knife to Pasquarella's throat and said, "I'm going to jail anyway. I might as well kill you, bitch."

¶ 17 The police officer responding to Pasquarella's domestic violence call entered the apartment through the front door and observed defendant

on top of Pasquarella. The police officer instructed defendant to get off Pasquarella. Defendant then started repeating, "I'm going to jail." The police officer then handcuffed defendant as defendant stepped away from Pasquarella. Pasquarella shortly thereafter asked, "Well, why'd you do it?" and defendant responded, "Why'd you do it?" Defendant later said, "Man, I messed up." Pasquarella stated, "I got a restraining order," to which defendant responded, "Yeah, I know you did."

¶ 18 The State contends the Court of Appeals misapplied the standard of review and erroneously analyzed the evidence in the light most favorable to defendant. We agree that the Court of Appeals erred.

¶ 19 The Court of Appeals identified that a court must view the evidence in the light most favorable to the State and resolve every reasonable inference in favor of the State. *Tucker*, 273 N.C. App. at 177. Nonetheless, the Court of Appeals failed to follow this standard. It initially ignored the State's evidence of defendant's statement, "I know," by concluding that "the State presented *no* evidence that defendant received notice or was otherwise aware of the [6 September 2017] DVPO." *Id.* at 178 (emphasis added). Yet, the Court of Appeals then determined that defendant's statement, "I know," which the State argued showed defendant was aware of the second DVPO, was "too tenuous to form a basis for a reasonable inference by the jury." *Id.* at 179.

¶ 20 The State introduced, and the trial court allowed into evidence, the recording from the responding officer's body camera. The State then played for the jury the recording. That recording captured Pasquarella saying, "I got a restraining order," and defendant responding, "Yeah, I know you did." The State replayed the recording for the trial court when defendant first moved to dismiss for insufficient evidence.

¶ 21 Defendant's statement that he was aware of the existence of the DVPO was evidence that could be viewed in different lights. However, the applicable standard of review for a motion to dismiss for insufficient evidence requires a court to view the evidence in the light most favorable to the State. *Barnes*, 334 N.C. at 75. Therefore, the Court of Appeals was required to consider this evidence in the light most favorable to the State when reviewing de novo the trial court's denial of the motion to dismiss for sufficiency of the evidence. The Court of Appeals erred by not viewing the evidence in this light.

¶ 22 Defendant argued that his statement could refer to the ex parte DVPO, which expired on 6 September 2017, *Tucker*, 273 N.C. App. at 178, and the Court of Appeals adopted defendant's view, ignoring other possible meanings of defendant's declaration, *id.* at 178. By determining

that the State's evidence was "too tenuous," *id.* at 178–79, the analysis by the Court of Appeals impermissibly focused on the weight, not the sufficiency, of the evidence. However, that was the task of the jury—not the court. The proper application of the standard of review does not involve weighing the evidence, *Fritsch*, 351 N.C. at 379, considering defendant's evidence that is not favorable to the State, *Baker*, 338 N.C. at 558–59, or contemplating what evidence the State "should have presented," *State v. Miller*, 363 N.C. 96, 100–01 (2009).

¶ 23 Applying the proper standard of review, we hold that the properly considered evidence, taken in the light most favorable to the State, was sufficient to support a determination that defendant "knowingly violate[d]" the 6 September 2017 DVPO. *See* N.C.G.S. § 50B-4.1(g). Defendant's statement, "I know," in addition to his other statements, conduct, and the timing of such conduct, supports this holding. The existence of evidence that could support different inferences is not determinative of a motion to dismiss for insufficient evidence. *See Barnes*, 334 N.C. at 75. The evidence need only be sufficient to support a reasonable inference. *See id.*

IV. Conclusion

¶ 24 As we conclude that the Court of Appeals erred and that there is sufficient evidence of defendant's knowledge of the 6 September 2017 DVPO for his convictions, we reverse the decision of the Court of Appeals. Accordingly, because we reverse the Court of Appeals on the issue of defendant's violation of the domestic violence protective order, we reinstate defendant's convictions that were reversed or vacated by the Court of Appeals—violating a civil domestic violence protective order while in possession of a deadly weapon, felonious breaking or entering, and habitual felon.

REVERSED.

STATE v. PABON

[380 N.C. 241, 2022-NCSC-16]

STATE OF NORTH CAROLINA
v.
RAFAEL ALFREDO PABON

No. 467A20

Filed 11 February 2022

1. Constitutional Law—Confrontation Clause—test performed by nontestifying chemical analyst—prejudice analysis—overwhelming evidence

Even assuming, without deciding, that in defendant's trial for rape and kidnapping, the trial court violated defendant's rights under the Confrontation Clause by overruling his objections to the testimony of a forensic scientist manager from the State Crime Laboratory regarding testing performed by a nontestifying chemical analyst—that a confirmatory test detected the drug Clonazepam (a date rape drug) in the victim's urine—the State met its burden under N.C.G.S. § 15A-1443(b) of demonstrating that the alleged error was harmless beyond a reasonable doubt. In the first place, other evidence established that the crime lab's initial testing detected Clonazepam in the victim's urine; moreover, even without the evidence of Clonazepam in the victim's urine, there was overwhelming evidence of defendant's guilt before the jury, including evidence of the drug Cyclobenzaprine (another date rape drug) in the victim's hair sample, surveillance footage showing the victim in an impaired state with defendant, the testimony of a restaurant waitress to the same effect, the testimony of a sexual assault nurse examiner, the testimony of the victim and her mother regarding the victim's impaired state, and DNA evidence.

2. Evidence—prior bad acts—prior sexual assaults—prejudice analysis—overwhelming evidence

Even assuming, without deciding, that in defendant's trial for rape and kidnapping, the trial court erred by allowing two women to give Evidence Rule 404(b) testimony that defendant had previously sexually assaulted them, defendant failed to demonstrate a reasonable possibility that, absent the error, the jury would have reached a different verdict, pursuant to N.C.G.S. § 15A-1443(a). This case was not a credibility contest; rather, there was overwhelming evidence of defendant's guilt before the jury, including evidence of the drug Cyclobenzaprine (a date rape drug) in the victim's hair sample, surveillance footage showing the victim in an impaired state

with defendant, the testimony of a restaurant waitress to the same effect, the testimony of the sexual assault nurse examiner, the testimony of the victim and her mother regarding her impaired state, and DNA evidence.

Chief Justice NEWBY concurring.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 273 N.C. App. 645 (2020), finding no prejudicial error in judgments entered on 14 December 2018 by Judge Christopher W. Bragg in Superior Court, Cabarrus County. On 15 December 2020, the Supreme Court allowed defendant's petition for discretionary review of an additional issue pursuant to N.C.G.S. § 7A-31. Heard in the Supreme Court on 9 November 2021.

Joshua H. Stein, Attorney General, by Jeffrey B. Welty, Special Deputy Attorney General, for the State-appellee.

George B. Currin, for defendant-appellant.

HUDSON, Justice.

¶ 1 Here we consider whether defendant was prejudiced by the trial court's admission of certain testimony that we assume without deciding violated the Confrontation Clause of the Sixth Amendment and Rule 404(b) of the North Carolina Rules of Evidence. Because we conclude that even assuming there was error, defendant was not prejudiced, we modify and affirm the ruling of the Court of Appeals.

I. Factual and Procedural Background

A. Trial

¶ 2 On 23 January 2017, a Cabarrus County grand jury indicted defendant Rafael Pabon for the second-degree forcible rape and first-degree kidnapping of Samantha Camejo-Forero (Forero). On 6 March 2017, superseding indictments were issued for the same charges. Beginning on 4 December 2018, defendant was tried by a jury in Superior Court, Cabarrus County, with Judge Christopher W. Bragg presiding.

¶ 3 At trial, the State's evidence tended to show as follows: Defendant first met Forero in November 2015 to discuss a roof repair warranty. At the time, Forero worked "flipping houses" in the Charlotte area,

and defendant worked as a construction contractor. After their initial meeting, defendant and Forero communicated periodically via text or phone call about work projects, their professions, and their families. Defendant was married and had a daughter; Forero was unmarried and had a son. Forero testified that she developed a friendship with defendant and that they would occasionally get together for lunch or coffee.

¶ 4 On the morning of 4 January 2017, defendant and Forero planned to get breakfast together. Forero testified that she had recently purchased a house and wanted to see if defendant could help her find a painter. Shortly after 8:30am, defendant picked Forero up at her house in Matthews. Defendant had—unprompted—brought Forero a latte, which he handed to her to drink. Very quickly after starting to drink the latte, Forero began "feeling weird." Forero testified feeling as if "you were in a movie[,] like . . . it wasn't your body but you know you're there but you're not." Forero began having difficulty moving and could not think clearly.

¶ 5 After driving for around forty-five minutes from Matthews to Concord, defendant and Forero arrived at a Denny's restaurant. Forero testified that she could not read the menu, had difficulty controlling her body and mind, and could not remember if she ate. Video surveillance footage from the Denny's, which was played at trial, showed Forero slouching at the table, staring into space, struggling to put food into her mouth, nodding off, falling over, and having difficulty walking while leaving. Demekia Harold-Strod, the waitress who served defendant and Forero, testified that Forero looked as if she was on drugs, was moving very slowly, had her head down a lot, and made little or no eye contact.

¶ 6 After leaving Denny's around 10:30 a.m., defendant drove Forero about thirty minutes away to his friend Mark Stones's house. Defendant claimed that he needed to pick up Stones's mail while Stones was out of town. Stones' house was located in a secluded, wooded area without any close neighbors. When defendant and Forero entered the house, Forero sat on a couch. Forero testified that defendant then sat next to her on the couch and began making unwanted sexual advances toward her, including kissing and touching her, pulling up her sweater, and kissing her breast. Forero testified that although she did not want or consent to defendant's advances, she was mentally and physically incapacitated and unable to stop them. Forero testified that defendant then picked her up, carried her to a nearby bedroom, and laid her on a bed. Defendant removed his clothes, removed Forero's underwear, and continued to kiss and touch her. Forero testified that defendant then engaged in nonconsensual vaginal intercourse with her. Forero testified that she later

walked to a nearby bathroom, where she saw a used condom on the floor. Afterward, defendant acted "like nothing happened."

¶ 7 Around 12:45 p.m., defendant and Forero left Stones's house and began driving back to Forero's house. During the drive, Forero's mother, Aura Forero de Camejo (Camejo), who lived with Forero, called Forero's cell phone. Camejo testified that she called Forero "because [she] thought it was strange that a breakfast would have lasted so long." Forero answered, and the two had a short conversation. Camejo testified that Forero's speech was significantly slurred, that she had difficulty speaking, and that she had never sounded like that before. Forero did not remember talking to Camejo. Forero still could "not feel anything" and "didn't feel [herself]." She could not remember most of the drive home.

¶ 8 Around 1:30 p.m., defendant dropped Forero back off at her home. Camejo testified that upon arriving, Forero was very pale, was swaying as she walked, and "looked like a zombie or a dead person." Forero immediately threw herself onto Camejo's bed and went to sleep. Forero slept through an alarm at 3:10 p.m. to pick her son up from the bus stop and still could not get up when her son arrived home and began shaking her and calling for her to wake up.

¶ 9 Around 5:00 p.m., Forero woke up and still felt "weird[,]" "couldn't walk straight[,]" and "couldn't think." Forero testified that "the first thing I ha[d] on my mind when I woke up . . . was him, it was his face all over me, and I knew what happen[ed]." At 5:23 p.m., Forero texted defendant to ask him what had happened because although she knew, she "want[ed] him to tell [her]." At 5:28 p.m., defendant called Forero and told her that nothing had happened—that after having breakfast at Denny's he had picked up the mail at Stones's house while she waited in the car, and then took her back home. After talking to defendant on the phone, Forero fell back asleep for the rest of the evening.

¶ 10 The next day, 5 January 2017, Forero again called defendant to ask him what had happened. Forero told defendant that she still did not feel well from the previous day and that she couldn't remember what had happened. Defendant again claimed that nothing unusual had happened, that they had just eaten breakfast and went to Stones's house to pick up the mail.

¶ 11 Forero then began researching online about "resources for victims of rape" and "how to report a rape." She contacted the Matthews Police Department and was directed to take a rape test at a hospital. She then left for the hospital "dressed the exact same way that she was [the] night before."

¶ 12 Forero went to Novant Health Presbyterian Medical Center in Charlotte. There, Lucille Montminy, a sexual assault nurse examiner, conducted Forero's sexual assault examination. During the pre-examination interview, Forero told Montminy that defendant had raped her the day before and recounted her memory of the events surrounding the rape. At trial, Montminy testified that Forero's account of the events during this interview was fully consistent with Montminy's knowledge of drug-assisted sexual assaults, including memory loss, confusion about the events, and feeling sick. During the subsequent physical examination, Montminy noted injuries to Forero's vaginal area that were "indicative of a penetration injury" from a penis. After the physical examination, Montminy collected blood and urine samples to be used in subsequent testing.

¶ 13 The next day, 6 January 2017, Forero gave a formal statement to detectives at the Matthews Police Department, who later transferred the case to the Cabarrus County Sheriff's Office. Forero granted detectives access to her phone, including her text messages, call records, and location data. Forero also provided detectives a hair sample to be used in subsequent testing.

¶ 14 At trial, the State presented testimony from two forensic toxicologists involved in the testing and analysis of Forero's biological samples: Frank Lewallen and Dr. Ernest Lykissa. Frank Lewallen was the forensic scientist manager at the Triad Regional Laboratory of the North Carolina State Crime Laboratory, located in Greensboro. Lewallen testified that his lab analyzed samples of Forero's blood and urine collected on 5 January 2017 during the sexual assault examination. Lewallen specified that he did not personally perform any of the testing of Forero's samples; rather, the testing was performed by two other forensic toxicologists, Brian Morse and Megan Deitz, and Lewallen subsequently reviewed their analysis. Lewallen noted that at the time of trial, Morse and Deitz were attending a training in Indiana.

¶ 15 Lewallen testified that while the initial screening of Forero's blood samples screened negative for drugs or alcohol, the initial screening of her urine sample revealed "a positive indication for Amphetamine and Methylenedioxyamphetamine and for Benzodiazepines." Next, Lewallen testified that a subsequent confirmatory analysis test performed by Deitz again detected these results. Specifically, the following exchange took place regarding Lewallen's review of Deitz's confirmatory testing:

> [Prosecutor]: So was this test performed in accordance with the state crime lab operating procedures?
>
> [Defense Counsel]: Objection. Hearsay and confrontation.

THE COURT: Overruled.

[Lewallen]: Yes, ma'am, it was.

[Prosecutor]: And were you able to personally review all of the data that the test produced?

[Defense Counsel]: Objection. Hearsay and confrontation.

THE COURT: Overruled.

[Lewallen]: Yes, ma'am, I was.

[Prosecutor]: Okay. Were you able to form an opinion about that test?

[Defense Counsel]: Objection. Hearsay and confrontation.

THE COURT: Overruled.

[Lewallen]: Yes, ma'am, I was.

[Prosecutor]: What was the result of that test?

[Defense Counsel]: Objection. Hearsay and confrontation.

THE COURT: Overruled.

[Lewallen]: For the blood, no substances were found present in the blood sample. In the urine sample, 7-aminoclonazepam was detected.

[Prosecutor]: And what is 7-aminoclonazepam?

[Lewallen]: That is a biological metabolite or breakdown product of Clonazepam[,] which is a Benzodiazepine.

¶ 16 Lewallen then explained that Clonazepam is an anticonvulsant drug with potential side effects including decreased pulse, decreased blood pressure, drowsiness, dizziness, sedation, muscular incoordination, and amnesia. Lewallen testified that a person who ingests Clonazepam could be significantly impaired, including not remembering events, experiencing a dreamlike state, and exhibiting speech impairment. Lewallen further noted that Clonazepam "has been documented to be used in [drug-facilitated sexual assault] cases."

¶ 17 The State also presented testimony from Dr. Lykissa. Dr. Lykissa was the director of ExperTox Laboratories in Houston, Texas, which analyzed Forero's hair sample. After testing the hair sample, Dr. Lykissa determined that Forero's hair contained significant levels of

Cyclobenzaprine, a muscle relaxant. Lykissa testified that, as a muscle relaxant, Cyclobenzaprine "floods the brain with serotonin," the neurotransmitter that causes sleep. Lykissa noted that, in excess, Cyclobenzaprine could "numb you to death[,]" and that drugs of this type "ha[ve] been known for a lot of overdoses out there."

¶ 18 In addition to his testimony regarding the hair analysis, Dr. Lykissa confirmed that the State Crime Lab found Clonazepam in Forero's urine sample. Dr. Lykissa testified that, if ingested together, Cyclobenzaprine and Clonazepam can have a "[s]ynergistic effect" resulting in "[v]ery serious impairment of [the person's] mental and physical faculties." These effects would likely be intensified, Lykissa testified, by a combination of the drugs with caffeine. Lykissa testified that a mix of these types of drugs are common in drug-facilitated sexual assaults, and that Forero's symptoms were consistent with such a combination.

¶ 19 The State also presented testimony from Kari Norquist, a former forensic scientist at the State Crime Lab. Norquist testified that she conducted a DNA analysis of Forero's rape test samples, including a swab from Forero's breast. Norquist determined that there were substantial amounts of defendant's DNA on Forero's breast swab and that the amount of defendant's DNA present was not common from a "casual transfer."

¶ 20 After Norquist, the State sought to present testimony from two of defendant's sisters-in-law: Chanel Samonds and Elise Weyersberg. In a voir dire hearing outside the presence of the jury, Samonds and Weyersberg both testified that defendant had previously sexually assaulted them. Based on the voir dire testimony and the arguments by the State and defense counsel, the trial court determined that Samonds and Weyersberg 's testimony was admissible under Rule 404(b) of the North Carolina Rules of Evidence as tending to illustrate intent and a common scheme or plan. The court further determined that the danger of unfair prejudice from the testimony did not substantially outweigh its probative value and that the testimony was therefore also admissible under Rule 403. Finally, the trial court informed counsel that it would provide the jury with a limiting instruction regarding their testimony. With these preliminary issues resolved, the State was allowed to present Samonds's and Weyersberg 's testimony to the jury.

¶ 21 Samonds, the wife of defendant's brother-in-law, testified first. Samonds testified that defendant raped her on 8 September 2008. Specifically, Samonds testified that defendant came to her house, began making unwanted sexual advances while the two sat on the couch, and engaged in forcible, nonconsensual vaginal intercourse after Samonds

repeatedly told him to stop. On cross-examination, Samonds testified that defendant was not prosecuted for this alleged rape.

¶ 22 Weyersberg, the sister of defendant's wife, testified next. Weyersberg testified that in 2006 or 2007, when she was nineteen or twenty years old, defendant made several unwanted sexual advances towards her while she lived at her parent's house. Weyersberg testified that during the first incident defendant came up behind her, started rubbing her shoulders, and began moving toward her breasts. When Weyersberg walked away, defendant followed and began rubbing her shoulders again. During this incident, defendant "was telling [Weyersberg] about how he had an orgy in Bolivia[,]" which made her "very uncomfortable." On a different occasion, when Weyersberg was alone downstairs in her parent's house, defendant asked her if she wanted to use massage oils with him and tried putting his hand up her pant leg. Weyersberg testified that defendant finally stopped when she went upstairs to her room.

¶ 23 After both Samonds's and Weyersberg 's testimony, the trial court gave the jury the following instruction:

> [T]he testimony of [the witness] is received solely for the purpose of showing that the defendant had the intent which is a necessary element of the crime charged in this case[,] and/or that there existed in the mind of the defendant a plan, scheme, system, or design involving the crime charged in this case. If you believe this evidence, you may consider it but only for the limited purpose for which it was received. You may not consider it for any other purpose.

¶ 24 After the State completed its evidentiary showing, defendant testified in his own defense. Defendant claimed that he and Forero had a romantic relationship beyond a common friendship. Regarding the events of 4 January 2017, defendant testified that he and Forero went to breakfast at Denny's, stopped at Stones's house, and engaged in consensual sexual activity short of intercourse at Stones's house. Regarding Forero's abnormal state of mind and body that day, defendant suggested that perhaps Forero had a virus, but conceded that he "did not [know] at the time."

¶ 25 On 14 December 2018, the jury found defendant guilty of second-degree forcible rape and first-degree kidnapping. The trial court sentenced defendant to consecutive terms of 104 to 185 months' imprisonment for the rape conviction and 104 to 137 months' imprisonment for the kidnapping conviction. Based on the rape conviction, the trial court

ordered defendant to enroll in lifetime satellite-based monitoring upon his release from imprisonment. Defendant timely appealed.

B. Court of Appeals

¶ 26 On appeal, defendant alleged seven trial court errors: (1) that the trial court erred when it denied his motions to dismiss; (2) that the trial court erred when it admitted 404(b) evidence of alleged prior wrongs; (3) that the trial court erred when it admitted expert testimony in violation of the Confrontation Clause; (4) that the indictments were facially invalid; (5) that the trial court erred when it failed to properly instruct the jury; (6) that the trial court erred when it allowed the jury to consider evidence of aggravating factors; and (7) that the trial court erred when it ordered defendant to enroll in satellite-based monitoring.

¶ 27 On 6 October 2020, the Court of Appeals filed an opinion rejecting each of defendant's arguments and "find[ing] that [d]efendant received a fair trial free of prejudicial error." *State v. Pabon*, 273 N.C. App. 645, 671 (2020). Specifically, two of the seven issues raised by defendant are pertinent to this appeal.

¶ 28 First, the Court of Appeals rejected defendant's argument that the trial court erred in admitting the testimony of Lewallen in violation of the Confrontation Clause of the Sixth Amendment. *Id.* at 661. Defendant argued that "Lewallen failed to provide an independent opinion regarding the testing and analysis of [Forero]'s blood and urine samples because both tests were performed by two nontestifying forensic toxicologists." *Id.* Defendant further asserted that because the nontestifying experts were not unavailable to testify and he did not have a prior opportunity to cross-examine them, the admission of Lewallen's testimony regarding the test results violated defendant's rights under the Confrontation Clause. *Id.*

¶ 29 The Court of Appeals disagreed. Specifically, the court held that Lewallen "offered his own opinion, without reference to or reliance upon the opinions or conclusions of the nontestifying technicians." *Id.* at 666. "Thus," the court held, "Lewallen's opinion was based on his own analysis and was not merely surrogate testimony for an otherwise inadmissible lab report or signed affidavit certifying the nontestifying technician's results." *Id.* Further, because Lewallen's independent expert opinion was the substantive evidence that defendant had the right to, and did in fact, confront through cross-examination, the court held that "[d]efendant's Confrontation Clause rights were not violated, [and] the trial court did not err in admitting Lewallen's expert testimony." *Id.* at 667.

¶ 30 Second, the Court of Appeals rejected defendant's argument regarding Rule 404(b) evidence. Defendant argued that the trial court erred in admitting Samonds's and Weyersberg's testimony regarding defendant's alleged prior sexual assaults under Rule 404(b). Noting that "[t]his Court has been markedly liberal in admitting evidence of similar sex offenses by a defendant for purposes [outlined] in Rule 404(b)[,]" the Court of Appeals agreed with the trial court that the Samonds and Weyersberg testimony contained sufficient similarities with the present allegations to be admissible as evidence of a common plan or scheme under that rule. *Id.* at 659 (second alteration in original) (quoting *State v. Bagley*, 321 N.C. 201, 207 (1987)). Specifically, the Court of Appeals highlighted three similarities between all three allegations: (1) "each woman testified that [d]efendant gained their trust prior to each incident"; (2) "[d]efendant utilized that position of trust to sexually assault each woman"; and (3) "[d]efendant tried to persuade each victim that he had not sexually assaulted them." *Pabon*, 273 N.C. App. at 659–60.

¶ 31 Regarding the temporal proximity element of Rule 404(b) analysis, the Court of Appeals held that "[b]ecause these acts were performed continuously over a period of years, the acts were not too remote to be considered for the purposes of 404(b)." *Id.* at 660. Finally, the Court of Appeals held that the trial court did not abuse its discretion in ruling that the probative value of the Samonds and Weyersberg testimony was not substantially outweighed by the danger of unfair prejudice under Rule 403. *Id.* at 661. Accordingly, the Court of Appeals held that the trial court did not err in admitting the State's Rule 404(b) evidence. *Id.*

¶ 32 Judge Murphy dissented in part from the Court of Appeals' majority opinion. While Judge Murphy concurred with the majority's analysis regarding the motion to dismiss, the Rule 404(b) evidence, and the indictment, he disagreed with the majority's Confrontation Clause analysis. *Id.* at 675 (Murphy, J., concurring in part and dissenting in part). Specifically, the dissent would have found that Lewallen's testimony regarding the forensic reports did not provide an independent expert opinion but rather "simply parroted the conclusions of a test performed by another person not subject to the confrontation required by the United States Constitution." *Id.* at 674–75. Accordingly, the dissent would have held that "Lewallen's testimony was inadmissible and [d]efendant is entitled to a new trial free from this prejudicial violation of his constitutional rights." *Id.* at 675.

C. Present Appeal

¶ 33 On 10 November 2020, defendant simultaneously gave notice of appeal based on the Confrontation Clause issue raised in Judge Murphy's

dissent and petitioned this Court for discretionary review on the other issues he raised before the Court of Appeals. On 15 December 2020, this Court allowed defendant's petition for discretionary review as to one additional issue: the admission of the Samonds and Weyersberg testimony under Rule 404(b).

¶ 34 Before this Court, defendant asserts that the trial court committed two prejudicial errors: (1) overruling his Confrontation Clause objections to the testimony of Lewallen regarding the tests performed by a nontestifying chemical analyst; and (2) overruling his objections to the Rule 404(b) testimony of Samonds and Weyersberg.

¶ 35 First, defendant argues that the trial court erred in overruling his Confrontation Clause objections to the testimony of Lewallen, the State's expert from the State Crime Lab, regarding the forensic tests performed by a nontestifying chemical analyst. In alignment with the Court of Appeals dissent, defendant argues that Lewallen did not provide an independent opinion as to the presence of the Clonazepam in Forero's urine sample but merely parroted the results of the test of a nontestifying analyst. Further, defendant alleges that this error was prejudicial because Lewallen's testimony regarding the presence of Clonazepam in Forero's urine sample was "crucial to the State's case." Specifically, defendant contends that because the State emphasized the "synergistic effect of mixing the two drugs and how this mixture would cause very serious impairment of a person's mental and physical faculties[,] . . . the State would have been hard pressed to prove its case" in the absence of Lewallen's testimony.

¶ 36 Second, defendant argues that the trial court erred in overruling his objections to the Rule 404(b) testimony of Samonds and Weyersberg. Defendant asserts that the Samonds and Weyersberg testimony fall short of both requirements of Rule 404(b): sufficient similarity and temporal proximity. Regarding the first requirement, defendant argues that any similarities between the alleged prior bad acts and the crimes for which he was charged were too generic in light of the stark dissimilarities between the alleged acts to be considered admissible. Regarding the second requirement, defendant argues that the elapsed time between the alleged prior bad acts and the current charges—eight and one-half years and ten years, respectively—renders them too attenuated to reasonably suggest intent or any common scheme or plan. Finally, defendant asserts that the trial court's erroneous admission of the Samonds and Weyersberg testimony was prejudicial because "[t]here was not overwhelming evidence of [d]efendant's guilt and [d]efendant testified at trial and denied [Forero]'s allegations." Rather, defendant contends that

the case boiled down to a "credibility contest" between him and Forero, and that the improper admission of the Samonds and Weyersberg testimony of alleged prior sexual assaults therefore prejudicially bolstered Forero's credibility with the jury while undermining his own.

¶ 37 In response, the State contends that neither the Confrontation Clause issue nor the Rule 404(b) issue amounted to trial court error, and even assuming they did, neither error would be prejudicial. Regarding the first issue, the State argues that Lewallen's testimony offered his independent expert opinion on the forensic analysis, therefore complying with the requirements of the Confrontation Clause. Regarding the second issue, the State argues that the Samonds and Weyersberg testimony, for the reasons expressed by the Court of Appeals, was both sufficiently similar and temporally proximate to the present charges to be properly admitted under Rule 404(b). In any event, the State argues, even assuming that these issues constituted errors, neither would be prejudicial. The State contends that even without the testimony in question, "[i]n light of the supporting testimony and physical evidence, no reasonable juror would have been left with the impression that . . . [d]efendant's version of events was truthful."

II. Analysis

¶ 38 After careful consideration, we assume, without deciding, that the trial court erred on both the Confrontation Clause issue and the Rule 404(b) issue, but nevertheless determine that neither assumed error was prejudicial.

A. Confrontation Clause: Independent Expert Opinion Testimony

¶ 39 **[1]** First, we consider defendant's Confrontation Clause claim. This Court reviews alleged constitutional errors in the admission of testimony in violation of the Confrontation Clause de novo. *State v. Ortiz-Zape*, 367 N.C. 1, 10 (2013).

¶ 40 The Sixth Amendment to the United States Constitution establishes that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him[.]" U.S. Const. amend VI. This "bedrock procedural guarantee applies to both federal and state prosecutions." *Crawford v. Washington*, 541 U.S. 36, 42 (2004) (citing *Pointer v. Texas*, 380 U.S. 400, 406 (1965)). Although the basic theory of the right to confront one's accusers "dates back to Roman times[,]" our country's "immediate source of the concept . . . was the [English] common law. *Crawford*, 541 U.S. at 43.

¶ 41 Modern times and technologies introduced a new question to this old right: who does the accused have the right to confront when the "accuser" is a not a person, but a forensic report? In 2011, the Supreme Court of the United States answered this question in *Bullcoming v. New Mexico*, 564 U.S. 647 (2011). There, the principal evidence presented against defendant Donald Bullcoming in his trial for driving while intoxicated was "a forensic laboratory report certifying that [his] blood-alcohol concentration was well above the [legal] threshold." *Id.* at 651. "At trial, the prosecution did not call as a witness the analyst who signed the certification. Instead, the State called another analyst who was familiar with the laboratory's testing procedures, but had neither participated in nor observed the test on Bullcoming's blood sample." *Id.* The Court held that this did not satisfy Bullcoming's rights under the Confrontation Clause because the testifying analyst provided mere "surrogate testimony" without expressing any " 'independent opinion' concerning Bullcoming's BAC."

¶ 42 Since *Bullcoming*, this Court has sought to apply this constitutional protection with fidelity. In *Ortiz-Zape*, for instance, because a forensic scientist "testified as to her opinion that a substance was cocaine based upon her independent analysis of testing performed by another analyst in her laboratory[,]" this Court held that "the testifying expert was the witness whom defendant had the right to confront." 367 N.C. 1, at 2, 12–13 (2013). Accordingly, we reversed the Court of Appeals' holding that the expert's testimony violated the Confrontation Clause. *Id.* at 14.

¶ 43 In *State v. Craven*, 367 N.C. 51, (2013), this Court reached the opposite conclusion on the same question where a forensic chemist who had not personally performed the testing of the alleged cocaine "testified about the identity, composition, and weight of the substances recovered" from the defendant. *Id.* at 54. However, based on a review of the testimony, this Court determined that the testifying witness "did not offer—or even purport to offer—her own independent analysis or opinion on the . . . samples. Instead, [she] merely parroted [the nontestifying analysts'] conclusions from their lab reports." *Id.* at 56–57. Accordingly, this Court held that the testifying expert's "surrogate testimony violated defendant's Sixth Amendment right to confrontation." *Id.* at 57.

¶ 44 When a Confrontation Clause violation is established, the reviewing court must then "determine if the admission of [the offending] evidence . . . was such prejudicial error as to require a new trial." *State v. Watson*, 281 N.C. 221, 232 (1972). "A violation of the 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." N.C.G.S. § 15A-1443(b). "The burden is upon the State to demonstrate, beyond a

reasonable doubt, that the error was harmless." N.C.G.S. § 15A-1443(b). If it does so, the jury's verdict is not disturbed on appeal, in spite of a Confrontation Clause violation. *See Watson*, 281 N.C. at 233 (determining that a Confrontation Clause error was harmless beyond a reasonable doubt).

¶ 45 Here, we assume without deciding that the trial court's admission of Lewallen's testimony regarding the results of Deitz's confirmatory test of Forero's urine sample violated defendant's right to confrontation under the Sixth Amendment. However, because we conclude that this assumed error was harmless beyond a reasonable doubt, we modify and affirm the holding Court of Appeals finding no prejudicial error on this issue.

¶ 46 First, any improper testimony from Lewallen was not the only evidence of Clonazepam in Forero's urine sample. Rather, Lewallen testified about two distinct findings of Clonazepam in Forero's sample: first describing the "initial" or "preliminary" testing, and then describing the "confirmatory" testing. As to Deitz's confirmatory testing, Lewallen testified as follows:

> [Prosecutor]: What was the result of that test?
>
> [Defense Counsel]: Objection. Hearsay and confrontation.
>
> THE COURT: Overruled.
>
> [Lewallen]: For the blood, no substances were found present in the blood sample. In the urine sample, 7-aminoclonazepam was detected.
>
> [Prosecutor]: And what is 7-aminoclonazepam?
>
> [Lewallen]: That is a biological metabolite or breakdown product of Clonazepam[,] which is a Benzodiazepine.

This quoted testimony formed the basis of defendant's Confrontation Clause argument on appeal and is the testimony which we assume without deciding violated the Confrontation Clause.

¶ 47 As to the "initial" or "preliminary" testing, though, Lewallen testified as follows:

> [Prosecutor]: Okay. What opinion did you form about that initial screening test?
>
> [Defense Counsel]: Objection. Hearsay and confrontation.
>
> THE COURT: Overruled.

> [Lewallen]: For the blood it was negative for all 12 assays. For the urine we had a positive indication for Amphetamine and Methylenedioxyamphetamine and for Benzodiazepines.

Although defendant objected to this testimony at trial, this was not the testimony upon which defendant based his Confrontation Clause argument on appeal and is not part of any assumed error.

¶ 48 Accordingly, based on Lewallen's testimony regarding the initial testing, even in the absence of his subsequent testimony regarding the confirmatory testing, there was still competent evidence before the jury of the presence of Clonazepam in Forero's urine sample. Therefore, Dr. Lykissa's testimony regarding the "synergistic effect" of the combination of both Clonazepam and Cyclobenzaprine in drug-facilitated sexual assaults would still have been grounded in the evidence.

¶ 49 Next, the State has demonstrated that even in the absence of *any* of Lewallen's testimony regarding the presence of Clonazepam in Forero's urine sample, the jury would still have had ample evidence of Cyclobenzaprine in Forero's hair sample through Dr. Lykissa's testimony. Although defendant correctly notes that the State emphasized the synergistic effect of the combination of the two drugs, Dr. Lykissa also testified about the potential impact of Cyclobenzaprine alone. Specifically, Dr. Lykissa noted that Cyclobenzaprine is a "muscle relaxant," "it floods the brain with serotonin[,]" "it can numb you to death," it "is notorious," its effects would be heightened by the ingestion of caffeine, and "[i]t's in the same family of Amitriptyline, [which] has been known for a lot of overdoses out there."

¶ 50 This evidence, even in the absence of Lewallen's testimony regarding Clonazepam and the synergistic effects, still supports the State's evidence of Forero's symptoms on 4 January 2017—namely dizziness, rapid decline of motor skills, confusion, drowsiness, memory loss, and a generally dreamlike state. Notably, these symptoms were not established by Lewallen's testimony, or even by Lykissa's, but by the testimony of those who observed them firsthand: Forero's mother, the sexual assault nurse examiner, the Denny's waitress, the Denny's surveillance video, and, of course, Forero herself. The ample evidence of the presence of Cyclobenzaprine in Forero's hair sample, the known effects of Cyclobenzaprine, and the evidence of Forero's symptoms strongly supported the State's case of drug-facilitated sexual assault. Accordingly, the State has demonstrated that even without Lewallen's testimony, any reasonable jury would likely have reached the same conclusion based on the other evidence.

¶ 51 Moreover, even setting aside the assumedly improper Lewallen testimony would neither disturb nor undermine the other overwhelming evidence of defendant's guilt. The jury was presented with extensive testimony from eighteen witnesses supporting the State's theory of defendant's actions, filling nearly one thousand transcript pages. The State also submitted 146 exhibits for the jury's consideration.

¶ 52 Of course, sheer volume is not dispositive; the State has also demonstrated that Forero's testimony was extensive, detailed, and consistent, revealing numerous indications of drug-facilitated sexual assault. Further, her testimony was corroborated by that of Forero's mother and the Denny's waitress, who directly witnessed her appearance, behavior, speech, and demeanor on 4 January 2017. Next, a procession of highly trained and experienced medical, forensic, and law enforcement professionals further supported Forero's claims, including Montminy (the sexual assault nurse examiner), Norquist (the rape kit examiner), Dr. Lykissa, Detective Danielle Helms (Matthews Police Department), Lieutenant Kevin Pfister (Cabarrus County Sheriff's Office), and Detective Sergeant April Samples (Cabarrus County Sheriff's Office), among several others. Finally, the State's exhibits were also potent and corroborative, particularly the Denny's surveillance video, Dr. Lykissa's report, the rape kit evidence, and the DNA evidence. In considering this overwhelming evidence against defendant, we conclude that the State met its burden of demonstrating that, even assuming that the admission of the Lewallen testimony was erroneous, "the minds of an average jury would not have found the [remaining] evidence less persuasive had the [erroneous] evidence . . . been excluded." *Watson*, 281 N.C. at 233. As such, any Confrontation Clause error was harmless beyond a reasonable doubt.

¶ 53 Defendant's attempts to undermine the State's demonstration of no prejudice are unavailing. Specifically, defendant asserts that "[t]he prejudice . . . is manifest as th[e] improperly admitted evidence was crucial to the State's case." Defendant contends that because the State emphasized the "synergistic effects" of combining Clonazepam and Cyclobenzaprine, "it is obvious that without Lewallen's inadmissible testimony . . . , the State would have been hard pressed to prove its case."

¶ 54 We cannot agree. As noted above: (1) other portions of Lewallen's testimony also established his opinion that Clonazepam was detected in Forero's urine sample; (2) Lykissa's testimony independently established the presence of another drug common in drug-facilitated sexual assaults in Forero's hair sample; and (3) the State presented other overwhelming testimony and evidence tending to prove defendant's guilt.

¶ 55 Defendant presented eight witnesses and thirteen exhibits to support his claim that he and Forero had a romantic relationship and had engaged in consensual sexual activity short of intercourse. In response to the overwhelming evidence of Forero's incapacitation, defendant suggested that Forero may have had a virus, but then conceded that he "did not [know] at the time." Defendant's evidence did not address Montminy's finding of vaginal injuries consistent with penetration from a penis, did not undermine Dr. Lykissa's forensic report, and did not provide an alternative explanation as to why Forero might have had Cyclobenzaprine in her system when she was not taking any medications at the time.

¶ 56 To be clear, defendant, like all criminal defendants, enjoyed a presumption of innocence until proven guilty by the State beyond a reasonable doubt, and therefore was not required to put forth any testimony or evidence whatsoever. Likewise, the burden of demonstrating a lack of prejudice beyond a reasonable doubt upon a constitutional error lies with the State, and defendant was not required to affirmatively demonstrate prejudice on this issue. But the State's voluminous and comprehensive evidence of defendant's guilt amply satisfies its burden.

¶ 57 As shown through its verdict, this evidence persuaded the jury beyond a reasonable doubt that defendant committed the second-degree forcible rape and first-degree kidnapping of Forero on 4 January 2017. Although the assumedly erroneous Lewallen testimony confirmed the presence of Clonazepam in Forero's urine sample and emphasized the potential "synergistic effects" of the combination of Clonazepam and Cyclobenzaprine, its admission does not require a new trial, in light of the overwhelming nature of the remaining evidence. Accordingly, we modify and affirm the holding of the Court of Appeals finding no prejudicial error on this issue.

B. Rule 404(b): Evidence of Prior Bad Acts

¶ 58 **[2]** Second, we consider defendant's Rule 404(b) claim.

> When the trial court has made findings of fact and conclusions of law to support its 404(b) ruling, . . . we look to whether the evidence supports the findings and whether the findings support the conclusions. We review de novo the legal conclusion that the evidence is, or is not, within the coverage of Rule 404(b).

State v. Beckelheimer, 366 N.C. 127, 130 (2012).

¶ 59 Rule 404(b) of the North Carolina Rules of Evidence establishes that:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.

N.C.G.S. § 8C-1, Rule 404(b) (2021).

¶ 60 Generally, Rule 404 acts as a gatekeeper against "character evidence": evidence of a defendant's character—as illustrated through either direct testimony or evidence of prior bad acts—admitted "for the purpose of proving that he acted in conformity therewith on a particular occasion." N.C.G.S. § 8C-1, Rule 404(a). It has long been observed that character evidence "is objectionable not because it has no appreciable probative value but because it has too much. The natural and inevitable tendency of the tribunal—whether judge or jury—is to give excessive weight to the vicious record of crime thus exhibited and either to allow it to bear too strongly on the present charge or to take the proof of it as justifying a condemnation, irrespective of the accused's guilt of the present charge." John Henry Wigmore, *Evidence* § 58.2 (Peter Tillers ed. 1983). Accordingly, Rule 404(b) evidence "should be carefully scrutinized in order to adequately safeguard against the improper introduction of character evidence against the accused." *State v. Al-Bayyinah*, 356 N.C. 150, 154 (2002).

¶ 61 This important protective role notwithstanding, this Court has repeatedly held that "Rule 404(b) state[s] a clear general rule of *inclusion*." *State v. Coffey*, 326 N.C. 268, 278–79 (1990); s*ee Al-Bayyinah*, 356 N.C. at 153–54 (quoting *Coffey* for this same proposition). That is, relevant evidence of past crimes, wrongs, or acts by a defendant are generally admissible for any one or more of the purposes enumerated in Rule 404(b)'s non-exhaustive list, "subject to but *one exception* requiring its exclusion if its *only* probative value is to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged." *Coffey*, 326 N.C. at 279 (emphasis in original); *see Beckelheimer*, 366 N.C. at 130 (noting that "[Rule 404(b)'s] list 'is not exclusive, and such evidence is admissible as long as it is relevant to any fact or issue other than the defendant's propensity to commit the crime' " (quoting *State v. White*, 340 N.C. 264, 284 (1995))).

¶ 62 Rule 404(b) has particular salience in trials for sexual offenses. On the one hand, "this Court has been markedly liberal in admitting evidence of similar sex offenses by a defendant." *State v. Bagley*, 321 N.C. 201, 207 (1987) (quoting *State v. Cotton*, 318 N.C. 663, 666 (1987)). On the other hand, though, the high potency of prior sex offense testimony brings a correspondingly high risk of improper sway upon the jury's determination. *See State v. Gray*, 210 N.C. App. 493, 521 (2011) (noting that "[t]he improper admission of a prior sexual assault by a defendant tends to bolster an alleged victim's testimony that an assault occurred *and* that the defendant was the perpetrator, since such evidence informs the jury that the defendant has committed sexual assault in the past."); *State v. McClain*, 240 N.C. 171, 174 (1954) (noting that "[p]roof that a defendant has been guilty of another crime equally heinous prompts to a ready acceptance and belief in the prosecution's theory that he is guilty of the crime charged. Its effect is to predispose the mind of the juror to believe the [defendant is] guilty, and thus effectually to strip him of the presumption of innocence.").

¶ 63 In order to navigate this terrain, this Court has looked toward the useful guidance of twin north stars: similarity and temporal proximity. *See Al-Bayyinah*, 356 N.C. at 154 ("To effectuate these important evidentiary safeguards, the rule of inclusion described in *Coffey* is constrained by the requirements of similarity and temporal proximity."). Regarding the first, prior acts are considered sufficiently similar under Rule 404(b) " 'if there are some unusual facts present in both crimes' that would indicate that the same person committed them." *Beckelheimer*, 366 N.C. at 131 (quoting *State v. Stager*, 329 N.C. 278, 304 (1991)). While these similarities must be specific enough to distinguish the acts from any generalized commission of the crime, "[w]e do not require that [they] 'rise to the level of the unique and bizarre.' " *Beckelheimer*, 366 N.C. at 131 (quoting *State v. Green*, 321 N.C. 594, 604, *cert. denied*, 488 U.S. 900 (1988)). Regarding the second, while a greater lapse in time between the prior and present acts generally indicate a weaker case for admissibility under Rule 404(b), *see, e.g.*, *Jones*, 322 N.C. at 586, 591 (holding that admission of Rule 404(b) testimony of a prior sexual assault that took place "some seven years before in much the same manner as the [allegations] in the case *sub judice*" was "prejudicial to the defendant's fundamental right to a fair trial on the charges for which he was indicted because the prior acts were too remote in time"), "remoteness for purposes of 404(b) must be considered in light of the specific facts of each case[,] . . . [and t]he purpose underlying the evidence also affects the analysis." *Beckelheimer*, 366 N.C. at 132 (cleaned up).

¶ 64 Finally, if an appellate court reviewing a trial court's Rule 404(b) ruling determines in accordance with these guiding principles that the admission of the Rule 404(b) testimony was erroneous, it must then determine whether that error was prejudicial. *See Scott*, 331 N.C. at 46 (engaging in prejudice analysis after finding Rule 404(b) error). In accordance with N.C.G.S. § 15A-1443(a), "[t]he test for prejudicial error is whether there is a reasonable possibility that, had the error not been committed, a different result would have been reached at trial." *Id.* "The burden of showing such prejudice . . . is upon the defendant." N.C.G.S. § 15A-1443(a). Notably, while for the reasons noted above there is a "high *potential* for prejudice inherent in the introduction of evidence of prior [sex] offenses," such evidence is not prejudicial per se. *Scott*, 331 N.C. at 46 (emphasis added).

¶ 65 Here, as in the Confrontation Clause analysis above, we assume without deciding that the Samonds and Weyersberg testimony was erroneously admitted under Rule 404(b). However, because we conclude that this assumed error was not prejudicial, we modify and affirm the ruling Court of Appeals finding no prejudicial error on this issue.

¶ 66 In determining whether a Rule 404(b) error creates "a reasonable possibility that, had the error not been committed, a different result would have been reached at trial[,]" the burden of demonstrating prejudice lies with defendant. *Id.*; *see* N.C.G.S. § 15A-1443(a). Here, after careful consideration, we conclude that defendant has failed to demonstrate a reasonable possibility that the jury would have reached a different verdict if the Samonds and Weyersberg testimony had been excluded at trial.

¶ 67 In his arguments regarding Rule 404(b) prejudice, defendant asserted that "[t]here was not overwhelming evidence of [d]efendant's guilt." "Rather," defendant claimed, "this case boiled down to" a credibility contest: "the credibility of the prosecuting witness . . . versus the credibility of [d]efendant." "Given th[is] lack of overwhelming evidence and the central importance of the credibility of [d]efendant versus the credibility of [Forero]," defendant argued, "the erroneous admission of the prior bad acts evidence . . . was highly prejudicial."

¶ 68 We cannot agree. In a simple "credibility contest," there is little or no physical or corroborating evidence of the incident in question, leaving the competing stories of the two internal participants and whom to believe as the only real question for the factfinder. In such an instance, any evidence of prior acts that tends to bolster or undermine the credibility of one of the primary participants may be particularly influential

in the ultimate outcome. *See*, *e.g.*, *Scott*, 331 N.C. at 46 (determining that the erroneous admission of testimony regarding a prior sexual assault allegation was prejudicial when the "[b]oth the State's evidence and the defendant's were corroborated to some extent by the testimony of other witnesses").

¶ 69 That is plainly not the case here. Although defendant and Forero did present two contrasting stories about the events of 4 January 2017, Forero's version of the events was then corroborated by extensive supporting external testimony and evidence. As discussed in more detail above, this corroborating evidence included: Camejo and Harold-Strod's testimony regarding Forero's apparent incapacitation; surveillance video footage demonstrating this incapacitation; Montminy's testimony regarding Forero's description of the alleged rape during the sexual assault examination; Montminy's testimony regarding Forero's vaginal injury consistent with penetration by a penis; subsequent DNA testing of the rape kit; Detective Helms's testimony regarding her interview with Forero and subsequent investigation; Lieutenant Pfister's testimony regarding his review of the evidence and investigation of the scene of the alleged crime; Detective Samples' testimony regarding the investigation process; and Dr. Lykissa's testimony regarding the presence of a drug common in drug-facilitated sexual assaults in Forero's hair sample, among other testimony and evidence. We see this case not as simply a "credibility contest," but as one with overwhelming evidence of defendant's guilt.

¶ 70 It is within the context of this overwhelming evidence that we must consider the relative impact of the Samonds and Weyersberg testimony alleging past sexual assault. By the time Samonds and Weyersberg shared their allegations with the jury, Dr. Lykissa, Montminy, Camejo, Norquist, Detective Helms, Harold-Strod, and Lieutenant Pfister, among others, had already corroborated Forero's testimony, with additional supporting testimony to come later. Under these circumstances, we cannot conclude that a reasonable possibility exists that the jury would have reached a different verdict but for the assumedly erroneous admission of the Samonds and Weyersberg testimony. Accordingly, defendant has failed to meet his burden of showing prejudice, and we modify and affirm the holding of the Court of Appeals finding no prejudicial error on this issue.

III. Conclusion

¶ 71 Assuming without deciding that the trial court's admission of the Lewallen testimony violated defendant's rights under the Confrontation

Clause and that the Samonds and Weyersberg testimony violated Rule 404(b) of North Carolina Rules of Evidence, we nevertheless conclude that these assumed errors were not prejudicial. Regarding the Lewallen testimony, the State has met its burden under N.C.G.S. § 15A-1443(b) of demonstrating that the assumed Confrontation Clause error was harmless beyond a reasonable doubt. As for the Samonds and Weyersberg testimony, defendant has failed to meet his burden under N.C.G.S. § 15A-1443(a) of demonstrating that there is a reasonable possibility that had the assumed Rule 404(b) error not been committed, a different result would have been reached at trial. Accordingly, we modify and affirm the holding of the Court of Appeals finding no prejudicial error on these issues.

MODIFIED AND AFFIRMED.

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

Chief Justice NEWBY concurring.

¶ 72 I concur in the portion of the majority's opinion holding that defendant was not prejudiced by the alleged errors in this case. I do not, however, join the portions of the majority opinion that discuss defendant's arguments regarding the trial court's alleged error under the Confrontation Clause of the Sixth Amendment and N.C.G.S. § 8C–1, Rule 404(b). We have assumed without deciding that the trial court erred. Thus, discussion of the merits of these arguments is unnecessary. *Tr. of Rowan Tech. Coll. v. J. Hyatt Hammond Assocs., Inc.*, 313 N.C. 230, 242, 328 S.E.2d 274, 281 (1985). Accordingly, I concur.

N.C. NAACP v. MOORE

[380 N.C. 263 (2022)]

NORTH CAROLINA STATE CONFERENCE OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE,	)	
PLAINTIFF-APPELLANT,	)	WAKE COUNTY
v.	)	
TIM MOORE, IN HIS OFFICIAL CAPACITY, PHIL BERGER, IN HIS OFFICIAL CAPACITY,	)	
DEFENDANT-APPELLEES	)	

No. 261A18-3

ORDER

Pursuant to an administrative order entered by this Court on December 23, 2021, and having considered precedent established by this Court, the North Carolina Code of Judicial Conduct, and the arguments of the parties, plaintiffs' motion to disqualify the undersigned is denied.

This Court has repeatedly held that "[a] suit against a public official in his official capacity is a suit against the State." *White v. Trew*, 366 N.C. 360, 363, 736 S.E.2d 166, 168 (2013). *See also Mullis v. Sechrest*, 347 N.C. 548, 554, 495 S.E.2d 721, 725 (1998) ("official-capacity suits are merely another way of pleading an action against the governmental entity."); *Meyer v. Walls*, 347 N.C. 97, 111, 489 S.E.2d 880, 888 (1997) (official capacity "is a legal term of art with a narrow meaning—the suit is in effect one against the entity.") (Citation omitted); *Harwood v. Johnson*, 326 N.C. 231, 238, 388 S.E.2d 439, 443 (1990) ("A suit against defendants in their official capacities, as public officials or a public employee of the Parole Commission acting pursuant to its direction, is a suit against the State.); and *Est. of Long by & through Long v. Fowler*, 378 N.C. 138, 861 S.E.2d 686 (2021) ("a suit against a State employee in that employee's official capacity is a suit against the State[.]"). Stated a different way by the Supreme Court of the United States, "a suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office." *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71 (1989).

With this straightforward precedent, a reasonable person would understand that a suit against a government official in his or her official capacity is not a suit against the individual. *See Matter of Mason*, 916 F.2d 384, 386 (7th Cir. 1990) ("Judges must imagine how a

reasonable, well-informed observer of the judicial system would react." The question is "how things appear to the well-informed, thoughtful observer rather than to a hypersensitive or unduly suspicious person.") *See also United States v. Jordan*, 49 F.3d 152, 156 (5th Cir. 1995) ("we ask how things appear to the well-informed, thoughtful and objective observer, rather than the hypersensitive, cynical, and suspicious person.").

There can be no question that this is a suit against the State. Plaintiff's motion seeks to disqualify the undersigned from performing constitutionally prescribed duties because my father is named in this action in his official capacity. Indeed, my father's name appears in the caption only as a matter of procedure.

> It is the public policy of the State of North Carolina that in any action in any North Carolina State court in which the validity or constitutionality of an act of the General Assembly or a provision of the North Carolina Constitution is challenged, the General Assembly, jointly through the Speaker of the House of Representatives and the President Pro Tempore of the Senate, constitutes the legislative branch[.]

N.C.G.S. § 1-72.2. Moreover, Rule 19(d) of the Rules of Civil Procedure requires that the President Pro Tempore of the Senate "must be joined as [a] defendant[] in any civil action challenging the validity of a North Carolina statute or provision of the North Carolina Constitution under State or federal law." N.C.G.S. § 1A-1, 19 (2019).

More than 2.7 million North Carolinians, knowing or at least having information available to them concerning my father's service in the Legislature, elected me to consider and resolve significant constitutional questions like the one at issue here. The ultimate question, and indeed the touchstone of all recusal issues, is "whether the justice can be fair and impartial?" Because this case is a suit against the State, and because I can and will be fair and impartial carrying out my duties in this case, plaintiff's motion is denied.

This the 7th day of January, 2022.

s/Berger, J.
Philip E. Berger, Jr.,
Associate Justice

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 7th day of January, 2022.

AMY L. FUNDERBURK
Clerk of the Supreme Court

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

NORTH CAROLINA STATE CONFERENCE OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE	)	
v.	)	WAKE COUNTY
TIM MOORE, IN HIS OFFICIAL CAPACITY, PHILIP BERGER, IN HIS OFFICIAL CAPACITY	)	

No. 261A18-3

ORDER

Pursuant to this Court's administrative order of 23 December 2021, after months of thorough and thoughtful deliberation, I have concluded that I can and will be fair and impartial in deciding *North Carolina State Conference of the National Association for the Advancement of Colored People v. Moore, et al.* (No. 261A18-3). Accordingly, the 23 July 2021 Motion to Disqualify filed therein is denied insofar as it requested my disqualification.

In reaching this conclusion, I thoughtfully considered: (1) the arguments presented by the appellate and amicus parties; (2) my ethical responsibilities as an Associate Justice of the Supreme Court of North Carolina under our Code of Judicial Conduct; (3) my solemn oath to serve on our state's Court of last resort—rather than recusing myself or being disqualified to avoid controversy; and (4) my resulting judicial duty to all North Carolinians—including the 2,746,362 who voted for me and the 2,616,265 who did not—to prevent any ideological or political affiliation from tainting my legal analysis. Finally, I am following a strong and firmly rooted tradition in reaching the conclusion not to recuse myself due to my prior legislative service. As the 101st Justice on our Court since its founding in 1819, I am following the precedent established by the 51 of my 100 predecessor Justices who first served in the legislature and later went on to fairly and impartially judge various statutes that were passed or amended during their legislative tenure before they joined the North Carolina Supreme Court. These 51 include 18 former Chief Justices of our Court—including Joseph Branch, James G. Exum, Jr. and Henry E. Frye; five former Speakers of our House of Representatives; and over two dozen associate justices—including eventual U.S. Senator Samuel J. Ervin, Jr., former Governor Dan K. Moore, and Willis P. Whichard.

For the reasons summarized above, the relevant portion of the Motion to Disqualify is denied. This the 7th day of January 2022.

s/Barringer, J.
Tamara Patterson Barringer

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 7th day of January, 2022.

AMY L. FUNDERBURK
Clerk of the Supreme Court

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

COMMUNITY SUCCESS INITIATIVE, ET AL.,)
)
PLAINTIFFS,)
)
v.)
)
TIMOTHY K. MOORE, IN HIS OFFICIAL CAPACITY AS SPEAKER OF THE NORTH CAROLINA HOUSE OF REPRESENTATIVES, ET AL.,)
)
DEFENDANTS.)

TENTH DISTRICT

No. 331P21

ORDER

Pursuant to an administrative order entered by this Court on December 23, 2021, and having reviewed and considered precedent established by this Court, the North Carolina Code of Judicial Conduct, and the arguments of the parties, plaintiffs' motion to disqualify the undersigned is denied.

This the 31st day of January, 2022.

s/Berger, J.
Philip E. Berger, Jr.,
Associate Justice

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 31 day of January 2022.

AMY FUNDERBURK
Clerk, Supreme Court of
North Carolina

s/Amy Funderburk
~~M.C. Hackney~~
~~Assistant~~ Clerk, Supreme Court of
North Carolina

HARPER v. HALL

[380 N.C. 269 (2022)]

NORTH CAROLINA LEAGUE OF CONSERVATION VOTERS, INC., ET AL.	)	
COMMON CAUSE	)	
v.	)	Wake County
REPRESENTATIVE DESTIN HALL, IN HIS OFFICIAL CAPACITY AS CHAIR OF THE HOUSE STANDING COMMITTEE ON REDISTRICTING, ET AL.	)	
REBECCA HARPER, ET AL.	)	
v.	)	
REPRESENTATIVE DESTIN HALL, IN HIS OFFICIAL CAPACITY AS CHAIR OF THE HOUSE STANDING COMMITTEE ON REDISTRICTING, ET AL.	)	

No. 413PA21

EXPEDITED BRIEFING ORDER

On 11 January 2022, the trial court entered an order in favor of defendants that resolved all claims raised by plaintiffs in the consolidated cases captioned above.

The Court sets the following expedited briefing schedule in this case: Appellants' briefs and the Record on Appeal shall be due on or before 21 January 2022; appellees' briefs shall be due on or before 28 January 2022; and reply briefs, if any, shall be due on or before 31 January 2022. Oral argument will be heard virtually on 2 February 2022 at 9:30 a.m.

By order of the Court in Conference, this the 14th day of January 2022.

s/Berger, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 14th day of January 2022.

AMY L. FUNDERBURK
Clerk of the Supreme Court

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

REBECCA HARPER, ET AL.,

PLAINTIFFS,

NORTH CAROLINA LEAGUE OF CONSERVATION VOTERS, INC.; HENRY M. MICHAUX, JR., ET AL.,

PLAINTIFFS,

COMMON CAUSE,

PLAINTIFF-INTERVENOR,

v.

REPRESENTATIVE DESTIN HALL, IN HIS OFFICIAL CAPACITY AS CHAIR OF THE HOUSE STANDING COMMITTEE ON REDISTRICTING, ET AL.,

DEFENDANTS.

Wake County

No. 413PA21

ORDER

The NCLCV Plaintiffs', Harper Plaintiffs', and Plaintiff-Intervenor Common Cause's (together, "plaintiffs-appellants") motion to extend the time allowed for oral argument is allowed only as follows: the time for oral argument will be extended both for the plaintiffs-appellants collectively, and for the defendants-appellees collectively, to forty-five minutes for each side pursuant to North Carolina Rule of Appellate Procedure 30(b). The plaintiffs-appellants' collective total of forty-five minutes for oral argument, including main argument and rebuttal, shall be divided equally among the three plaintiffs-appellants unless they agree otherwise. The defendants-appellees' collective total of forty-five minutes for oral argument shall be divided equally between the two defendants-appellees unless they agree otherwise.

By order of this Court in Conference, this 26th day of January, 2022.

s/Berger, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 26 day of January, 2022.

AMY L. FUNDERBURK
Clerk of the Supreme Court

s/Amy L. Funderburk
Clerk

HARPER v. HALL

[380 N.C. 272 (2022)]

REBECCA HARPER, ET AL.,	)
	)
PLAINTIFFS,	)
	)
NORTH CAROLINA LEAGUE OF CONSERVATION VOTERS, INC.; ET AL.,	)
	)
PLAINTIFFS	)
	)
COMMON CAUSE	)
	)
PLAINTIFF-INTERVENOR	)
	)
v.	)
	)
REPRESENTATIVE DESTIN HALL, IN HIS OFFICIAL CAPACITY AS CHAIR OF THE HOUSE STANDING COMMITTEE ON REDISTRICTING; ET AL.,	)
	)
DEFENDANTS.	)

TENTH DISTRICT

No. 413PA21

ORDER

Pursuant to an administrative order entered by this Court on December 23, 2021, and having reviewed and considered precedent established by this Court, the North Carolina Code of Judicial Conduct, and the arguments of the parties, plaintiffs' motions to disqualify the undersigned is denied.

This the 31st day of January, 2022.

s/Berger, J.
Philip E. Berger, Jr.,
Associate Justice

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 31 day of January 2022.

AMY FUNDERBURK
Clerk, Supreme Court of
North Carolina

s/Amy Funderburk
~~M.C. Hackney~~
~~Assistant~~ Clerk, Supreme Court of
North Carolina

REBECCA HARPER; AMY CLARE OSEROFF; DONALD RUMPH; JOHN ANTHONY BALLA; RICHARD R. CREWS; LILY NICOLE QUICK; GETTYS COHEN, JR.; SHAWN RUSH; JACKSON THOMAS DUNN, JR.; MARK S. PETERS; KATHLEEN BARNES; VIRGINIA WALTERS BRIEN; AND DAVID DWIGHT BROWN	)	
v.	)	
REPRESENTATIVE DESTIN HALL, IN HIS OFFICIAL CAPACITY AS CHAIR OF THE HOUSE STANDING COMMITTEE ON REDISTRICTING; SENATOR WARREN DANIEL, IN HIS OFFICIAL CAPACITY AS CO-CHAIR OF THE SENATE STANDING COMMITTEE ON REDISTRICTING AND ELECTIONS; SENATOR RALPH HISE, IN HIS OFFICIAL CAPACITY AS CO-CHAIR OF THE SENATE STANDING COMMITTEE ON REDISTRICTING AND ELECTIONS; SENATOR PAUL NEWTON, IN HIS OFFICIAL CAPACITY AS CO-CHAIR OF THE SENATE STANDING COMMITTEE ON REDISTRICTING AND ELECTIONS; SPEAKER OF THE NORTH CAROLINA HOUSE OF REPRESENTATIVES, TIMOTHY K. MOORE; PRESIDENT PRO TEMPORE OF THE NORTH CAROLINA SENATE, PHILIP E. BERGER; THE NORTH CAROLINA STATE BOARD OF ELECTIONS; AND DAMON CIRCOSTA, IN HIS OFFICIAL CAPACITY	)	Wake County
NORTH CAROLINA LEAGUE OF CONSERVATION VOTERS, INC.; HENRY M. MICHAUX, JR.; DANDRIELLE LEWIS; TIMOTHY CHARTIER; TALIA FERNÓS; KATHERINE NEWHALL; R. JASON PARSLEY; EDNA SCOTT; ROBERTA SCOTT; YVETTE ROBERTS; JEREANN KING JOHNSON; REVEREND REGINALD WELLS; YARBROUGH WILLIAMS, JR.; REVEREND DELORIS L. JERMAN; VIOLA RYALS FIGUEROA; AND COSMOS GEORGE	)	
v.	)	

HARPER v. HALL

[380 N.C. 274 (2022)]

REPRESENTATIVE DESTIN HALL, IN HIS OFFICIAL CAPACITY AS CHAIR OF THE HOUSE STANDING COMMITTEE ON REDISTRICTING; SENATOR WARREN DANIEL, IN HIS OFFICIAL CAPACITY AS CO-CHAIR OF THE SENATE STANDING COMMITTEE ON REDISTRICTING AND ELECTIONS; SENATOR RALPH E. HISE, IN HIS OFFICIAL CAPACITY AS CO-CHAIR OF THE SENATE STANDING COMMITTEE ON REDISTRICTING AND ELECTIONS; SENATOR PAUL NEWTON, IN HIS OFFICIAL CAPACITY AS CO-CHAIR OF THE SENATE STANDING COMMITTEE ON REDISTRICTING AND ELECTIONS; REPRESENTATIVE TIMOTHY K. MOORE, IN HIS OFFICIAL CAPACITY AS SPEAKER OF THE NORTH CAROLINA HOUSE OF REPRESENTATIVES; SENATOR PHILIP E. BERGER, IN HIS OFFICIAL CAPACITY AS PRESIDENT PRO TEMPORE OF THE NORTH CAROLINA SENATE; THE STATE OF NORTH CAROLINA; THE NORTH CAROLINA STATE BOARD OF ELECTIONS; DAMON CIRCOSTA, IN HIS OFFICIAL CAPACITY AS CHAIRMAN OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS; STELLA ANDERSON, IN HER OFFICIAL CAPACITY AS SECRETARY OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS; JEFF CARMON III, IN HIS OFFICIAL CAPACITY AS MEMBER OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS; STACY EGGERS IV, IN HIS OFFICIAL CAPACITY AS MEMBER OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS; TOMMY TUCKER, IN HIS OFFICIAL CAPACITY AS MEMBER OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS; AND KAREN BRINSON BELL, IN HER OFFICIAL CAPACITY AS EXECUTIVE DIRECTOR OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS

No. 413PA21

ORDER

After careful consideration of the Court's 23 December 2021 administrative order relating to recusal motions, the arguments advanced for and against the request for my recusal in this case, and an examination of the provisions of the Code of Judicial Conduct and other authorities

in light of the relevant facts, I have concluded that there is no reasonable basis for questioning my ability to fairly and impartially decide this case. As a result, I have elected to retain responsibility for evaluating the merits of the recusal motion and conclude that it should be denied.

The issue raised by the motion seeking my recusal is the extent to which my "impartiality may reasonably be questioned," North Carolina Code of Judicial Conduct Canon 3.C(1), on the theory that I have "such a personal bias, prejudice or interest" that I "would be unable to rule impartially," *State v. Fie*, 320 N.C. 626, 627 (1987), in this case, which arises from a challenge to the lawfulness of Congressional and legislative districts established by the General Assembly. I was not elected from and am not seeking reelection in any of the districts that are at issue in this case (or any other district, for that matter) and, for that reason, I have no personal interest in how this case is decided.

Aside from the fact that the Code of Judicial Conduct requires recusal only when my impartiality can "reasonably" be questioned under Canon 3.C(1), rather than whether there is "the slightest concern about my impartiality," I am unable to see how either the Court's 8 December 2021 decision to stay further filing and postpone the primary or any decision that the Court might make concerning the merits of this case in the future will have any substantial or measurable impact upon my ability to obtain reelection to the Court later this year. Simply put, any attempt to determine the effect of the 8 December 2021 order upon the outcome of this year's judicial elections is nothing more than an exercise in speculation, particularly given that the 8 December 2021 order has the same effect upon my reelection campaign that it does upon the campaigns of every other candidate who has announced or will announce that he or she intends to seek election to the seat on the Court that I now occupy. As a result, the present situation differs markedly from the one at issue in *Faires v. State Board of Elections*, 368 N.C. 825 (2016), which addressed the constitutionality of a statute that would, if upheld, have prevented anyone from running against a previously elected member of the Court, including a member of the Court who was seeking reelection that year.

The prior decisions of this Court do not require that its members recuse themselves in cases involving the lawfulness of Congressional and legislative districts heard during the year in which they are seeking election or reelection. *Pender County v. Bartlett*, 361 N.C. 491 (2007), supports, rather than undercuts, my decision to deny the recusal motion. Although Justice Hudson did not participate in *Pender County*, she was not yet a member of the Court when the case was argued, and this Court's opinion provides no indication that her decision to recuse

herself stemmed from the fact that she had been on the ballot in 2006. 361 N.C. at 511. In addition, then-Chief Justice Parker and then-Justices Martin and Timmons-Goodson, all of whom ran for reelection in 2006, participated in deciding *Pender County*. 361 N.C. at 493.

A similar pattern can be seen in other redistricting-related cases since *Pender County*. For example, then-Justice Newby does not appear to have recused himself when the Court (1) entered an order on 11 May 2012 expediting appellate review of a redistricting-related discovery order, *Dickson v. Rucho*, 366 N.C. 206, 208 (2012), and (2) filed an opinion on 25 January 2013 addressing the lawfulness of that order on the merits, *Dickson v. Rucho*, 366 N.C. 332 (2013), despite the fact that he was a candidate for reelection to the Court in 2012. Similarly, neither Justice Hudson, then-Chief Justice Martin, nor then-Justice Beasley recused themselves from the Court's 19 December 2014 decision in *Dickson v. Rucho*, 367 N.C. 542 (2014), even though all three of them sought election or reelection in 2014. Thus, the established practice at this Court is for justices who are in the process of running for election or reelection to participate in deciding redistricting-related cases like this one.

Finally, I note that no other justice is available to serve in my stead if I recuse myself. For that reason, members of this Court occupy a different position than members of the trial bench and the Court of Appeals, all of whom can be replaced by other judges if they refrain from participating in a particular case. In light of that fact, the members of this Court, including me, have an obligation to accept the responsibility that results from hearing and deciding controversial cases unless a provision of the Code requires them to do otherwise. In my opinion, no such obligation exists here.

As a result, I do not believe that there is any reasonable basis for believing that any interest that I may have, including my hope of being reelected, will preclude me from fairly and impartially deciding this case. On the contrary, I am satisfied that I can decide this case fairly and impartially and that there is no reasonable basis for believing otherwise. Thus, the Legislative Defendant's recusal motion is denied.

This the 31st day of January 2022.

s/Ervin, J.
Samuel J. Ervin, IV
Associate Justice

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 31st day of January 2022.

AMY FUNDERBURK
Clerk, Supreme Court of
North Carolina

s/Amy Funderburk
~~M.C. Hackney~~
~~Assistant~~ Clerk, Supreme Court of
North Carolina

HARPER v. HALL

[380 N.C. 279 (2022)]

REBECCA HARPER; AMY CLARE OSEROFF; DONALD RUMPH; JOHN ANTHONY BALLA; RICHARD R. CREWS; LILY NICOLE QUICK; GETTYS COHEN, JR.; SHAWN RUSH; JACKSON THOMAS DUNN, JR.; MARK S. PETERS; KATHLEEN BARNES; VIRGINIA WALTERS BRIEN; AND DAVID DWIGHT BROWN	)	
v.	)	
REPRESENTATIVE DESTIN HALL, IN HIS OFFICIAL CAPACITY AS CHAIR OF THE HOUSE STANDING COMMITTEE ON REDISTRICTING; SENATOR WARREN DANIEL, IN HIS OFFICIAL CAPACITY AS CO-CHAIR OF THE SENATE STANDING COMMITTEE ON REDISTRICTING AND ELECTIONS; SENATOR RALPH HISE, IN HIS OFFICIAL CAPACITY AS CO-CHAIR OF THE SENATE STANDING COMMITTEE ON REDISTRICTING AND ELECTIONS; SENATOR PAUL NEWTON, IN HIS OFFICIAL CAPACITY AS CO-CHAIR OF THE SENATE STANDING COMMITTEE ON REDISTRICTING AND ELECTIONS; SPEAKER OF THE NORTH CAROLINA HOUSE OF REPRESENTATIVES, TIMOTHY K. MOORE; PRESIDENT PRO TEMPORE OF THE NORTH CAROLINA SENATE, PHILIP E. BERGER; THE NORTH CAROLINA STATE BOARD OF ELECTIONS; AND DAMON CIRCOSTA, IN HIS OFFICIAL CAPACITY	)	Wake County
NORTH CAROLINA LEAGUE OF CONSERVATION VOTERS, INC.; HENRY M. MICHAUX, JR.; DANDRIELLE LEWIS; TIMOTHY CHARTIER; TALIA FERNÓS; KATHERINE NEWHALL; R. JASON PARSLEY; EDNA SCOTT; ROBERTA SCOTT; YVETTE ROBERTS; JEREANN KING JOHNSON; REVEREND REGINALD WELLS; YARBROUGH WILLIAMS, JR.; REVEREND DELORIS L. JERMAN; VIOLA RYALS FIGUEROA; AND COSMOS GEORGE	)	
v.	)	

REPRESENTATIVE DESTIN HALL, in his official capacity as Chair of the House Standing Committee on Redistricting; SENATOR WARREN DANIEL, in his official capacity as Co-Chair of the Senate Standing Committee on Redistricting and Elections; SENATOR RALPH E. HISE, in his official capacity as Co-Chair of the Senate Standing Committee on Redistricting and Elections; SENATOR PAUL NEWTON, in his official capacity as Co-Chair of the Senate Standing Committee on Redistricting and Elections; REPRESENTATIVE TIMOTHY K. MOORE, in his official capacity as Speaker of the North Carolina House of Representatives; SENATOR PHILIP E. BERGER, in his official capacity as President Pro Tempore of the North Carolina Senate; THE STATE OF NORTH CAROLINA; THE NORTH CAROLINA STATE BOARD OF ELECTIONS; DAMON CIRCOSTA, in his official capacity as Chairman of the North Carolina State Board of Elections; STELLA ANDERSON, in her official capacity as Secretary of the North Carolina State Board of Elections; JEFF CARMON III, in his official capacity as Member of the North Carolina State Board of Elections; STACY EGGERS IV, in his official capacity as Member of the North Carolina State Board of Elections; TOMMY TUCKER, in his official capacity as Member of the North Carolina State Board of Elections; and KAREN BRINSON BELL, in her official capacity as Executive Director of the North Carolina State Board of Elections

No. 413PA21

ORDER

A Motion for Recusal of Justice Anita S. Earls was filed herein by defendants Representative Destin Hall, Senator Warren Daniel, Senator Ralph Hise, Senator Paul Newton, Representative Timothy K. Moore, and Senator Philip E. Berger. Pursuant to this Court's

administrative order dated 23 December 2021 addressing the procedure to be followed in these circumstances, the motion was assigned to me for final determination.

Because the motion is without basis in fact or law and raises many of the same issues as those raised in a similar motion filed in 2019 by many of the same defendants, *see* Legislative Defendants' Mot. To Recuse Justice Earls, *Common Cause v. Lewis*, 373 N.C. 258, No. 417P19 (Nov. 6, 2019) that previously was denied by the Court, *see* Order Denying Legislative Defendants' Mot. to Recuse Justice Earls, *Common Cause v. Lewis*, 373 N.C. 258 (Nov. 15, 2019), 2019 N.C. LEXIS 1143, it is appropriate for me to rule on this motion at this time.

With regard to both the prior motion and this one, "[b]ecause these motions for disqualification touch me personally, I resolved, when they were filed, to give defendants' arguments the fullest possible consideration." *Pennsylvania v. Int'l Union of Operating Eng'rs*, 388 F. Supp. 155, 160 (E.D. Pa. 1974) (Judge Higginbotham denying motions to disqualify himself because of his public statements concerning social injustice and civil rights). For the reasons that follow, the motion is denied.

Two sources of law govern when a Justice of this Court should voluntarily recuse herself from participation in the deliberation and decision of a pending case: (1) the North Carolina Code of Judicial Conduct and (2) the due process clause of the Fourteenth Amendment, as interpreted by the United States Supreme Court in cases such as *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009) and *Williams v. Pennsylvania*, 579 U.S. 1 (2016). Turning first to the North Carolina Code of Judicial Conduct, the provision of the Code relevant to the defendants' motion in this case is Canon 3(c)(1), which states:

> C. Disqualification.
>
> (1) On motion of any party, a judge should disqualify himself/herself in a proceeding in which the judge's impartiality may reasonably be questioned, including but not limited to instances where:
>
> (a) The judge has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceedings;
>
> (b) The judge served as lawyer in the matter in controversy, or a lawyer with whom

> the judge previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;
>
> (c) The judge knows that he/she, individually or as a fiduciary, or the judge's spouse or minor child residing in the judge's household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;
>
> (d) The judge or the judge's spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:
>
> (i) Is a party to the proceeding, or an officer, director, or trustee of a party;
>
> (ii) Is acting as a lawyer in the proceeding;
>
> (iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;
>
> (iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

There is both a subjective and an objective component to a Justice's ethical obligation under Canon 3(c). Subjectively, a Justice must be satisfied that she can be fair and impartial and that she can rule on the case based on the facts and the law. I have subjectively determined that I can and will be fair and impartial in carrying out my duties in this case.

The balance of this motion is addressed to the objective component, as defendants "assert that there is a financial interest and personal bias on the part of the justice that makes her unable to rule impartially." Of the four concerns that defendants contend demonstrate my financial interest and personal bias, three are the same as those raised in the recusal

motion in *Common Cause v. Lewis*, namely that my 2018 campaign for election to the Court was financially supported by the North Carolina Democratic Party, that I have a personal bias against defendants because in my prior career I represented clients who were adverse parties to the State, and that in various speeches or public statements before becoming a Justice I made statements expressing views about redistricting. The motion raising these concerns in the *Common Cause v. Lewis* litigation in 2019 was denied by the Court in conference. There is no reason why these concerns would have greater force in this litigation over an entirely new redistricting plan that was drawn years after I joined the Court, particularly given the passage of even more time.

I have no financial interest whatsoever in the outcome of this case and no member of my family or any person within the third degree of relationship to me or my spouse has any interest, financial or otherwise, in the outcome. Thus, subsections 3(C)(1)(c) and 3(C)(1)(d) of the Code are not implicated here.

With regard to subsection 3(C)(1)(a), personal prejudice against defendants cannot be inferred from my prior role as counsel in voting rights litigation. It is well established that my past career as an attorney who litigated civil rights matters occurring more than four years ago is not disqualifying.[1] In general, in this context, "[b]ias or prejudice does not refer to any views a judge may entertain toward the subject matter involved in the case." *State v. Kennedy*, 110 N.C. App. 302, 305 (1993). Every Justice comes to the Court having had a prior career in some substantive area of law. As Justice Scalia observed in a case squarely addressing the meaning of impartiality in the judicial context:

> A judge's lack of predisposition regarding the relevant legal issues in a case has never been thought a necessary component of equal justice, and with good reason. For one thing, it is virtually impossible to find a judge who does not have preconceptions about the law. As then-Justice Rehnquist observed of our own Court: "Since most Justices come to this bench no earlier than their middle years, it would be unusual if they had not by that time formulated at least some tentative notions that would influence them in their interpretation of the sweeping clauses of

1. In December 2017, I resigned from my job, and withdrew from practicing law and representing clients, in order to campaign for election to this Court.

> the Constitution and their interaction with one another. It would be not merely unusual, but extraordinary, if they had not at least given opinions as to constitutional issues in their previous legal careers." Indeed, even if it were possible to select judges who did not have preconceived views on legal issues, it would hardly be desirable to do so. "Proof that a Justice's mind at the time he joined the Court was a complete tabula rasa in the area of constitutional adjudication would be evidence of lack of qualification, not lack of bias."

Republican Party v. White, 536 U.S. 765, 777–78 (2002) (quoting *Laird v. Tatum*, 409 U.S. 824, 835 (1972) (memorandum opinion)).

No one suggests that a former prosecutor now serving as a Justice must be disqualified from criminal cases because of a bias against criminal defendants. For similar reasons, multiple courts have repudiated the argument that a judge should be disqualified based on prior work as a civil rights lawyer. *United States v. Alabama*, 828 F.2d 1532, 1543 (11th Cir. 1987) ("Nor can we countenance defendants' claim that [a judge] is prejudiced and no longer impartial by virtue of his background as a civil rights lawyer."), *cert. denied*, 487 U.S. 1210 (1988); *United States v. Black*, 490 F. Supp. 2d 630, 661 (E.D.N.C. 2007) ("[F]ormer civil rights attorneys are not necessarily barred from presiding as a judge in civil rights cases."); *United States v. Fiat*, 512 F. Supp. 247, 251–52 (D.D.C. 1981) (collecting cases rejecting arguments that a judge should recuse from discrimination cases based on prior advocacy for civil rights and racial justice causes); *see also MacDraw, Inc. v. CIT Grp. Equip. Fin., Inc.*, 157 F.3d 956, 963 (2d Cir. 1998) ("[I]t is intolerable for a litigant, without any factual basis, to suggest that a judge cannot be impartial because of his or her race and political background.").

Nor does my prior work with non-partisan civil rights organizations require my recusal. As Federal District Court Judge Nancy Gertner explained regarding her work with the Lawyers' Committee for Civil Rights:

> Former association with such an organization alone cannot and should not be seen as undermining one's neutrality as a judge. The Supreme Court has said as much on several occasions when they were applying to themselves the

> same standards of recusal mandated for district court judges. The fact that a judge actively advocated a legal, constitutional or political policy or opinion before being a judge is not a bar to adjudicating a case that implicates that opinion or policy.

Wessmann by Wessmann v. Bos. Sch. Comm., 979 F. Supp. 915, 916–17 (D. Mass. 1997) (citations omitted). There is simply no factual or legal basis for the assertion that I cannot be fair and impartial in this matter now because of my prior career as a civil rights attorney or because of statements I made before joining the Court.

The one new assertion not raised in the *Common Cause v. Lewis* motion is defendants' contention that my prior professional association with one of the many attorneys of record in this matter is a disqualifying factor. Advancing what they acknowledge is a "broad reading of Cannon [sic] 3(C)(1)(b)," they assert, without citation, that other judges read the canon so broadly as to counsel recusal under circumstances such as these. In fact, the precedent in North Carolina is precisely the opposite. Under Judicial Standards Commission's Formal Advisory Opinion 2009-02,[2] disqualification is not required based on this type of prior association. In that Opinion, the Commission advised that "the best practice is for judges to follow a 'Six Month Rule' whereby newly installed judges, for a minimum of 6 months after taking judicial office, refrain from presiding over any adjudicatory proceeding wherein an attorney associated with the judge's prior employer provides legal representation to a party in the proceeding." *Id.* Although the Opinion notes that "specific circumstances may necessitate a deviation from the 'Six Month Rule,' " it is unclear whether the referenced deviation contemplates a shorter or longer period of time. Nevertheless, it has now been years since I worked with that former colleague, and my previous professional association therefore is not disqualifying.

Applying the more general constitutional due process standards in these circumstances also leads to an obvious answer. The contributions to my campaign identified by defendants are far less significant in both absolute and relative terms than the spending in *Caperton v. A.T. Massey Coal Company* that the United States Supreme Court recognized as implicating a due process concern. 556 U.S. at 885. In that

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2. https://www.nccourts.gov/assets/inline-files/09-02.pdf?ZUcwTcUAKlVHRO9m57DRJbWI4mgEWpXV.

case, unlike here, the Justice whose impartiality was being challenged was up for election, and a party to the proceeding before the court spent "three times the amount spent by [the Justice's] own committee" and "$1 million more than the total amount spent by the campaign committees of both candidates combined." *Id.* at 873. Here, the entities contributing to my 2018 campaign are not parties to this lawsuit, and my campaign received 92 other contributions close to or at the statutory limit of $5,200 for that election. Moreover, in North Carolina, it is common for political parties to contribute to judicial campaigns. The in-kind contributions to my campaign from the North Carolina Democratic Party were only roughly 13% of my overall total committee spending, a small fraction of the contributions deemed problematic in *Caperton*.

There is relevant North Carolina precedent on this point as well. In 2012, this Court summarily denied a motion to recuse then-Associate Justice Newby in an appeal involving North Carolina's legislative redistricting plans. *See* Order Denying Plaintiffs' Mot. for Recusal of Justice Paul Newby, *Dickson v. Rucho*, 366 N.C. 425 (2012) (Dec. 17, 2012), 2012 N.C. LEXIS 1015. The plaintiffs in *Dickson* sought recusal in light of campaign expenditures supporting then-Associate Justice Newby made by the Republican State Leadership Conference (RSLC), a political committee focused on electing Republicans in state elections. The RSLC's own documents stated that they retained the consultant who drew the redistricting maps at issue in that litigation. *See* Pl.-Appellants' Mot. for Recusal of Justice Paul Newby at 9, *Dickson v. Rucho*, 366 N.C. 425 (2012), No. 201PA12-1 (Nov. 21, 2012). Campaign finance disclosure reports showed that the RSLC spent hundreds of thousands of dollars in support of then-Associate Justice Newby's candidacy in the final months of the campaign. *Id.* at 27–29. It also donated $1.17 million to a political action committee that supported then-Associate Justice Newby's campaign, which amounted to well over half the money spent on advertising in support of his candidacy. *Id.* Independent expenditures supporting then-Associate Justice Newby were more than three times greater than the total expenditures of both candidates' campaigns in what was a closely contested election while the appeal was pending before this Court. *Id.* at 28. If the spending at issue in *Dickson* was insufficient to warrant recusal, then so too are the contributions identified by defendants here—which are far less substantial both in absolute terms and relative to total spending in the race, and which occurred years before the redistricting maps at issue were even drawn.

This Court's prior recusal decisions are relevant to any recusal inquiry. *See Cheney v. U.S. Dist. Court for Dist. of Columbia*, 541 U.S.

913, 924–26 (2004). There is ample precedent demonstrating that none of the reasons advanced by defendants require my disqualification. Therefore, the motion is denied.

This the 31st day of January 2022.

s/Earls, J.
Anita Earls
Associate Justice

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 31 day of January 2022.

AMY FUNDERBURK
Clerk, Supreme Court of
North Carolina

s/Amy Funderburks
~~M.C. Hackney~~
~~Assistant~~ Clerk, Supreme Court of
North Carolina

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

11 FEBRUARY 2022

1P22	State v. Quinton Lajuan Duncan	Def's Petition for Writ of Habeas Corpus (COAP21-515)	Denied **01/04/2022**
2P22	Thomasina Gean v. Novant Health	Plt's Pro Se Motion to Review the Case	Dismissed
3P22	Michael Buttacavoli v. Katherine Langley	1. Plt's Pro Se Motion for Time Extension to File Appeal 2. Plt's Pro Se Motion to Compel Inspection and Discovery	1. Dismissed **01/10/2022** 2. Dismissed **01/10/2022** **Berger, J., recused**
4P22	State v. Marquell Q. Hunter	Def's Pro Se Motion to Re-Calculate Sentence	Dismissed
6P22	Julia Love Hall v. TalentBridge	Plt's Pro Se Motion for Private Investigation	Dismissed
12P22	State v. Rose Williams	Def's Pro Se Motion for Appropriate Relief	Dismissed
15P22	State v. Keith Aaron Bucklew	1. Def's Motion for Temporary Stay (COA20-556) 2. Def's Petition for Writ of Supersedeas 3. Def's PDR Under N.C.G.S. § 7A-31	1. Allowed **01/12/2022** 2. 3.
17P22	Glenn Henderson v. Target, 7 Does, Brian Cornell, Sedgwick Dave North, Jaylynn Crawford	1. Plt's Pro Se Notice of Appeal Based Upon a Constitutional Question (COA21-259) 2. Plt's Pro Se PDR Under N.C.G.S. § 7A-31 3. Defs' Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed
20P22	Katie Hoppe Smith v. Allan Michael Smith	Def's Pro Se Motion for Writ: Have Body(s)	Dismissed
21P22	State v. Broderick Tywone Ruth	1. State's Motion for Temporary Stay (COA20-657) 2. State's Petition for Writ of Supersedeas 3. State's Motion for Extension of Time to File PDR	1. Allowed **01/19/2022** 2. 3. Allowed **01/25/2022**
23P22	State v. Eric Pierre Stewart	1. State's Motion for Temporary Stay (COA21-101) 2. State's Petition for Writ of Supersedeas 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **01/21/2022** 2. 3.

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

11 FEBRUARY 2022

24A21	In the Matter of B.B., S.B., S.B.	Respondent-Mother's Motion for Additional Time to Hear Issues Remanded to the Trial Court	Allowed **12/30/2021**
41A22	State v. Mark Brichikov	1. State's Motion for Temporary Stay 2. State's Petition for Writ of Supersedeas	1. Allowed **02/04/2022** 2.
49P21	State v. Jeffrey Scott Thomas	Def's PDR Under N.C.G.S. § 7A-31 (COA19-594)	Denied
50P21	Richard C. Semelka, M.D. v. The University of North Carolina and The University of North Carolina at Chapel Hill	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA19-1076) 2. Respondants' Conditional PDR	1. Denied 2. Dismissed as moot **Barringer, J., recused**
54A19-3	State v. Rogelio Albino Diaz-Tomas	1. Def's Motion for Temporary Stay 2. Def's Petition for Writ of Supersedeas 3. Def's Notice of Appeal Based Upon a Dissent 4. Def's PDR as to Additional Issues 5. Def's Conditional Petition for Writ of Certiorari to Review Order of the COA 6. Def's Conditional Petition for Writ of Certiorari to Review Order of District Court, Wake County 7. Def's Conditional Petition for Writ of Mandamus 8. Def's Motion to Expedite the Consideration of Defendant's Matters 9. Def's Motion to Proceed *In Forma Pauperis* 10. Def's Motion to Take Judicial Notice 11. Def's Motion for Leave to Amend Notice of Appeal 12. Def's Motion for Summary Reversal	1. Allowed **04/21/2020** 2. Allowed **06/03/2020** 3. --- 4. Special Order **12/15/2020** 5. Allowed **12/15/2020** 6. Allowed **12/15/2020** 7. 8. Dismissed as moot **12/15/2020** 9. Allowed **12/15/2020** 10. Dismissed as moot **12/15/2020** 11. Allowed **12/15/2020** 12. Dismissed **12/15/2020**

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

11 FEBRUARY 2022

		13. Def's Motion to Supplement Record on Appeal	13. Allowed **12/15/2020**
		14. Def's Motion to Consolidate Diaz-Tomas and Nunez Matters	14. Allowed **06/30/2020**
		15. Def's Motion to Clarify the Extent of Supersedeas Order	15. Dismissed **12/15/2020**
		16. Def's Motion in the Alternative to Hold Certiorari and Mandamus Petitions in Abeyance	16. Allowed **12/15/2020**
		17. Def's Motion to File Memorandum of Additional Authority	17. Dismissed **07/08/2020**
		18. Def's Motion for Petition for Writ of Procedendo	18. Dismissed **12/15/2020**
		19. Def's Motion for Printing and Mailing of PDR on Additional Issues	19. Dismissed **12/15/2020**
		20. Def's Motion for the Production of Discovery Under Seal	20. Denied **12/15/2020**
		21. Def's Motion to Amend Certificate of Service	21. Allowed **12/15/2020**
		22. Def's Motion to Amend Motion for Petition for Writ of Procedendo	22. Dismissed as moot **12/15/2020**
		23. Def's Motion to Unconsolidate Cases for Oral Argument	23. Special Order **08/31/2021**
		24. The North Carolina Advocates for Justice's Motion for Leave to File Amicus Brief	24. Allowed **03/02/2021**
		25. State's Motion for Oral Argument to be Heard Via Webex and not in Person	25. Allowed **12/29/2021** **Berger, J., recused**
61P21	State v. Benny Ray Robinson	Def's PDR Under N.C.G.S. § 7A-31 (COA19-1149)	Denied
76P01-2	State v. Timothy Wayne Youngs	Def's Pro Se Motion to Review Case (COA99-1449)	Dismissed
76P21	State v. Nicholas Burnette Clark	1. Def's Pro Se Motion to Dismiss All Charges	1. Dismissed
		2. Def's Pro Se Motion in Arrest of Judgment	2. Dismissed
		3. Def's Pro Se Motion for Request for Documents	3. Dismissed
		4. Def's Pro Se Motion for the Appointment of Counsel	4. Dismissed as moot

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

11 FEBRUARY 2022

84P21	Nowak v. Metropolitan Sewerage District of Buncombe County, et al.	1. Defs' PDR Under N.C.G.S. § 7A-31 (COA19-797) 2. Plt's Conditional PDR	1. Denied 2. Dismissed as moot **Berger, J., recused**
100P21	State v. James Earl Cummings, Jr.	Def's Pro Se Motion for Double Jeopardy	Dismissed
108A21	Volvo Group North America, LLC, et al. v. Roberts Truck Center, Ltd., et al.	Plts' and Defs' Joint Motion to Dismiss Appeal	Allowed **12/16/2021**
131P16-22	State v. Somchai Noonsab	1. Def's Pro Se Motion for Objection 2. Def's Pro Se Motion for Order Compelling Discoveries 3. Def's Pro Se Motion to Produce Lower Court Documents and Procedures 4. Def's Pro Se Motion for Production of Documents	1. Dismissed 2. Dismissed 3. Dismissed 4. Dismissed
181A21	Toshiba Global Commerce Solutions, Inc. v. Smart & Final Stores LLC	Def's Motion to Continue Oral Argument	Allowed **01/12/2022**
203P21	State v. Marcia Carson Finney	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA20-354) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. — 2. Denied 3. Allowed

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

11 FEBRUARY 2022

228A21	C Investments 2, LLC v. Arlene P. Auger, Herbert W. Auger, Eric E. Craig, Gina Craig, Laura DuPuy, Stephen Ezzo, Janice Huff Ezzo, Anne Carr Gilman Wood, as Trustee of the Francis Davidson Gilman, III Trust fbo Pets UW Dated June 20, 2007, Lauren Heaney, Bridget Holdings, LLC, Ginner Hudson, Jack Hudson, Chad Julka, Sabrina Julka, Arthur Maki, Ruth Maki, Jennie Raubacher, Matthew Raubacher, as Co-Trustees of the Raubacher/Cheung Family Trust Dated November 11, 2018, Lawrence Tillman, Linda Tillman, Ashfaq Uraizee, Jabeen Uraizee, Jeffrey Stegall, and Valerie Stegall	1. Defs' (Arlene P. Auger, Herbert W. Auger, Eric E. Craig, Gina Craig, Stephen Ezzo, Janice Huff Ezzo, Ashfaq Uraizee, and Jabeen Uraizee) Notice of Appeal Based Upon a Dissent (COA19-976) 2. Defs' (Arlene P. Auger, Herbert W. Auger, Eric E. Craig, Gina Craig, Stephen Ezzo, Janice Huff Ezzo, Ashfaq Uraizee, and Jabeen Uraizee) PDR as To Additional Issues	1. --- 2. Allowed
230P21-2	State v. Jordan Nathaniel Mitchell	1. Def's Pro Se Motion for Prayer for Judgment 2. Def's Pro Se Motion for Production of Documents 3. Def's Pro Se Motion for Court Appointed Lawyer with a Speedy Trial 4. Def's Pro Se Motion for Payment of All Royalties	1. Dismissed 2. Dismissed 3. Dismissed 4. Dismissed

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

11 FEBRUARY 2022

240P21	In the Matter of the Foreclosure of a Lien by Executive Office Park of Durham Association, Inc. v. Martin E. Rock a/k/a Martin A. Rock Lien Dated: October 23, 2018 Lien Recorded 18 M 1195 In the Clerk's Office, Durham County Courthouse	1. Petitioner's PDR Under N.C.G.S. § 7A-31 (COA20-405) 2. Respondent's Motion to Dismiss PDR 3. Petitioner's Motion for Temporary Stay 4. Petitioner's Petition for Writ of Supersedeas 5. Respondent's Motion that Petitioner be Taxed Costs or Fines 6. Respondent's Petition for Writ of Mandamus 7. Respondent's Motion in the Alternative for Order Directing the Durham County Clerk of Superior Court to Set a Hearing as to the Release of Appeal Bond	1. Allowed 2. Denied 3. Allowed **09/01/2021** 4. Allowed 5. 6. Denied **10/06/2021** 7. Denied **10/06/2021**
244P21-2	David Meyers v. Todd Ishee, Warden Denise Jackson, Governor Roy Cooper, Secretary of North Carolina Department of Public Safety Erik Hooks, Assistant Commissioner of Prisons of North Carolina of Public Safety Brandeshawn Harris	1. Petitioner's Pro Se Motion for Recall 2. Petitioner's Pro Se Petition for Writ of Mandamus 3. Petitioner's Pro Se Motion for Petition for Writ of Quo Warranto 4. Petitioner's Pro Se Petition for Writ of Habeas Corpus	1. Dismissed 2. Denied 3. Dismissed 4. Denied **02/01/2022**
248A21	State v. Amy Regina Atwell	1. Def's Notice of Appeal Based Upon a Dissent (COA20-496) 2. Def's PDR as to Additional Issues	1. --- 2. Denied
255P21	State v. Joshua Blake Taylor	Def's PDR Under N.C.G.S. § 7A-31	Denied
255PA20	State v. Edgardo Gandarilla Nunez	State's Motion for Oral Argument to be Heard Via Webex and not in Person	Allowed **12/29/2021** **Berger, J., recused**

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261A18-3	North Carolina State Conference of the National Association for the Advancement of Colored People v. Tim Moore, in his official capacity, Philip Berger, in his official capacity	1. Plt's Motion to Disqualify Justice Barringer and Justice Berger (COA19-384)	1. Special Order **01/07/2022**
		2. Plt's Motion to Disqualify Justice Barringer	2. Special Order **01/07/2022**
		3. Former Chairs of the North Carolina Judicial Standards Commission's Motion for Leave to File Amicus Brief	3. Allowed **10/29/2021**
		4. North Carolina Professors of Professional Responsibility's Motion for Leave to File Amicus Brief	4. Allowed **11/02/2021**
		5. North Carolina Professors of Constitutional Law's Motion for Leave to File Amicus Brief	5. Allowed **11/02/2021**
		6. North Carolina Institute for Constitutional Law and the John Locke Foundation's Motion for Leave to File Amicus Brief	6. Allowed **11/04/2021**
		7. Scholars of Judicial Ethics and Professional Responsibility's Motion for Leave to File Amicus Brief	7. Allowed **11/05/2021**
		8. Brennan Center for Justice at New York University School of Law's Motion for Leave to File Amicus Brief	8. Allowed **11/05/2021**
		9. North Carolina Legislative Black Caucus's Motion for Leave to File Amicus Brief	9. Allowed **11/05/2021**
		10. Legislative Black Caucus's Motion to Admit Aaron Marcu Pro Hac Vice	10. Allowed **11/15/2021**
		11. Legislative Black Caucus's Motion to Admit Shannon McGovern Pro Hac Vice	11. Allowed **11/15/2021**
270P21	State v. Tony Bernard Simmons, Jr.	Def's Pro Se Motion to Resolve Charges	Dismissed
293P21	State v. Kevin Christopher Michael Tripp	Def's Pro Se Motion for Counsel	Dismissed
304P20-5	Clyde Junior Meris v. Guilford County Sheriffs	1. Petitioner's Pro Se Petition for Writ of Certiorari	1. Denied
		2. Petitioner's Pro Se Motion for Judicial Notice	2. Dismissed

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316P21	State v. Demarcus Antonio Blakley	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA20-239) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed
326PA21-2	Christine Alden v. Lisa Osborne	Respondent's Motion for Extension of Time to Respond to Motion to Dismiss up to and including the Day Reply Brief Will be Due (COAP21-200)	Allowed **12/17/2021**
331P21	Community Success Initiative et al. v. Moore, et al.	1. Plts' Emergency Motion for Temporary Stay (COAP21-340) 2. Plts' Petition for Writ of Supersedeas 3. Legislative Defs' Motion to Admit David H. Thompson Pro Hac Vice 4. Legislative Defs' Motion to Admit Peter A. Patterson Pro Hac Vice 5. Legislative Defs' Motion to Admit Joseph O. Masterman Pro Hac Vice 6. Legislative Defs' Motion to Admit William V. Bergstrom Pro Hac Vice 7. Plts' Motion for Leave to File Reply 8. Counsel for Plts' Motion to Withdraw as Counsel 9. Plts' Motion for Prompt Disqualification of Justice Berger, Jr. 10. Plts' Motion in the Alternative for Deferred Disqualification Following the Court's Resolution of Plaintiffs' Petition for Writ of Supersedeas and Motion for Temporary Stay	1. Special Order **09/10/2021** 2. Special Order **09/10/2021** 3. Allowed **09/10/2021** 4. Allowed **09/10/2021** 5. Allowed **09/10/2021** 6. Allowed **09/10/2021** 7. Dismissed as moot **09/10/2021** 8. Allowed **09/10/2021** 9. Special Order **01/31/2022** 10. Special Order **01/31/2022**
349P21	Angela Wilson Freeman v. Tommie Lee Glenn	Plt's PDR Under N.C.G.S. § 7A-31 (COA20-478)	Denied
353P21-3	State v. Travis Wayne Baxter	Def's Pro Se Motion for PDR	Dismissed
362P17-5	State v. James Cornell Howard	1. Def's Pro Se Petition for Writ of Mandamus (COA17-77) 2. Def's Pro Se Motion for Immediate Release from Custody	1. Denied **01/07/2022** 2. Denied **01/07/2022**

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364P21-2	Thomasina Gean v. Mecklenburg County Schools EEOC Huntingtowne Farms Classroom Teachers Association	Plt's Pro Se Motion for Supreme Court to Review How Other Courts Handled Cases	Dismissed
370P04-19	State v. Anthony Leon Hoover	Def's Pro Se Motion for Averment of Jurisdiction	Dismissed
373P21	State v. Nathaniel Lee Joyner	Def's PDR Under N.C.G.S. § 7A-31 (COA20-156)	Denied
374A14-2	Lewis, et al. v. Flue-Cured Tobacco Cooperative	1. Plts' PDR Prior to a Determination by COA 2. Plts' Petition in the Alternative for Writ of Certiorari to Review Order of Superior Court, Wake County 3. Plts' and Defs' Joint Motion to Stay Proceedings Pending Final Approval of Settlement	1. 2. 3. Allowed **02/04/2022**
376A21	Woodcock, et al. v. Cumberland County Hospital System, et al.	Defs' Motion to File Documents Under Seal	Allowed **12/22/2021**
383P21	State v. Christopher Gene Crawford	1. Def's Pro Se Motion for Leave to File PDR 2. Def's Pro Se PDR Under N.C.G.S. § 7A-31 3. Def's Pro Se Motion to Proceed *In Forma Pauperis*	1. Dismissed as moot 2. Denied 3. Allowed
385P21	State v. William Anthony France	Def's PDR Under N.C.G.S. § 7A-31 (COA20-487)	Denied
393PA20	In the Matter of L.N.H.	Petitioner's Motion to Deem New Brief Timely Filed and Served	Allowed **01/25/2022**
397P21	State v. Joseph Cornell Corbett, III	Def's PDR Under N.C.G.S. § 7A-31 (COA20-155)	Denied

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398P21	Duke Energy Carolinas, LLC, Plaintiff v. Michael L. Kiser, Robin S. Kiser, and Sunset Keys, LLC, Defendants/Third-Party Plaintiffs v. Thomas E. Schmitt and Karen A. Schmitt, et al., Third-Party Defendants	1. Plt's Motion for Temporary Stay (COA20-333) 2. Plt's Petition for Writ of Supersedeas 3. Plt's PDR Under N.C.G.S. § 7A-31 4. Third-Party Defs' (Schmitts, et al.) PDR Under N.C.G.S. § 7A-31 5. Third-Party Defs' PDR Under N.C.G.S. § 7A-31	1. Allowed **11/15/2021** 2. Allowed 3. Allowed 4. Allowed 5. Allowed **Ervin, J., recused**
400P21-2	Frederick Wilson v. Ken Osadnick, et al.	1. Plt's Pro Se Motion for Subpoena 2. Plt's Pro Se Motion for Subpoena 3. Plt's Pro Se Motion for Subpoena 4. Plt's Pro Se Motion for Subpoena 5. Plt's Pro Se Motion for Subpoena	1. Dismissed 2. Dismissed 3. Dismissed 4. Dismissed 5. Dismissed
403P21	Louis M. Bouvier, Jr., Karen Andrea Niehans, Samuel R. Niehans, and Joseph D. Golden v. William Clark Porter, IV, Holtzman Vogel Josefiak Torchinsky PLLC, Steve Roberts, Erin Clark, Gabriella Fallon, Steven Saxe, and the Pat McCrory Committee Legal Defense Fund	Defs' (Holtzman Vogel Josefiak Torchinsky PLLC, Steve Roberts, Erin Clark, Gabriela Fallon, Steven Saxe, and the Pat McCrory Committee Legal Defense Fund) Motion to Recuse (COA20-441)	Dismissed as moot **01/18/2022** **Earls, J., recused**
407P20-5	State v. Archie M. Sampson	Def's Pro Se Motion to Fire and Replace Staff	Dismissed
408P21	State v. Ricardo Vernar Hale	Def's PDR Under N.C.G.S. § 7A-31 (COA20-716)	Denied
409P04-2	Mary Carter v. Global Tel-Link/ Department of Public Safety	1. Plt's Pro Se Motion for Complaint (COA03-318) 2. Plt's Pro Se Petition for Writ of Certiorari 3. Plt's Pro Se Motion to Proceed *In Forma Pauperis*	1. Dismissed 2. Denied 3. Allowed
411P21	State v. Joseph Earl Clark, II	Def's Pro Se Motion for PDR (COAP21-326)	Dismissed

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412P21	State v. Roger Levern Sanders	1. Def's Motion for Temporary Stay (COA21-89)	1. Allowed **12/03/2021** Dissolved **02/09/2022**
		2. Def's Petition for Writ of Supersedeas	2. Denied
		3. Def's PDR Under N.C.G.S. § 7A-31	3. Denied
413PA21	Harper, et al. v. Hall, et al., and NC League of Conservation Voters, et al. v. Hall, et al.	1. Plts' (Harper, et al.) PDR Prior to Determination by COA (COAP21-525)	1. Special Order **12/08/2021**
		2. Plts' (Harper, et al.) Motion to Suspend Appellate Rules to Expedite a Decision	2. Special Order **12/08/2021**
		3. Plts' (Harper, et al.) Motion for Prompt Disqualification of Justice Berger, Jr.	3. Special Order **01/31/2022**
		4. Plts' (Harper, et al.) Motion in the Alternative for Deferred Consideration of Disqualification Following the Court's Resolution of PDR Prior to a Determination by COA	4.
		5. Plts' (N.C. League of Conservation Voters, Inc., et al.) PDR Prior to Determination by COA	5. Special Order **12/08/2021**
		6. Plts' (N.C. League of Conservation Voters, Inc., et al.) Petition in the Alternative for Writ of Certiorari to Review Order of Superior Court, Wake County	6. Special Order **12/08/2021**
		7. Plts' (N.C. League of Conservation Voters, Inc., et al.) Motion to Suspend Appellate Rules and Expedite Schedule	7. Special Order **12/08/2021**
		8. Plts' (N.C. League of Conservation Voters, Inc., et al.) Petition for Writ of Supersedeas or Prohibition	8. Special Order **12/08/2021**
		9. Plts' (N.C. League of Conservation Voters, Inc., et al.) Motion for Temporary Stay	9.
		10. Plts' (Harper, et al.) Notice of Joinder of Motion for Temporary Stay	10.
		11. Defs' (Hall, et al.) Notice of Intent to Respond	11.
		12. Intervenors' (NC Sheriffs' Association, NC District Attorneys Association, and NC Association of Clerks of Superior Court) Motion to Intervene as Parties	12. Denied **01/24/2022**

		13. Intervenors' (NC Sheriffs' Association, NC District Attorneys Association, and NC Association of Clerks of Superior Court) Motion for Reconsideration of the Court's 8 December 2021 Order Staying the Candidate Filing Period	13. Dismissed **01/24/2022**
		14. Legislative-Defs' Motion for Recusal of Justice Samuel J. Ervin, IV	14. Special Order **01/31/2022**
		15. Plt's Notice of Appeal Based Upon a Constitutional Question	15.
		16. Plt's Notice of Appeal Based Upon a Constitutional Question	16.
		17. Plts' (Harper, et al.) Renewed Motion for Disqualification of Justice Berger, Jr.	17. Special Order **01/31/2022**
		18. Notice of Appeal Based Upon a Constitutional Question 1	18.
		9. Legislative-Defs' Motion for Recusal of Justice Anita S. Earls	19. Special Order **01/31/2022**
		20. Plt-Intervenor's (Common Cause) Motion for Disqualification of Justice Berger, Jr.	20. Special Order **01/31/2022**
		21. Plts' (N.C. League of Conservation Voters, Inc., et al.) Motion to Admit Sam Hirsch, Jessica Ring Amunson, Zachary C. Schauf, Urja Mittal, and Karthik P. Reddy Pro Hac Vice	21. Allowed **01/21/2022**
		22. Plt-Intervenor's (Common Cause) Motion to Admit J. Tom Boer and Olivia T. Molodanof Pro Hac Vice	22. Allowed **01/21/2022**
		23. Legislative-Defs' Motion to Admit Mark Braden Pro Hac Vice	23. Allowed **01/21/2022**
		24. Legislative-Defs' Motion to Admit Katherine McKnight Pro Hac Vice	24. Allowed **01/21/2022**
		25. Plts' (Harper, et al.) Motion to Admit Elisabeth S. Theodore, R. Stanton Jones, Samuel F. Callahan, Abha Khanna, Lalitha D. Madduri, Jacob D. Shelly, and Graham W. White Pro Hac Vice	25. Motion Allowed in Part; Denied in Part **01/21/2022**
		26. Buncombe County Board of Commissioners' Motion for Leave to File Amicus Brief	26. Allowed **01/24/2022**
		27. Campaign Legal Center's Motion for Leave to File Amicus Brief	27. Allowed **01/24/2022**

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		28. Campaign Legal Center's Motion to Admit Christopher Lamar and Orion de Nevers Pro Hac Vice	28. Allowed **01/24/2022**
		29. Bipartisan Former Governors Michael F. Easley, Arnold Schwarzenegger, Christine Todd Whitman, and William Weld's Motion for Leave to File Amicus Brief	29. Allowed **01/24/2022**
		30. Plts' (Harper, et al.) Renewed Motion to Admit Elisabeth S. Theodore, R. Stanton Jones, Samuel F. Callahan, Jacob D. Shelly, and Graham W. White Pro Hac Vice	30. Allowed **01/24/2022**
		31. Professor Charles Fried's Motion to Admit Ruth M. Greenwood, Theresa J. Lee, and Nicholas O. Stephanopoulos Pro Hac Vice	31. Allowed **01/24/2022**
		32. NCLCV Plts', Harper Plts, and Plt-Intervenor Common Cause's Motion for Extension of Time Allowed for Oral Argument	32. Special Order **01/26/2022**
423P21	State v. Michael J. Grace	1. Def's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Alamance County (COAP20-588)	1. Dismissed
		2. Def's Pro Se Motion to Proceed *In Forma Pauperis*	2. Allowed
		3. Def's Pro Se Motion to Appoint Counsel	3. Dismissed as moot
424P14-4	John S. Stritzinger v. Bank of America	Plt's Pro Se Motion for a Formal Bill of Exception	Dismissed
427P21	State v. Kevin Hart, Jr.	Def's Pro Se Motion to Take Care of Problem with Undue Delay	Denied **01/04/2022**
429P21	State v. Justin Marcellus Norman	Def's Pro Se Motion to Resolve All Pending Charges	Dismissed
430P21	In the Matter of A.C.	1. Petitioner's Motion for Temporary Stay (COA20-508)	1. Denied **12/28/2021**
		2. Petitioner's Petition for Writ of Supersedeas	2. Denied
		3. Petitioner's PDR Under N.C.G.S. § 7A-31	3. Denied
		4. Guardian ad Litem's PDR Under N.C.G.S. § 7A-31	4. Denied

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432P21	State v. Arthur Vladimir Kochetkov	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA20-774) 2. Def's PDR Under N.C.G.S. § 7A-31	1. Dismissed *ex mero motu* 2. Denied
433P21	State v. Daniel Raymond Jonas	1. State's Motion for Temporary Stay (COA20-712) 2. State's Petition for Writ of Supersedeas 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **12/22/2021** 2. 3.
437P21	Thomasina Gean v. Quick Trip	Plt's Pro Se Motion to Review this Case	Dismissed
505P20	State v. Rayquan Jamal Borum	1. State's PDR Under N.C.G.S. § 7A-31 (COA19-1022) 2. Def's Conditional PDR Under N.C.G.S. § 7A-31 3. State's Motion for Temporary Stay 4. State's Petition for Writ of Supersedeas	1. Allowed 2. Denied 3. Allowed **01/27/2021** 4. Allowed
580P05-24	In re David Lee Smith	1. Def's Pro Se Petition for Writ of Mandamus 2. Def's Pro Se Petition for Writ of Mandamus 3. Def's Pro Se Emergency Petition for Writ of Mandamus	1. Denied **12/20/2021** 2. Denied **12/20/2021** 3. Denied **12/20/2021** **Ervin, J., recused**
580P05-25	In re David Lee Smith	Def's Pro Se Emergency Petition for Writ of Mandamus	Dismissed **Ervin, J., recused**

REBECCA HARPER; AMY CLARE OSEROFF; DONALD RUMPH; JOHN ANTHONY BALLA; RICHARD R. CREWS; LILY NICOLE QUICK; GETTYS COHEN, JR.; SHAWN RUSH; JACKSON THOMAS DUNN, JR.; MARK S. PETERS; KATHLEEN BARNES; VIRGINIA WALTERS BRIEN; AND DAVID DWIGHT BROWN	)	
v.	)	
REPRESENTATIVE DESTIN HALL, IN HIS OFFICIAL CAPACITY AS CHAIR OF THE HOUSE STANDING COMMITTEE ON REDISTRICTING; SENATOR WARREN DANIEL, IN HIS OFFICIAL CAPACITY AS CO-CHAIR OF THE SENATE STANDING COMMITTEE ON REDISTRICTING AND ELECTIONS; SENATOR RALPH HISE, IN HIS OFFICIAL CAPACITY AS CO-CHAIR OF THE SENATE STANDING COMMITTEE ON REDISTRICTING AND ELECTIONS; SENATOR PAUL NEWTON, IN HIS OFFICIAL CAPACITY AS CO-CHAIR OF THE SENATE STANDING COMMITTEE ON REDISTRICTING AND ELECTIONS; SPEAKER OF THE NORTH CAROLINA HOUSE OF REPRESENTATIVES TIMOTHY K. MOORE; PRESIDENT PRO TEMPORE OF THE NORTH CAROLINA SENATE PHILIP E. BERGER; THE NORTH CAROLINA STATE BOARD OF ELECTIONS; AND DAMON CIRCOSTA, IN HIS OFFICIAL CAPACITY	)	Wake County
NORTH CAROLINA LEAGUE OF CONSERVATION VOTERS, INC.; HENRY M. MICHAUX, JR.; DANDRIELLE LEWIS; TIMOTHY CHARTIER; TALIA FERNÓS; KATHERINE NEWHALL; R. JASON PARSLEY; EDNA SCOTT; ROBERTA SCOTT; YVETTE ROBERTS; JEREANN KING JOHNSON; REVEREND REGINALD WELLS; YARBROUGH WILLIAMS, JR.; REVEREND DELORIS L. JERMAN; VIOLA RYALS FIGUEROA; AND COSMOS GEORGE	)	
v.	)	
REPRESENTATIVE DESTIN HALL, IN HIS OFFICIAL CAPACITY AS CHAIR OF THE	)	

HOUSE STANDING COMMITTEE ON REDISTRICTING; SENATOR WARREN DANIEL, IN HIS OFFICIAL CAPACITY AS CO-CHAIR OF THE SENATE STANDING COMMITTEE ON REDISTRICTING AND ELECTIONS; SENATOR RALPH E. HISE, JR., IN HIS OFFICIAL CAPACITY AS CO-CHAIR OF THE SENATE STANDING COMMITTEE ON REDISTRICTING AND ELECTIONS; SENATOR PAUL NEWTON, IN HIS OFFICIAL CAPACITY AS CO-CHAIR OF THE SENATE STANDING COMMITTEE ON REDISTRICTING AND ELECTIONS; REPRESENTATIVE TIMOTHY K. MOORE, IN HIS OFFICIAL CAPACITY AS SPEAKER OF THE NORTH CAROLINA HOUSE OF REPRESENTATIVES; SENATOR PHILIP E. BERGER, IN HIS OFFICIAL CAPACITY AS PRESIDENT PRO TEMPORE OF THE NORTH CAROLINA SENATE; THE STATE OF NORTH CAROLINA; THE NORTH CAROLINA STATE BOARD OF ELECTIONS; DAMON CIRCOSTA, IN HIS OFFICIAL CAPACITY AS CHAIRMAN OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS; STELLA ANDERSON, IN HER OFFICIAL CAPACITY AS SECRETARY OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS; JEFF CARMON III, IN HIS OFFICIAL CAPACITY AS MEMBER OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS; STACY EGGERS IV, IN HIS OFFICIAL CAPACITY AS MEMBER OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS; TOMMY TUCKER, IN HIS OFFICIAL CAPACITY AS MEMBER OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS; AND KAREN BRINSON BELL, IN HER OFFICIAL CAPACITY AS EXECUTIVE DIRECTOR OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS

No. 413PA21

ORDER

This matter was heard on direct appeal from an order of a three-judge panel of the Superior Court in Wake County, filed 11 January 2022. The case was fully briefed and argued before this Court on 2 February 2022 and is ready for decision. Because time is pressing, the Court enters the following order, to be followed by an opinion; based on the matters presented to the Court, including the findings of fact of the three-judge panel, it is ordered:

1. "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." *Corum v. Univ. of N.C.*, 330 N.C. 761, 783 (1992). The North Carolina General Assembly, in turn, has the duty to reapportion North Carolina's congressional and state legislative districts; however, exercise of this power is subject to limitations imposed by other constitutional provisions, including the Declaration of Rights. "The civil rights guaranteed by the Declaration of Rights in Article I of our Constitution," including the free elections clause, N.C. Const. art. I, § 10, the equal protection clause, N.C. Const. art. I, § 19, the free speech clause, N.C. Const. art. I, § 14, and the freedom of assembly clause, N.C. Const. art. I, § 12, "are individual and personal rights entitled to protection against state action." *Corum*, 330 N.C. at 782. It is the duty of this Court "to ensure that the violation of these rights is never permitted by anyone who might be invested under the Constitution with the powers of the State," *id.* at 783, including the legislative power of apportionment. *See Stephenson v. Bartlett*, 355 N.C. 354, 380–81 (2002). We conclude that claims asserting that congressional and state legislative districting plans enacted by the General Assembly are unlawful partisan gerrymanders that violate the free elections clause, the equal protection clause, the free speech clause, and the freedom of assembly clause of the Declaration of Rights in article I, sections 10, 19, 14, and 12, respectively, of the North Carolina Constitution are, consistent with the text and structure of our State's constitution and our system of separation of powers, justiciable in North Carolina courts.

2. This Court concludes that, to the extent Legislative Defendants have challenged any of the trial court's findings of fact, these findings are supported by competent evidence and are therefore not clearly erroneous. Accordingly, all of the trial court's factual findings are binding on appeal and we adopt them in full.

3. Based on the trial court's factual findings, we conclude that the congressional and legislative maps enacted in S.L. 2021-175 ("An Act to Realign North Carolina House of Representatives Districts Following the Return of the 2020 Federal Decennial Census"), S.L. 2021-173 ("An Act to Realign the Districts of the North Carolina State Senate Following the Return of the 2020 Federal Decennial Census"), and S.L. 2021-174 ("An Act to Realign the Congressional Districts Following the Return of the 2020 Federal Decennial Census") are unconstitutional beyond a reasonable doubt under the free elections clause, the equal protection clause, the free speech clause, and the freedom of assembly clause of the North Carolina Constitution. We hereby enjoin the use of these maps in any future elections, commencing with the upcoming candidate filing period scheduled to commence on **24 February 2022** for elections in 2022, including primaries scheduled to take place on **17 May 2022**.

4. To comply with the limitations contained in the North Carolina Constitution which are applicable to redistricting plans, the General Assembly must not diminish or dilute any individual's vote on the basis of partisan affiliation. The fundamental right to vote includes the right to enjoy "substantially equal voting power and substantially equal legislative representation." *Stephenson*, 355 N.C. at 382. This encompasses the opportunity to aggregate one's vote with likeminded citizens to elect a governing majority of elected officials who reflect those citizens' views. When, on the basis of partisanship, the General Assembly enacts a districting plan that diminishes or dilutes a voter's opportunity to aggregate with likeminded voters to elect a governing majority—that is, when a districting plan systematically makes it harder for one group of voters to elect a governing majority than another group of voters of equal size—the General Assembly unconstitutionally infringes upon that voter's fundamental right to vote.

5. The General Assembly violates the North Carolina Constitution when it deprives a voter of his or her right to substantially equal voting power on the basis of partisan affiliation. Showing that a reapportionment plan makes it systematically more difficult for a voter to aggregate his or her vote with other likeminded voters—which can be measured either by comparing the number of representatives that a group of voters of one partisan affiliation can plausibly elect with the number of representatives that a group of voters of the same size of another partisan affiliation can plausibly elect, or by comparing the relative chances of voters from each party electing a supermajority or majority of representatives under various possible electoral conditions—suffices to establish the diminishment or dilution of a voter's voting power on the basis of his or her views. Here, the trial court specifically found that the General Assembly diminished and diluted the voting power of voters affiliated with one party on the basis of party affiliation. *See*, *e.g.*, *N.C. League of Conservation Voters, Inc. v. Hall*, No. 21 CVS 015426, 2022 WL 124616, at *29 (N.C. Super. Ct. Jan. 11, 2022) (¶¶ 140, 142). Such a plan is subject to strict scrutiny and is unconstitutional unless the General Assembly can demonstrate that the plan is "narrowly tailored to advance a compelling governmental interest." *Stephenson*, 355 N.C. at 377. Achieving partisan advantage incommensurate with a political party's level of statewide voter support is neither a compelling nor a legitimate governmental interest.

6. There are multiple reliable ways of demonstrating the existence of an unconstitutional partisan gerrymander. In particular, mean-median difference analysis, efficiency gap analysis, close-votes, close seats analysis, and partisan symmetry analysis may be useful in assessing

whether the mapmaker adhered to traditional neutral districting criteria and whether a meaningful partisan skew necessarily results from North Carolina's unique political geography. If some combination of these metrics demonstrates there is a significant likelihood that the districting plan will give the voters of all political parties substantially equal opportunity to translate votes into seats across the plan, then the plan is presumptively constitutional. The General Assembly shall submit to the trial court in writing, along with their proposed remedial maps, an explanation of what data they relied on to determine that their districting plan is constitutional, including what methods they employed in evaluating the partisan fairness of the plan.

7. Federal law does not prohibit consideration of partisanship and incumbency protection in the redistricting process. *Stephenson*, 355 N.C. at 371. The federal Constitution does not prohibit reliance on partisan criteria in an effort to "achieve 'political fairness' between the political parties." *Gaffney v. Cummings*, 412 U.S. 735, 736 (1973). Incumbency protection may be a permissible redistricting criterion if it is applied evenhandedly, is not perpetuating a prior unconstitutional redistricting plan, and is consistent with the equal voting power requirements of the state constitution.

8. To comply with this Order, redistricting plans shall adhere to traditional neutral districting criteria and not subordinate them to partisan criteria. Traditional neutral districting criteria as enumerated in the North Carolina Constitution and this Court's precedents include the drawing of single-member districts which are as nearly equal in population as is practicable, which consist of contiguous territory, which are geographically compact, and which maintain whole counties. N.C. Const. art. II, §§ 3, 5. The "Whole County Provision" must be applied in a manner consonant with the requirements of the Voting Rights Act and federal "one-person, one-vote" principles. *Stephenson*, 355 N.C. at 382. The General Assembly must first assess whether, using current election and population data, racially polarized voting is legally sufficient in any area of the state such that Section 2 of the Voting Rights Act requires the drawing of a district to avoid diluting the voting strength of African-American voters. Partisan advantage is not a traditional neutral districting criterion under state law.

9. In accordance with N.C.G.S. § 120-2.4(a), the General Assembly shall have the opportunity to submit new congressional and state legislative districting plans that satisfy all provisions of the North Carolina Constitution. The General Assembly shall submit such plans for review to the trial court on or before **18 February 2022** at 5:00 p.m. Should the

General Assembly choose not to submit new congressional and state legislative districting plans on or before this deadline, the trial court will select a plan which comports with constitutional requirements based upon the findings it entered in its prior order. Regardless, all parties to this proceeding and intervenors may submit to the trial court proposed remedial districting plans by **18 February 2022** at 5:00 p.m., and comments on any maps submitted shall be filed with the trial court by **21 February 2022** at 5:00 p.m. The trial court will approve or adopt compliant congressional and state legislative districting plans no later than noon on **23 February 2022**. Any emergency application for a stay pending appeal must be filed no later than **23 February 2022** at 5:00 p.m.

10. State Defendants are advised to anticipate that new districting plans for Congress, the North Carolina Senate, and the North Carolina House of Representatives will be available by **23 February 2022** and are directed to take all necessary measures to ensure that the **17 May 2022** primary election and all subsequent elections occur as scheduled using the remedial districting plans. Further, all ballot items, including referenda, that would have appeared on the **8 March 2022** ballot prior to this Court's prior Order enjoining elections for public office shall appear on the **17 May 2022** ballot; municipal elections in circumstances where a second primary is not required under N.C.G.S. § 163-111 will be conducted on **26 July 2022**.

Opinion to follow.

Remanded to the trial court for remedial proceedings.

By order of the Court in conference, this the 4th day of February 2022.

s/Hudson, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 4 day of February 2022.

s/Amy Funderburk
AMY L. FUNDERBURK
Clerk of the Supreme Court

Chief Justice NEWBY dissenting.

I dissent from the decision of the Court which violates separation of powers by effectively placing responsibility for redistricting with the judicial branch, not the legislative branch as expressly provided in our constitution. As predicted by the Supreme Court of the United States, this Court's decision results in an "unprecedented expansion of judicial power." *Rucho v. Common Cause*, 139 S. Ct. 2484, 2507 (2019). " '[J]udicial action must be governed by *standard*, by *rule*,' and must be 'principled, rational, and based upon reasoned distinctions' found in the Constitution or laws. Judicial review of partisan gerrymandering does not meet those basic requirements." *Id.* (alteration and emphases in original) (citation omitted) (quoting *Vieth v. Jubelirer*, 541 U.S. 267, 278, 279, 124 S. Ct. 1769, 1777 (2004) (plurality opinion)) (noting that the Supreme Court of United States has "never struck down a partisan gerrymander as unconstitutional—despite various requests over the past 45 years"). By choosing to hold that partisan gerrymandering violates the North Carolina Constitution and by devising its own remedies, there appears to be no limit to this Court's power.

"All political power is vested in and derived from the people; all government of right originates from the people, is founded upon their will only, and is instituted solely for the good of the whole." N.C. Const. art. I, § 2. Our state constitution is our foundational document for government; its text reflects the express will of the people. *State ex rel. Martin v. Preston*, 325 N.C. 438, 448, 385 S.E.2d 473, 478 (1989). The will of the people is best served, and everyone's rights are best protected, when the plain language of the constitution is followed. Recognizing special rights to one favored person or group invariably diminishes the rights of others.

Unlike the United States Constitution, the North Carolina Constitution "is in no matter a grant of power." *McIntyre v. Clarkson*, 254 N.C. 510, 515, 119 S.E.2d 888, 891 (1961) (quoting *Lassiter v. Northampton Cnty. Bd. of Elections*, 248 N.C. 102, 112, 102 S.E.2d 853, 861 (1958)). Rather, "[a]ll power which is not limited by the Constitution inheres in the people." *Id.* (quoting *Lassiter*, 248 N.C. at 112, 102 S.E.2d at 861). The people act through the General Assembly. *Preston*, 325 N.C. at 448, 385 S.E.2d at 478. Since the General Assembly serves as the "agent of the people for enacting laws," *id.*, a restriction on the General Assembly is in fact a restriction on the people themselves. Therefore, this Court presumes that legislation is constitutional, and a constitutional limitation upon the General Assembly must be

express and proven beyond a reasonable doubt. *Baker v. Martin*, 330 N.C. 331, 334, 410 S.E.2d 887, 889 (1991).

"The legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other." N.C. Const. art. I, § 6. "[A]s essentially a function of the separation of powers," *Baker v. Carr*, 369 U.S. 186, 217, 82 S. Ct. 691, 710 (1962), a court should not review questions better suited for the political branches. This Court must refuse to resolve a dispute "(1) when the Constitution commits [the] issue . . . to one branch of government; or (2) when satisfactory and manageable criteria or standards do not exist for judicial determination of the issue." *Hoke Cnty. Bd. of Educ. v. State*, 358 N.C. 605, 639, 599 S.E.2d 365, 391 (2004) (emphasis omitted) (citing *Baker*, 369 U.S. at 210, 82 S. Ct. at 706). The issue before us—partisan consideration in redistricting—is both constitutionally committed to another branch of government, the General Assembly, and lacking in satisfactory legal standards. Thus, a claim for partisan gerrymandering presents a nonjusticiable political question.

The North Carolina Constitution expressly acknowledges that the authority to redistrict belongs to the General Assembly. *See* N.C. Const. art. II, §§ 3, 5; U.S. Const. art. I, § 4, cl. 1. In a system based upon popular sovereignty, this structure makes sense because legislators, as opposed to judges, are in the best position to address the people's interests. *See Vieth*, 541 U.S. at 358, 124 S. Ct. at 1824 (Breyer, J., dissenting) ("It is precisely *because* politicians are best able to predict the effects of boundary changes that the districts they design usually make some political sense.").

The General Assembly's redistricting authority is checked by the people through express constitutional provisions as interpreted by this Court. Our constitution subjects redistricting by the General Assembly to only four express limitations. *See* N.C. Const. art. II, §§ 3, 5. Since these limitations say nothing about the permissibility of partisan gerrymandering, the issue has only two legitimate avenues for reform: a statute or a constitutional amendment that imposes a restraint for the Court to apply. As such, unless and until the people alter the law to either limit or prohibit the practice of partisan gerrymandering, this Court is without any satisfactory or manageable legal standard and thus must refuse to resolve such a claim.

A majority of this Court, however, tosses judicial restraint aside, seizing the opportunity to advance its agenda. There is no express provision of the constitution supporting the decision of the majority; there

is no showing that the enacted redistricting plans are unconstitutional beyond a reasonable doubt. A summary pronouncement by the majority to the contrary does not make it so. In the majority's view, it is this Court, rather than the people, who hold the power to alter our constitution. Thus, the majority by judicial fiat amends the plain text of Article I, Sections 10, 12, 14, and 19, to empower courts to supervise the legislative power of redistricting arising from complaints of partisan gerrymandering. Such action constitutes a clear usurpation of the people's authority alone to amend their constitution. *See* N.C. Const. art. XIII, §§ 2, 3, 4.

In essence, the majority rules that the North Carolina Constitution now has a statewide proportionality requirement for redistricting. It seeks to support this view with various provisions of our Declaration of Rights that are designed to protect individual and personal rights. *Corum v. Univ. of N.C.*, 330 N.C. 761, 782, 413 S.E.2d 276, 289 (1992). In doing so, it magically transforms the protection of individual rights into the creation of a protected class for members of a political party, subjecting a redistricting plan to strict scrutiny review. The majority presents various views about what constitutes unconstitutional partisan gerrymandering. *See* Order, ¶¶ 4–6 (providing a variety of observations about what the constitution requires). Absent from the order is any mention of "extreme partisan gerrymandering," which was the issue presented to the Court. Perhaps the sentence best characterizing the majority's holding is that "[t]he General Assembly violates the North Carolina Constitution when it deprives a voter of his or her right to substantially equal voting power on the basis of partisan affiliation." Order, ¶ 5. The question of *how much* partisan consideration is unconstitutional remains a mystery, as does what is meant by "substantially equal voting power on the basis of partisan affiliation." Any discretionary decisions constitutionally committed to the General Assembly in the redistricting process have now been transferred to the Court.

In seeking to hide its partisan bias, the majority states that "redistricting plans shall adhere to traditional neutral districting criteria and not subordinate them to partisan criteria." Order, ¶ 8. Ironically, the majority claims the General Assembly should not subordinate traditional neutral districting criteria to partisan considerations, but its litmus test of constitutionality *requires* a satisfactory partisanship analysis. In fact, only a satisfactory partisanship analysis makes a plan constitutional. But, the Court provides no guidance as to what constitutes an acceptable partisanship analysis. The Court further says that the constitution requires the use of various political science techniques

of voting analysis. In addition to the remedial maps, the Court requires the General Assembly to report "an explanation of what data they relied on to determine that their districting plan is constitutional, including what methods they employed in evaluating the partisan fairness of the plan." Order, ¶ 6. Glaringly, it fails to mention which data or methods are acceptable or what results would be satisfactory. Apparently, the majority alone knows what would be constitutional. Further, the Court allows other groups to submit alternate plans but does not mandate the same disclosures.

In rejecting the notion that claims of partisan gerrymandering present a justiciable issue, the Supreme Court of the United States noted the unreliability of political science models:

> Even the most sophisticated districting maps cannot reliably account for some of the reasons voters prefer one candidate over another, or why their preferences may change. Voters elect individual candidates in individual districts, and their selections depend on the issues that matter to them, the quality of the candidates, the tone of the candidates' campaigns, the performance of an incumbent, national events or local issues that drive voter turnout, and other considerations. Many voters split their tickets. Others never register with a political party, and vote for candidates from both major parties at different points during their lifetimes. For all of those reasons, asking judges to predict how a particular districting map will perform in future elections risks basing constitutional holdings on unstable ground outside judicial expertise.

Rucho, 139 S. Ct. at 2503–04.

Nonetheless, the Court mandates a political-science-based approach without complying with the direct statutory requirements triggered when a redistricting plan is found unconstitutional. North Carolina law requires that

> [e]very order or judgment declaring unconstitutional or otherwise invalid, in whole or in part and for any reason, any act of the General Assembly that apportions or redistricts State legislative or congressional districts shall find

> with specificity all facts supporting that declaration, shall state separately and with specificity the court's conclusions of law on that declaration, and shall, with specific reference to those findings of fact and conclusions of law, identify every defect found by the court, both as to the plan as a whole and as to individual districts.

N.C.G.S. § 120-2.3 (2021). The majority's order today provides no specificity—only a vague and undefined ambition of "political fairness"—which ultimately only the majority can measure and determine if its desired result is accomplished.

In 2019 the trial court required the General Assembly to redraw the districts. *Common Cause v. Lewis*, No. 18 CVS 014001, 2019 WL 4569584, at *135 (N.C. Super. Ct. Sept. 3, 2019). The 2020 election took place under these constitutionally compliant districts. The people have expressed their will by electing the current members of the General Assembly. The people were aware that the legislators elected in 2020 would be tasked with drawing new districts according to the census, *see* N.C. Const. art. II, §§ 3, 5, and by any standard, the process used by the General Assembly to follow the nonpartisan criteria meets the requirements of the 2019 trial court order. Thus, the General Assembly and any neutral observer would have to inquire what about our constitutional text has changed from 2019 to 2022 resulting in this newfound constitutional requirement.

The 2019 remedial order required that for a plan to be constitutional, "[p]artisan considerations and election results data *shall not be used* in the drawing of legislative districts." *Common Cause v. Lewis*, No. 18 CVS 014001, 2019 WL 4569584, at *136 (N.C. Super. Ct. Sept. 3, 2019) (emphasis added). The order today contradicts this directive by requiring partisan data be used. Similarly, the court-approved constitutional districts drawn in 2019 provided that Voting Rights Act districts are not required anywhere in North Carolina. The majority today also contradicts that finding. It should be noted that the trial court here also found that no Voting Rights Act districts are necessary in North Carolina.

Finally, the majority's managed timeline is arbitrary and seems designed only to ensure this Court's continued direct involvement in this proceeding. Instead of following our customary process of allowing the trial court to manage the details of a case on remand, the majority follows the Governor's lead in mandating a May primary. No reason is given, nor does one exist—except for perceived partisan advantage—for

not allowing the trial court to manage the remand schedule, including, if necessary, further delaying the primary.

To avoid the "smothering of freedom beneath the robes of a judicial despotism," *Dilday v. Beaufort Cnty. Bd. of Educ.*, 267 N.C. 438, 455, 149 S.E.2d 345, 347 (1966) (Lake, J., concurring), this Court should respect the constitutional role of the General Assembly. Further, the Court must provide a manageable standard to determine when a proposed redistricting plan is constitutional. The Court has failed to do so. The majority's requirements are so vague as to only allow this Court to ultimately determine a plan's constitutionality. With this ruling, the majority moves beyond traditional judicial decision-making in favor of judicially amending the constitution. I respectfully dissent.

Dissenting opinion to follow.

Justices BERGER and BARRINGER join in this dissenting opinion.

REBECCA HARPER; AMY CLARE OSEROFF; DONALD RUMPH; JOHN ANTHONY BALLA; RICHARD R. CREWS; LILY NICOLE QUICK; GETTYS COHEN, JR.; SHAWN RUSH; JACKSON THOMAS DUNN, JR.; MARK S. PETERS; KATHLEEN BARNES; VIRGINIA WALTERS BRIEN; AND DAVID DWIGHT BROWN	)	
v.	)	
REPRESENTATIVE DESTIN HALL, IN HIS OFFICIAL CAPACITY AS CHAIR OF THE HOUSE STANDING COMMITTEE ON REDISTRICTING; SENATOR WARREN DANIEL, IN HIS OFFICIAL CAPACITY AS CO-CHAIR OF THE SENATE STANDING COMMITTEE ON REDISTRICTING AND ELECTIONS; SENATOR RALPH HISE, IN HIS OFFICIAL CAPACITY AS CO-CHAIR OF THE SENATE STANDING COMMITTEE ON REDISTRICTING AND ELECTIONS; SENATOR PAUL NEWTON, IN HIS OFFICIAL CAPACITY AS CO-CHAIR OF THE SENATE STANDING COMMITTEE ON REDISTRICTING AND ELECTIONS; SPEAKER OF THE NORTH CAROLINA HOUSE OF REPRESENTATIVES TIMOTHY K. MOORE; PRESIDENT PRO TEMPORE OF THE NORTH CAROLINA SENATE PHILIP E. BERGER; THE NORTH CAROLINA STATE BOARD OF ELECTIONS; AND DAMON CIRCOSTA, IN HIS OFFICIAL CAPACITY	)	Wake County
NORTH CAROLINA LEAGUE OF CONSERVATION VOTERS, INC.; HENRY M. MICHAUX, JR.; DANDRIELLE LEWIS; TIMOTHY CHARTIER; TALIA FERNÓS; KATHERINE NEWHALL; R. JASON PARSLEY; EDNA SCOTT; ROBERTA SCOTT; YVETTE ROBERTS; JEREANN KING JOHNSON; REVEREND REGINALD WELLS; YARBROUGH WILLIAMS, JR.; REVEREND DELORIS L. JERMAN; VIOLA RYALS FIGUEROA; AND COSMOS GEORGE	)	
v.	)	
REPRESENTATIVE DESTIN HALL, IN HIS OFFICIAL CAPACITY AS CHAIR OF THE	)	

HOUSE STANDING COMMITTEE ON REDISTRICTING;)
SENATOR WARREN DANIEL, IN HIS)
OFFICIAL CAPACITY AS CO-CHAIR OF THE SENATE)
STANDING COMMITTEE ON REDISTRICTING AND)
ELECTIONS; SENATOR RALPH E. HISE, JR.,)
IN HIS OFFICIAL CAPACITY AS CO-CHAIR OF THE)
SENATE STANDING COMMITTEE ON REDISTRICTING)
AND ELECTIONS; SENATOR PAUL NEWTON,)
IN HIS OFFICIAL CAPACITY AS CO-CHAIR OF THE)
SENATE STANDING COMMITTEE ON REDISTRICTING)
AND ELECTIONS; REPRESENTATIVE)
TIMOTHY K. MOORE, IN HIS OFFICIAL)
CAPACITY AS SPEAKER OF THE NORTH CAROLINA)
HOUSE OF REPRESENTATIVES; SENATOR)
PHILIP E. BERGER, IN HIS OFFICIAL CAPACITY)
AS PRESIDENT PRO TEMPORE OF THE NORTH)
CAROLINA SENATE; THE STATE OF NORTH)
CAROLINA; THE NORTH CAROLINA)
STATE BOARD OF ELECTIONS;)
DAMON CIRCOSTA, IN HIS OFFICIAL CAPACITY)
AS CHAIRMAN OF THE NORTH CAROLINA STATE)
BOARD OF ELECTIONS; STELLA ANDERSON,)
IN HER OFFICIAL CAPACITY AS SECRETARY OF THE)
NORTH CAROLINA STATE BOARD OF ELECTIONS;)
JEFF CARMON III, IN HIS OFFICIAL CAPACITY)
AS MEMBER OF THE NORTH CAROLINA STATE)
BOARD OF ELECTIONS; STACY EGGERS IV, IN)
HIS OFFICIAL CAPACITY AS MEMBER OF THE)
NORTH CAROLINA STATE BOARD OF ELECTIONS;)
TOMMY TUCKER, IN HIS OFFICIAL CAPACITY)
AS MEMBER OF THE NORTH CAROLINA STATE)
BOARD OF ELECTIONS; AND KAREN BRINSON)
BELL, IN HER OFFICIAL CAPACITY AS EXECUTIVE)
DIRECTOR OF THE NORTH CAROLINA STATE)
BOARD OF ELECTIONS)

No. 413PA21

ORDER

Pursuant to Appellate Rule 32(b), it is HEREBY ORDERED, that the clerk shall enter judgment in this matter and issue the mandate of the Court, on 24 February 2022.

By order of the Court in conference, this the 15th day of February 2022.

s/Hudson, J.
For the Court

Chief Justice NEWBY and Justices BERGER and BARRINGER dissent.

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 15th day of February 2022.

s/Amy Funderburk
AMY L. FUNDERBURK
Clerk of the Supreme Court

HARPER v. HALL

[380 N.C. 317, 2022-NCSC-17]

REBECCA HARPER; AMY CLARE OSEROFF; DONALD RUMPH; JOHN ANTHONY BALLA; RICHARD R. CREWS; LILY NICOLE QUICK; GETTYS COHEN, JR.; SHAWN RUSH; JACKSON THOMAS DUNN, JR.; MARK S. PETERS; KATHLEEN BARNES; VIRGINIA WALTERS BRIEN; AND DAVID DWIGHT BROWN

v.

REPRESENTATIVE DESTIN HALL, IN HIS OFFICIAL CAPACITY AS CHAIR OF THE HOUSE STANDING COMMITTEE ON REDISTRICTING; SENATOR WARREN DANIEL, IN HIS OFFICIAL CAPACITY AS CO-CHAIR OF THE SENATE STANDING COMMITTEE ON REDISTRICTING AND ELECTIONS; SENATOR RALPH HISE, IN HIS OFFICIAL CAPACITY AS CO-CHAIR OF THE SENATE STANDING COMMITTEE ON REDISTRICTING AND ELECTIONS; SENATOR PAUL NEWTON, IN HIS OFFICIAL CAPACITY AS CO-CHAIR OF THE SENATE STANDING COMMITTEE ON REDISTRICTING AND ELECTIONS; SPEAKER OF THE NORTH CAROLINA HOUSE OF REPRESENTATIVES, TIMOTHY K. MOORE; PRESIDENT PRO TEMPORE OF THE NORTH CAROLINA SENATE, PHILIP E. BERGER; THE NORTH CAROLINA STATE BOARD OF ELECTIONS; AND DAMON CIRCOSTA, IN HIS OFFICIAL CAPACITY

NORTH CAROLINA LEAGUE OF CONSERVATION VOTERS, INC.; HENRY M. MICHAUX, JR.; DANDRIELLE LEWIS; TIMOTHY CHARTIER; TALIA FERNÓS; KATHERINE NEWHALL; R. JASON PARSLEY; EDNA SCOTT; ROBERTA SCOTT; YVETTE ROBERTS; JEREANN KING JOHNSON; REVEREND REGINALD WELLS; YARBROUGH WILLIAMS, JR.; REVEREND DELORIS L. JERMAN; VIOLA RYALS FIGUEROA; AND COSMOS GEORGE

v.

REPRESENTATIVE DESTIN HALL, IN HIS OFFICIAL CAPACITY AS CHAIR OF THE HOUSE STANDING COMMITTEE ON REDISTRICTING; SENATOR WARREN DANIEL, IN HIS OFFICIAL CAPACITY AS CO-CHAIR OF THE SENATE STANDING COMMITTEE ON REDISTRICTING AND ELECTIONS; SENATOR RALPH E. HISE, JR., IN HIS OFFICIAL CAPACITY AS CO-CHAIR OF THE SENATE STANDING COMMITTEE ON REDISTRICTING AND ELECTIONS; SENATOR PAUL NEWTON, IN HIS OFFICIAL CAPACITY AS CO-CHAIR OF THE SENATE STANDING COMMITTEE ON REDISTRICTING AND ELECTIONS; REPRESENTATIVE TIMOTHY K. MOORE, IN HIS OFFICIAL CAPACITY AS SPEAKER OF THE NORTH CAROLINA HOUSE OF REPRESENTATIVES; SENATOR PHILIP E. BERGER, IN HIS OFFICIAL CAPACITY AS PRESIDENT PRO TEMPORE OF THE NORTH CAROLINA SENATE; THE STATE OF NORTH CAROLINA; THE NORTH CAROLINA STATE BOARD OF ELECTIONS; DAMON CIRCOSTA, IN HIS OFFICIAL CAPACITY AS CHAIRMAN OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS; STELLA ANDERSON, IN HER OFFICIAL CAPACITY AS SECRETARY OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS; JEFF CARMON III, IN HIS OFFICIAL CAPACITY AS MEMBER OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS; STACY EGGERS IV, IN HIS OFFICIAL CAPACITY AS MEMBER OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS; TOMMY TUCKER, IN HIS OFFICIAL CAPACITY AS MEMBER OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS; AND KAREN BRINSON BELL, IN HER OFFICIAL CAPACITY AS EXECUTIVE DIRECTOR OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS

No. 413PA21

Filed 14 February 2022

1. Elections—North Carolina Constitution—legislative redistricting—gerrymandering claims—standing—concrete adverseness requirement

In an action alleging that redistricting plans enacted by the legislature were partisan gerrymanders in violation of the North Carolina Constitution, plaintiffs were not required to meet the federal injury-in-fact requirement for standing but needed to demonstrate concrete adverseness, such as being directly injured or adversely affected by the government's actions. Where plaintiffs asserted cognizable claims under the North Carolina Constitution, they raised an actual controversy and, therefore, each individual and organizational plaintiff had standing to bring their claims, whether or not their theory ultimately prevailed.

2. Elections—North Carolina Constitution—legislative redistricting—gerrymandering claims—political question doctrine—justiciability analysis

In a question of first impression, the Supreme Court concluded that a constitutional challenge to redistricting plans enacted by the legislature—alleging that the plans were partisan gerrymanders in violation of the North Carolina Constitution—raised a justiciable issue. Partisan gerrymandering claims do not constitute nonjusticiable political questions because there is no "textually demonstrable constitutional commitment of the issue" to the "sole discretion" of the legislature where the legislature's redistricting authority is subject to constitutional limitations, and because review of these claims would not require the Court to make "policy choices and value determinations." Plaintiffs' partisan gerrymandering claims were cognizable under the free elections clause, equal protection clause, free speech clause, and freedom of assembly clause, each of which protect voters' fundamental rights to vote on equal terms and to substantially equal voting power. Acts by the legislature that diminish and dilute voting power on the basis of partisan affiliation constitute viewpoint discrimination and retaliation that are subject to strict scrutiny review.

3. Elections—North Carolina Constitution—legislative redistricting—gerrymandering claims—strict scrutiny standard

In an action alleging that redistricting plans enacted by the legislature were partisan gerrymanders in violation of the North Carolina Constitution, the heightened standard of strict scrutiny applied to the question of whether the legislature infringed on voters' fundamental

right to substantially equal voting power where its plans served to diminish or dilute voting power on the basis of partisan affiliation. In applying this standard, the Supreme Court determined that proposed maps for congressional, North Carolina House, and North Carolina Senate districts constituted partisan gerrymandering in violation of the state constitution, and could not pass strict scrutiny, because partisan advantage is neither a compelling nor a legitimate governmental interest, and there was no showing that the maps were tailored to a compelling governmental interest such as neutral districting principles.

4. Elections—North Carolina Constitution—legislative redistricting—compliance with precedent—racially polarized voting analysis required

In an action alleging that redistricting plans enacted by the legislature were partisan gerrymanders in violation of the North Carolina Constitution, where plaintiffs' claims involved the same sections of the state constitution that were interpreted in *Stephenson v. Bartlett*, 355 N.C. 354 (2002) (Art. 1, secs. 3 and 5, and Art. II, secs. 3 and 5), adherence to *Stephenson* required the legislature to conduct a racially polarized voting analysis prior to drawing district lines in order to prevent diluting minority voting strength.

Justice MORGAN concurring.

Justice EARLS joins in this concurring opinion.

Chief Justice NEWBY dissenting.

Justices BERGER and BARRINGER join in this dissenting opinion.

Appeal pursuant to N.C.G.S. § 7A-27(b)(1) from the unanimous decision of a three-judge panel of the Superior Court in Wake County, denying plaintiffs' claims and requests for Declaratory Judgment and Permanent Injunctive Relief. On 8 December 2021, pursuant to N.C.G.S. § 7A-31 and Rule 15(e) of the North Carolina Rules of Appellate Procedure, the Supreme Court allowed plaintiffs' petitions for discretionary review prior to determination by the Court of Appeals. Heard in the Supreme Court on 2 February 2022.

Patterson Harkavy LLP, by Narendra K. Ghosh, Burton Craige, and Paul E. Smith; Elias Law Group LLP, by Abha Khanna, Lalitha D. Madduri, Jacob D. Shelly, and Graham W. White; and Arnold and Porter Kaye Scholer LLP, by Elisabeth S. Theodore, R. Stanton Jones, and Samuel F. Callahan, for Harper plaintiff-appellants.

Robinson, Bradshaw & Hinson, P.A., by Stephen D. Feldman, John R. Wester, Adam K. Doerr, and Erik R. Zimmerman; and Jenner & Block LLP, by Sam Hirsch, Jessica Ring Amunson, Zachary C. Schauf, Karthik P. Reddy, and Urja Mittal, for North Carolina League of Conservation Voters, Inc. plaintiff-appellants.

Southern Coalition for Social Justice, by Hilary H. Klein, Allison J. Riggs, Mitchell Brown, Katelin Kaiser, Jeffrey Loperfido, and Noor Taj; and Hogan Lovells US LLP, by J. Tom Boer and Olivia T. Molodanof, for Common Cause plaintiff-appellant.

North Carolina Department of Justice, by Amar Majmundar, Senior Deputy Attorney General, and Terence Steed, Mary Carla Babb, and Stephanie A. Brennan, Special Deputy Attorneys General, for State defendant-appellees.

Nelson Mullins Riley & Scarborough, LLP, by Phillip J. Strach, Alyssa M. Riggins, John Branch, and Thomas A. Farr; and Baker & Hostetler LLP, by Katherine L. McKnight and E. Mark Braden, for Legislative Defendants defendant-appellees.

Abraham Rubert-Schewel, Chris Lamar, and Orion de Nevers, for Campaign Legal Center, amicus curiae.

Haynsworth Sinkler Boyd, P.A., by William C. McKinney, Jonathan D. Klett and Sara A. Sykes; and States United Democracy Center, by Christine P. Sun and Ranjana Natarajan, for former governors, amici curiae.

Poyner Spruill LLP, by Edwin M. Speas Jr. and Caroline P. Mackie, for Buncombe County Board of Commissioners, amicus curiae.

Joshua H. Stein, Attorney General, by Ryan Y. Park, Solicitor General, James W. Doggett, Deputy Solicitor General, and Zachary W. Ezor, Solicitor General Fellow, for Governor Roy A. Cooper II and Attorney General Joshua H. Stein, amici curiae.

Phelps Dunbar LLP, by Nathan A. Huff and Jared M. Burtner, for National Republican Congressional Committee, amicus curiae.

Forward Justice, by Kathleen E. Roblez, Caitlin A. Swain, Daryl V. Atkinson, Ashley M. Mitchell, and Aviance Brown; and Irving Joyner for NC NAACP, amicus curiae.

Poyner Spruill LLP, by Caroline P. Mackie, for Professor Charles Fried, amicus curiae.

HUDSON, Justice.

¶ 1 Today, we answer this question: does our state constitution recognize that the people of this state have the power to choose those who govern us, by giving each of us an equally powerful voice through our vote? Or does our constitution give to members of the General Assembly, as they argue here, unlimited power to draw electoral maps that keep themselves and our members of Congress in office as long as they want, regardless of the will of the people, by making some votes more powerful than others? We hold that our constitution's Declaration of Rights guarantees the equal power of each person's voice in our government through voting in elections that matter.

¶ 2 In North Carolina, we have long understood that our constitution's promise that "[a]ll elections shall be free" means that every vote must count equally. N.C. Const. art. I, § 10. As early as 1875, this Court declared it "too plain for argument" that the General Assembly's malapportionment of election districts "is a plain violation of fundamental principles."[1] *People ex rel. Van Bokkelen v. Canaday*, 73 N.C. 198, 225 (1875). Likewise, this Court has previously held that judicial review was appropriate in legislative redistricting cases to enforce the requirements of the state constitution, even when doing so means interpreting state constitutional provisions more expansively than their federal counterparts. *See Stephenson v. Bartlett*, 355 N.C. 354, 379–82 (2002).

¶ 3 "A system of fair elections is foundational to self-government." *Comm. to Elect Dan Forest v. Emps. Pol. Action Comm.*, 376 N.C. 558, 2021-NCSC-6, ¶ 86 (Newby, C.J., concurring in the result). While partisan gerrymandering is not a new tool, modern technologies enable mapmakers to achieve extremes of imbalance that, "with almost surgical

1. Even earlier, in 1787, this Court held that the courts must interpret the constitution and invalidate laws that violate it. *Bayard v. Singleton*, 1 N.C. (Mart.) 5, 7 (1787).

precision,"[2] undermine our constitutional system of government.[3] Indeed, the programs and algorithms now available for drawing electoral districts have become so sophisticated that it is possible to implement extreme and durable partisan gerrymanders that can enable one party to effectively guarantee itself a supermajority for an entire decade, even as electoral conditions change and voter preferences shift. Fortunately, the technology that makes such extreme gerrymanders possible likewise makes it possible to reliably evaluate the partisan asymmetry of such plans and review the extent to which they depart from and subordinate traditional neutral redistricting principles.

¶ 4 Partisan gerrymandering creates the same harm as malapportionment, which has previously been held to violate the state constitution: some peoples' votes have more power than others. But a legislative body can only reflect the will of the people if it is elected from districts that provide one person's vote with substantially the same power as every other person's vote. In North Carolina, a state without a citizen referendum process and where only a supermajority of the legislature can propose constitutional amendments, it is no answer to say that responsibility for addressing partisan gerrymandering is in the hands of the people, when they are represented by legislators who are able to entrench themselves by manipulating the very democratic process from which they derive their constitutional authority. Accordingly, the only way that partisan gerrymandering can be addressed is through the courts, the branch which has been tasked with authoritatively interpreting and enforcing the North Carolina Constitution.

¶ 5 Here, the General Assembly enacted districting maps for the United States Congress, the North Carolina House of Representatives, and the North Carolina Senate that subordinated traditional neutral redistricting

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2. We note this expression was coined to describe the precision with which the North Carolina General Assembly targeted African American voters through the identification and exclusion of various forms of voter photo identification. *N.C. State Conf. of NAACP v. McCrory*, 831 F.3d 204, 214 (4th Cir. 2016). We believe it is equally apt as a description of the technical proficiency with which legislators across the country dilute the power of votes through the drawing of district lines.

3. In fact, the term "gerrymander" was coined in 1812 after the redrawing of Massachusetts Senate election districts to ensure the advantage of the Democratic-Republican Party under then-Governor Elbridge Gerry, in reference to a district drawn in a manner so contrived that it was said to resemble a salamander. The gerrymander was successful, as although the Federalist Party ousted Governor Gerry and flipped the Massachusetts House in the 1812 election, the Democratic-Republicans retained control of the state senate under this map. *See* Elmer C. Griffith, *The Rise and Development of the Gerrymander* 73–77 (1907).

criteria in favor of extreme partisan advantage by diluting the power of certain people's votes.[4] Despite finding that these maps were "extreme partisan outliers[,]" "highly non-responsive" to the will of the people, and "incompatible with democratic principles[,]" the three-judge panel below allowed the maps to stand because it concluded that judicial action "would be usurping the political power and prerogatives" of the General Assembly.

¶ 6 We emphatically disagree. Although the task of redistricting is primarily delegated to the legislature, it must be performed "in conformity with the State Constitution." *Stephenson*, 355 N.C. at 371. It is thus the solemn duty of this Court to review the legislature's work to ensure such conformity using the available judicially manageable standards. We will not abdicate this duty by "condemn[ing] complaints about districting to echo into a void." *Rucho v. Common Cause*, 139 S. Ct. 2484, 2507 (2019). Today, we hold that the enacted maps violate several rights guaranteed to the people by our state constitution. Accordingly, we reverse the judgment of the trial court below and remand this case back to that court to oversee the redrawing of the maps by the General Assembly or, if necessary, by the court.

¶ 7 Our dissenting colleagues have overlooked the fundamental reality of this case. Rather than stepping outside of our role as judicial officers and into the policymaking realm, here we are carrying out the most fundamental of our sacred duties: protecting the constitutional rights of the people of North Carolina from overreach by the General Assembly. Rather than passively deferring to the legislature, our responsibility is to determine whether challenged legislative acts, although presumed constitutional, encumber the constitutional rights of the people of our state. Here, our responsibility is to determine whether challenged apportionment maps encumber the constitutional rights of the people to vote on equal terms and to substantially equal voting power. This role of the courts is not counter to precedent but was one of the earliest recognized. In 1787, in *Bayard v. Singleton*, 1 N.C. (Mart.) 5 (1787), in a passage quoted by the dissenters, the Court held that it must step in to keep the General Assembly from taking away the state constitutional rights of the people, and "if the members of the General Assembly could do this, they might with equal authority . . . render themselves the Legislators of the State for life, without any further election of the people[,]" *id.* at 7. This we cannot countenance.

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4. The 2021 enacted plans for Congress, the North Carolina House of Representatives, and the North Carolina Senate have been attached in an appendix for ease of reference.

¶ 8 The dissenters here do not challenge in any way, as Legislative Defendants presented no evidence at trial to disprove, the extensive findings of fact of the trial court, to the effect that the enacted plans are egregious and intentional partisan gerrymanders, designed to enhance Republican performance, and thereby give a greater voice to those voters than to any others. Instead, they attempt at some length to justify our taking no action to correct the constitutional violations or to ignore them altogether. For example, while acknowledging that the "right to vote *on equal terms* is a fundamental right," citing *Northampton Cnty. Drainage Dist. No. One v. Bailey*, 326 N.C. 742, 747 (1990) (emphasis by the dissent), the dissent asserts, contrary to the findings and the extensive evidence at the trial and with no citation to the record or other authority, that "partisan gerrymandering has no significant impact upon the right to vote on equal terms."

¶ 9 Our contrary view is the beating heart of this case. Accordingly, we must act as a Court to make sure that the rights of the people are treated with proper respect. In so doing, we are protecting the individual rights of voters to cast votes that matter equally, as guaranteed by our constitution in article I, sections 10, 12, 14, and 19:

> Sec. 10. Free elections.
>
> All elections shall be free.
>
> Sec. 12. Right of assembly and petition.
>
> The people have a right to assemble together to consult for their common good, to instruct their representatives, and to apply to the General Assembly for redress of grievances; . . . .
>
> Sec. 14. Freedom of speech and press.
>
> Freedom of speech and of the press are two of the great bulwarks of liberty and therefore shall never be restrained, but every person shall be held responsible for their abuse.
>
> Sec. 19. Law of the land; equal protectio\n of the laws.
>
> . . . No person shall be denied the equal protection of the laws; . . . .

N.C. Const. art. I, §§ 10, 12, 14, 19. We ground our decision in the text, structure, history, and intent of these provisions from the Declaration of Rights.

¶ 10 Despite the dissenters' repeated assertions, we seek neither proportional representation for members of any political party, nor to guarantee representation to any particular group. We are only upholding the rights of individual voters as guaranteed by our state constitution. As the dissenters have noted, in *Deminski* and *Corum*, this Court has recently recognized and even expanded the role of the Court to interpret and protect individual rights enumerated in the state constitution.

¶ 11 In this opinion, we give as much direction as appropriate to the General Assembly while fully respecting their authority to proceed first in the effort to draw maps that meet constitutional standards. Should they be unable to do so or if they produce maps that fail to protect the constitutional rights of the people, the trial court may select maps by the process it deems best, subject to our review, in accordance with the timeline already set out in our order of 4 February 2022.

I. Factual and Procedural Background

A. Redistricting Process

¶ 12 Article II, sections 3 and 5 of the North Carolina Constitution require that "[t]he General Assembly, at the first regular session convening after the return of every decennial census of population taken by order of Congress, shall revise the [legislative] districts and the apportionment of Senators [and Representatives] among those districts, subject to [certain] requirements[.]" N.C. Const. art. II § 3, 5. This redistricting authority is subject to limitations contained in the North Carolina Constitution, including both in the provisions allocating the initial redistricting responsibility to the General Assembly and in other provisions which have been interpreted by this Court to be applicable to the redistricting process. *See*, *e.g.*, *Stephenson*, 355 N.C. 354; *Blankenship v. Bartlett*, 363 N.C. 518 (2009). Additionally, the General Assembly must comply with all applicable provisions of federal law, including federal one-person-one-vote requirements and the Voting Rights Act, under Article I, sections 3 and 5 of the North Carolina Constitution. *See id.*

¶ 13 On 12 February 2021, the United States Census Bureau announced that its release of the 2020 census data would be delayed by the COVID-19 pandemic and would not be released until the fall of 2021. On 24 February 2021, North Carolina State Board of Elections Executive Director Karen Brinson Bell recommended to the House Elections Law and Campaign Finance Reform Committee that the 2022 primary elections be delayed to a 3 May primary, 12 July second primary, and 8 November general election. The Committee, however, "did not follow

the Board's recommendations to delay the primaries and provide more time for the redistricting cycle." The full census data was ultimately released to the states on 12 August 2021.

¶ 14 On 5 August 2021, the General Assembly's Senate Committee on Redistricting and Elections and House Redistricting Committee convened a Joint Meeting to begin the discussion on the redistricting process. On 9 August 2021, the chairs of the Joint Redistricting Committee released its "2021 Joint Redistricting Committee Proposed Criteria." During the subsequent public comment period and committee debate, several citizens (including counsel for plaintiff Common Cause) and legislators (including Senate Minority Leader Dan Blue Jr.) urged the committee to change the criteria, which mandated a "race-blind" approach, to allow for the consideration of racial data in order to ensure compliance with the Voting Rights Act (VRA). The Joint Committee rejected these proposals. On 12 August 2021, the Joint Committee adopted the final redistricting criteria (Adopted Criteria), which were as follows:

> **Equal Population.** The Committees will use the 2020 federal decennial census data as the sole basis of population for the establishment of districts in the 2021 Congressional, House, and Senate plans. The number of persons in each legislative district shall be within plus or minus 5% of the ideal district population, as determined under the most recent federal decennial census. The number of persons in each congressional district shall be as nearly as equal as practicable, as determined under the most recent federal decennial census.
>
> **Contiguity.** No point contiguity shall be permitted in any 2021 Congressional, House, and Senate plan. Congressional, House, and Senate districts shall be compromised of contiguous territory. Contiguity by water is sufficient.
>
> **Counties, Groupings, and Traversals.** The Committees shall draw legislative districts within county groupings as required by *Stephenson v. Bartlett*, 355 N.C. 354, 562 S.E.2d 377 (2002) (*Stephenson I*), *Stephenson v. Bartlett*, 357 N.C. 301, 582 S.E.2d 247 (2003) (*Stephenson II*), *Dickson v. Rucho*, 367 N.C. 542, 766 S.E.2d 238 (2014) (*Dickson I*) and *Dickson v. Rucho*, 368 N.C. 481, 781 S.E.2d 460 (2015) (*Dickson II*).

Within county groupings, county lines shall not be traversed except as authorized by *Stephenson I*, *Stephenson II*, *Dickson I*, and *Dickson II*.

Division of counties in the 2021 Congressional plan shall only be made for reasons of equalizing population and consideration of double bunking. If a county is of sufficient population size to contain an entire congressional district within the county's boundaries, the Committees shall construct a district entirely within that county.

Racial Data. Data identifying the race of individuals or voters *shall not* be used in the construction or consideration of districts in the 2021 Congressional, House, and Senate plans. The Committees will draw districts that comply with the Voting Rights Act.

VTDs. Voting districts ("VTDs") should be split only when necessary.

Compactness. The Committees shall make reasonable efforts to draw legislative districts in the 2021 Congressional, House and Senate plans that are compact. In doing so, the Committee may use as a guide the minimum Reock ("dispersion") and Polsby-Popper ("permitter") scores identified by Richard H. Pildes and Richard G. Neimi in *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After Shaw v. Reno*, 92 Mich. L. Rev. 483 (1993).

Municipal Boundaries. The Committees may consider municipal boundaries when drawing districts in the 2021 Congressional, House, and Senate plans.

Election Data. Partisan considerations and election results data *shall not* be used in the drawing of districts in the 2021 Congressional, House, and Senate plans.

Member Residence. Member residence may be considered in the formation of legislative and congressional districts.

Community Consideration. So long as a plan complies with the foregoing criteria, local knowledge

> of the character of communities and connections between communities may be considered in the formation of legislative and congressional districts.

¶ 15 On 5 October 2021, after thirteen public hearings across the state during the month of September, the House and Senate redistricting committees convened separately to begin the redistricting process. The committee chairs announced that beginning on 6 October 2021, computer stations would be available in two rooms for legislators to draw potential maps. These stations would be open during business hours, and both the rooms and the screens of the station computers would be live-streamed and available for public viewing while the stations were open. In an apparent effort to show transparency and instill public confidence in the redistricting process, Legislative Defendants "requir[ed] legislators to draw and submit maps using software on computer terminals in the redistricting committee hearing rooms. That software did not include political data, and the House and Senate Committees would only consider maps drawn and submitted on the software." "According to Representative [Destin] Hall, [Chair of the House Standing Committee on Redistricting,] the Committee and 'the House as a whole' would 'only consider maps that are drawn in this committee room, on one of the four stations.' "

¶ 16 However, "[w]hile the four computer terminals in the committee hearing room did not themselves have election data loaded onto them, the House and Senate Committees did not actively prevent legislators and their staff from relying on pre-drawn maps created using political data, or even direct consultation of political data." For instance, between sessions at the public computer terminals, Representative Hall, who "personally drew nearly all of the House map [later] enacted[,] . . . met with his then-General Counsel . . . and others about the map-drawing in a private room adjacent to the public map-drawing room." During these meetings, and sometimes while sitting at the public terminals, Representative Hall viewed "concept maps" created on an unknown computer and using unknown software and data.[5] Further, "Representative Hall and Senator Ralph E. Hise, Jr., one of the Chairs of the Senate Redistricting Committee, confirmed that no restrictions on the use of outside maps were ever implemented or enforced."

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5. On 21 December 2021, during trial, the court ordered Legislative Defendants to produce these "concept maps" and related materials. Legislative Defendants never did so. Instead, Legislative Defendants asserted in verified interrogatory responses that "the concept maps that were created were not saved, are currently lost[,] and no longer exist."

¶ 17 Proposed versions of the congressional and House maps were filed on 28 and 29 October 2021 and then passed several readings in each chamber without alteration. A proposed version of the Senate map was filed on 29 October 2021. On 1 November 2021 the Senate Redistricting Committee adopted a substitute map. On 2 November 2021, the Committee adopted two amendments offered by Senator Natasha Marcus and Senator Ben Clark, respectively. On 3 and 4 November 2021, the final versions of each map passed several readings in each chamber without further alteration.

¶ 18 On 4 November 2021, the congressional, House, and Senate reapportionment maps were ratified into law as S.L. 2021-174, S.L. 2021-175, and S.L. 2021-173, respectively. Each map passed along strict party-line votes in each chamber.

B. Litigation

¶ 19 On 16 November 2021, plaintiffs North Carolina League of Conservation Voters, Inc., Henry M. Michaux Jr., Dandrielle Lewis, Timothy Chartier, Talia Fernos, Katherine Newhall, R. Jason Parsley, Edna Scott, Roberta Scott, Yvette Roberts, Jereann King Johnson, Reverend Reginald Wells, Yarbrough Williams Jr., Reverend Deloris L. Jerman, Viola Ryals Figueroa, and Cosmos George (NCLCV Plaintiffs) filed a complaint against Legislative Defendants (Civil Action No. 21 CVS 015426) contemporaneously with a Motion for Preliminary Injunction pursuant to Rules 7(b) and 65 of the North Carolina Rules of Civil Procedure. NCLCV Plaintiffs' complaint alleged

> that the 2021 districting plans for Congress, the North Carolina Senate, and the North Carolina House of Representatives violate the North Carolina Constitution by establishing severe partisan gerrymanders in violation of the Free Elections Clause, Art. I, § 10, the Equal Protection Clause, Art. I, § 19, and the Freedom of Speech and Assembly Clauses, Art. I, §§ 12, 14; by engaging in racial vote dilution in violation of the Free Elections Clause, Art. I, § 10, and the Equal Protection Clause, Art. I, § 19; and by violating the Whole County Provisions, Art. II, §§ 3(3), 5(3).

¶ 20 On 18 November 2021, plaintiffs Rebecca Harper, Amy Clare Oseroff, Donald Rumph, John Anthony Balla, Richard R. Crews, Lily Nicole Quick, Gettys Cohen Jr., Shawn Rush, Mark S. Peters, Kathleen Barnes, Virginia Walters Brien, Eileen Stephens, Barbara Proffitt, Mary Elizabeth Voss,

Chenita Barber Johnson, Sarah Taber, Joshua Perry Brown, Laureen Floor, Donald M. MacKinnon, Ron Osborne, Ann Butzner, Sondra Stein, Bobby Jones, Kristiann Herring, and David Dwight Brown (Harper Plaintiffs) filed a complaint against Legislative Defendants (Civil Action No. 21 CVS 500085) and a Motion for Preliminary Injunction pursuant to Rule 65 and N.C.G.S. § 1-485. On 13 December 2021, Harper Plaintiffs amended their complaint. Harper Plaintiffs' complaint "allege[d] that the 2021 districting plans for Congress, the North Carolina Senate, and the North Carolina House of Representatives violate the North Carolina Constitution—namely its Free Elections Clause, Art. I, § 10; its Equal Protection Clause, Art. I, § 19; and its Freedom of Speech and Freedom of Assembly Clauses, Art. I, §§ 12, 14."

¶ 21 On 19 and 22 November 2021, "the NCLCV and Harper actions, respectively, were assigned to [a] three-judge panel of Superior Court, Wake County, pursuant to N.C.G.S. § 1-267.1." On 3 December 2021, the panel consolidated the two cases pursuant to Rule 42 of the North Carolina Rules of Civil Procedure and heard NCLCV Plaintiffs' and Harper Plaintiffs' motions for preliminary injunction. On 3 December 2021, "after considering the extensive briefing and oral arguments on the motions, the [panel] denied [the parties'] Motion for Preliminary Injunction."

¶ 22 NCLCV Plaintiffs and Harper Plaintiffs subsequently filed a notice of appeal with the North Carolina Court of Appeals. On 6 December 2021, "[a]fter initially partially granting a temporary stay of the candidate filing period for the 2022 elections, the North Carolina Court of Appeals denied the requested temporary stay." NCLCV Plaintiffs and Harper Plaintiffs subsequently filed several items with this Court: two petitions for discretionary review prior to determination by the Court of Appeals; a motion to suspend appellate rules to expedite a decision; and a motion to suspend appellate rules and expedite schedule. On 8 December 2021, this Court granted a preliminary injunction and temporarily stayed the candidate filing period "until such time as a final judgment on the merits of plaintiffs' claims, including any appeals, is entered and remedy, if any is required, has been ordered." "The Order further directed [the panel] to hold proceedings on the merits of NCLCV Plaintiffs' and Harper Plaintiffs' claims and provide a written ruling on or before [11 January 2022]."

¶ 23 On 13 December 2021, the panel "entered a scheduling order . . . expediting discovery and scheduling [a] trial to commence on [3 January 2022]." That same day, "Common Cause moved to intervene in the[ ] consolidated cases as a plaintiff, challenging the process undertaken by the General Assembly to create and enact the state legislative and

congressional districts as a product of intentional racial discrimination undertaken for the purpose of racial vote dilution and to further the legislature's partisan gerrymandering goals." On 15 December 2021, the panel granted plaintiff Common Cause's motion. On 16 December 2021, plaintiff Common Cause filed its complaint, alleging

> that the 2021 districting plans for Congress, the North Carolina Senate, and the North Carolina House of Representatives violate the North Carolina Constitution—namely its Equal Protection Clause, Art. I, § 19; its Free Elections Clause, Art. I, § 10; and its Freedom of Speech and Freedom of Assembly Clauses, Art. I, §§ 12, 14—and seeks, among other relief, a declaratory ruling under the Declaratory Judgment Act.

¶ 24 On 17 December 2021 "Defendants Representative Destin Hall, in his official capacity as Chairman of the House Standing Committee on Redistricting; Senators Ralph E. Hise, Jr., Warren Daniel, Paul Newton, in their official capacities as Co-Chairmen of the Senate Committee on Redistricting and Elections; Philip E. Berger, in his official capacity as President Pro Tempore of the North Carolina Senate; Timothy K. Moore, in his official capacity as Speaker of the North Carolina House of Representatives (hereinafter "Legislative Defendants") filed their Answer to NCLCV Plaintiffs' Complaint." Legislative Defendants asserted numerous affirmative defenses, including, *inter alia*, that: (1) granting the requested relief will violate the VRA and the Constitution of the United States; (2) granting the requested relief will violate the rights of Legislative Defendants, Republican voters, and Republican candidates under the United States and North Carolina Constitutions; (3) the court cannot lawfully prevent the General Assembly from considering partisan advantage and incumbency protection; (4) plaintiffs seek to require districts where Democratic candidates are elected where such candidates are not currently elected; (5) plaintiffs' claims are barred by the doctrine of laches; (6) plaintiffs have failed to state claims upon which relief can be granted; (7) plaintiffs seek a theory of liability that will act to impose a judicial amendment to the North Carolina Constitution; (8) the only limitations on redistricting legislation are found in article II, sections 2, 3, 4, and 5 of the North Carolina Constitution; (9) plaintiffs' request for a court-designed redistricting plan violates the separation of powers doctrine; (10) plaintiffs' claims are nonjusticiable and fail to provide judicially manageable standards; (11) plaintiffs lack standing; and (12) plaintiffs have unclean hands and therefore are not entitled to equitable relief.

¶ 25 On 17 December 2021, defendants North Carolina State Board of Elections and its members Damon Circosta, in his official capacity as Chairman of the Board of Elections; Stella Anderson, in her official capacity as Secretary of the Board of Elections; and Jeff Carmon III, Stacy Eggers IV, and Tommy Tucker, in their official capacities as Members of the Board of Elections filed their answer to Harper Plaintiffs' amended complaint. That same day, these same defendants along with defendant State of North Carolina and defendant Karen Brinson Bell, in her official capacity as Executive Director of the North Carolina State Board of Elections filed their answer to NCLCV Plaintiffs' complaint.

¶ 26 "Throughout the intervening and expedited two-and-a-half-week period reserved for discovery, the parties filed and the [c]ourt expeditiously ruled upon over ten discovery-related motions . . . ." "Plaintiffs collectively designated eight individuals as expert witnesses and submitted accompanying reports[, and] Legislative Defendants designated two individuals as expert witnesses and submitted accompanying reports." The parties' discovery period closed on 31 December 2021, and a three-and-one-half day trial commenced on 3 January 2022.

C. Trial Court's Judgment

1. Findings of Fact

¶ 27 First, the trial court made extensive factual findings based on the evidence presented at trial. In short, these factual findings confirmed plaintiffs' assertions that each of the three enacted maps were "extreme partisan outliers" and the product of "intentional, pro-Republican partisan redistricting."

a. Plaintiffs' Extreme Partisan Gerrymandering Claims

¶ 28 After reviewing the factual and procedural history summarized above, the trial court made factual findings regarding plaintiffs' constitutional claims of extreme partisan gerrymandering. First, the court considered whether the evidence presented showed partisan intent and effects. Addressing direct evidence, the court found that "[t]here is no express language showing partisan intent within the text of the session laws establishing the Enacted Plans" and noted that "[t]he Adopted Criteria expressly forbade partisan considerations and election results data from being used in drawing districts in the Enacted Plans." Further, the court noted that "[n]o elections have been conducted under the Enacted Plans to provide direct evidence of partisan effects that could be attributed as a result of the Enacted Plans." However, the lack of direct evidence of intent did not stop the trial court from determining that

the enacted plans were intentionally constructed to yield a consistent partisan advantage for Republicans in a range of electoral environments.

¶ 29 Instead, the trial court turned to circumstantial evidence of partisan intent and effects. After surveying the recent history of partisan redistricting litigation and legislation and the neutral districting criteria Legislative Defendants claimed they had adhered to, the court reviewed plaintiffs' and Legislative Defendants' expert analyses of the enacted plans. The court's extensive factual findings regarding each expert's analysis are summarized below.

¶ 30 ***Harper Plaintiffs' Expert Dr. Jowei Chen.*** "Dr. Chen was qualified and accepted as an expert at trial in the fields of redistricting, political geography, simulation analyses, and geographic information systems." "Dr. Chen analyzed the partisan bias of the enacted congressional plan on a statewide and district-by-district basis." Specifically, Dr. Chen analyzed the congressional plans using

> various computer simulation programming techniques that allow him to produce a large number of nonpartisan districting plans that adhere to traditional districting criteria using U.S. Census geographies as building blocks. Dr. Chen's simulation process ignores all partisan and racial considerations when drawing districts, and the computer simulations are instead programmed to draw districting plans following various traditional districting goals, such as equalizing population, avoiding county and Voting Tabulation District (VTD) splits, and pursuing geographic compactness. By randomly generating a large number of districting plans that closely adhere to these traditional districting criteria, Dr. Chen assesses an enacted plan drawn by a state legislature and determines whether partisan goals motivated the legislature to deviate from these traditional districting criteria. Specifically, by holding constant the application of nonpartisan, traditional districting criteria through the simulations, he is able to determine whether the enacted plan could have been the product of something other than partisan considerations.

¶ 31 "Based on his analysis, Dr. Chen concluded that partisan intent predominated over the 2021 Adopted Criteria in drawing the adopted congressional plan, and that the Republican advantage in the enacted plan

cannot be explained by North Carolina's political geography or adherence to the Adopted Criteria."

¶ 32 ***Harper Plaintiffs' Expert Dr. Christopher Cooper.*** "Dr. Cooper was qualified and accepted as an expert at trial in the field of political science with a specialty in the political geography and political history of North Carolina." Using statewide voting data from the 2020 election, "Dr. Cooper analyzed the 2021 Congressional Plan [and] the partisan effects of each district's boundaries." Based on Dr. Cooper's analysis, the court observed that "[a]lthough North Carolina gained an additional congressional seat as a result of population growth that came largely from the Democratic-leaning Triangle (Raleigh-Durham-Chapel Hill) and the Charlotte metropolitan areas, the number of anticipated Democratic seats under the enacted map actually decreases, with only three anticipated Democratic seats, compared with the five seats that Democrats won in the 2020 election." This decrease, the court observed, is enacted "by splitting the Democratic-leaning counties of Guilford, Mecklenburg, and Wake among three congressional districts each." The court further noted that "[t]here was no population-based reason" for these splits.

¶ 33 After reviewing Dr. Cooper's maps showing these redistricted congressional lines as compared to county boundaries and VTD boundaries, the court noted that "[t]he congressional district map is best understood as a single organism given that the boundaries drawn for a particular congressional district in one part of the state will necessarily affect the boundaries drawn for the districts elsewhere in the state." Accordingly, the court found "that the 'cracking and packing' of Democratic voters in Guilford, Mecklenburg, and Wake counties has 'ripple effects throughout the map.' "

¶ 34 Reviewing Dr. Cooper's analysis of a few specific congressional districts within the new map as exemplars, the court noted that "[t]he 2021 Congressional Plan places the residences of an incumbent Republican representative and an incumbent Democratic representative within a new, overwhelmingly Republican district, NC-11, 'virtually guaranteeing' that the Democratic incumbent will lose her seat." Similarly, the court observed that "[t]he 2021 Congressional Plan includes one district where no incumbent congressional representative resides . . . [which] 'overwhelmingly favors' the Republican candidate based on the district's partisan lean."

¶ 35 The court then found that the 2021 North Carolina House and Senate Plans "similarly benefit the Republican party." The court noted that "Legislative Defendants' exercise of . . . discretion in the Senate

and House 2021 Plans resulted in Senate and House district boundaries that enhanced the Republican candidates' partisan advantage, and this finding is consistent with a finding of partisan intent." Finally, the court noted Dr. Cooper's finding that the "partisan redistricting carried out across the State has led to a substantial disconnect between the ideology and policy preferences of North Carolina's citizenry and their representatives in the General Assembly."

¶ 36 ***Harper Plaintiffs and Plaintiff Common Cause's Expert Dr. Jonathan Mattingly.***

> Dr. Mattingly was qualified and accepted as an expert at trial in the fields of applied math, statistical science, and probability.
>
> . . . Dr. Mattingly used the Metropolis-Hasting Markov Chain Monte Carlo ("MCMC") Algorithm to create a representative set, or "ensemble," of 100,000 maps for the state legislative districts and 80,000 maps for congressional districts as benchmarks against which he could compare the enacted maps. The algorithm produced maps that accorded with traditional districting criteria. Dr. Mattingly tuned his algorithm to ensure that the nonpartisan qualities of the simulated maps were similar to the nonpartisan qualities of the enacted map with respect to compactness and, for his primary ensembles, municipality splits.

"After generating the sample of maps, Dr. Mattingly used votes from multiple prior North Carolina statewide elections reflecting a range of electoral outcomes to compare the partisan performance and characteristics of the 2021 Congressional Plan to the simulated plans."

¶ 37 The trial court found, "based upon Dr. Mattingly's analysis, that the Congressional map is the product of intentional, pro-Republican partisan redistricting." The court further determined that "[t]he Congressional map is 'an extreme outlier' that is 'highly non-responsive to the changing opinion of the electorate.' "

¶ 38 Regarding the North Carolina legislative districts, the court likewise found, "based upon Dr. Mattingly's analysis, that the State House and Senate plans are extreme outliers that 'systematically favor the Republican Party to an extent which is rarely, if ever, seen in the nonpartisan collection of maps.' " The court found that "[t]he intentional partisan redistricting in both chambers is especially effective in preserving

Republican supermajorities in instances in which the majority or the vast majority of plans in Dr. Mattingly's ensemble would have broken it."

¶ 39 Regarding the North Carolina House map, the court further found that "the enacted plan shows a systematic bias toward the Republican party, favoring Republicans in every single one of the 16 elections [Dr. Mattingly] considered." The court determined that the North Carolina House "map is also especially anomalous under elections where a non-partisan map would almost always give Democrats the majority in the House because the enacted map denied Democrats that majority. The probability that this partisan bias arose by chance, without an intentional effort by the General Assembly, is 'astronomically small.' " The court determined that

> [t]he North Carolina House maps show that they are the product of an intentional, pro-Republican partisan redistricting over a wide range of potential election scenarios. Elections that under typical maps would produce a Democratic majority in the North Carolina House give Republicans a majority under the enacted maps. Likewise, maps that would normally produce a Republican majority under nonpartisan maps produce a Republican supermajority under the enacted maps. Among every possible election that Dr. Mattingly analyzed, the partisan results were more extreme than what would be seen from nonpartisan maps. In every election scenario, Republicans won more individual seats tha[n] they statistically should under nonpartisan maps.
>
> . . . The 2021 House Plan's partisan bias creates firewalls protecting the Republican supermajority and majority in the House, and this effect is particularly robust when the Republicans are likely to lose the supermajority: the enacted plan sticks at 48 democratic seats or fewer, even in situations where virtually all of the plans in the nonpartisan ensemble would elect 49 Democratic seats or more.

¶ 40 Regarding the North Carolina Senate, the court found that

> the results are the same: the enacted plan is an outlier or extreme outlier in elections where Democrats win a vote share between 47.5% and 50.5%. This range is significant because many North Carolina elections

> have this vote fraction, and this is the range where the non-partisan ensemble shows that Republicans lose the super-majority. But the enacted map in multiple elections used in Dr. Mattingly's analysis sticks at less than 21 Democratic seats, preserving a [Republican] supermajority. Notably, the enacted map never favors the Democratic party in comparison to the non-partisan ensemble in a single one of the 16 elections that Dr. Mattingly considered.

¶ 41 The court then considered Dr. Mattingly's "cracking and packing" analysis of the congressional, House, and Senate maps. Here, the court found

> that cracking Democrats from the more competitive districts and packing them into the most heavily Republican and heavily Democratic districts is the key signature of intentional partisan redistricting and it is responsible for the enacted congressional plan's non-responsiveness when more voters favor Democratic candidates, as shown in [Dr. Mattingly's] charts. Across his 80,000 simulated nonpartisan plans, not a single one had the same or more Democratic voters packed into the three most Democratic districts—i.e., the districts Democrats would win no matter what—in comparison to the enacted plan. And not a single one had the same or more Republican voters in the next seven districts—i.e., the competitive districts—in comparison to the enacted plan.

¶ 42 The trial court found similar "cracking and packing" in the House maps, noting that "the enacted maps, as compared to the sample maps, there is an overconcentration of Democratic voters in the least Democratic districts and in the most Democratic districts." The court found that "the districts with the highest concentration of Democrats have far more Democratic voters than expected in nonpartisan maps, and threshold districts have far fewer Democratic voters than expected in nonpartisan maps." In contrast, the court found that

> [i]n the middle districts—between the 60th most Democratic seat and the 80th most democratic seat—the Democratic vote fraction in the enacted plan is far below the . . . nonpartisan plans. These are the seats that determine the supermajority line

> and the majority line (if Republicans win the 61st seat, they win the majority, and if they win the 72nd most Democratic seat, they win the supermajority). The [c]ourt [found] that the systematic depletion of Democratic votes in those districts signals packing, does not exist in the non-partisan ensemble, and is responsible for the map's partisan outlier behavior. Those Democrat[ic] votes are instead placed in the 90th to 105th most Democratic district[s], where they are wasted because those seats are already comfortably Democratic.

¶ 43 Regarding cracking and packing in the Senate maps, the court found that "the same structure appears where virtually all of the seats in the middle range that determines majority and supermajority control have abnormally few Democrats."

¶ 44 Next, the court determined that "a desire to prevent the pairing of incumbents cannot explain the extreme outlier behavior of the enacted plan."

¶ 45 The court also observed that the General Assembly selectively prioritized preserving municipalities within the maps, choosing to do so "only when doing so advantaged Republicans." "Put differently, prioritizing municipality preservation in the Senate plans appears to enable more maps that favor Republicans. By contrast, for the House plan, where the enacted map does not prioritize preserving municipalities, . . . prioritizing municipalities would not have favored the Republican party in comparison."

¶ 46 Finally, the court found that "[t]he partisan bias that Dr. Mattingly identified by comparing the enacted plans to his nonpartisan ensemble could not be explained by political geography or natural packing."

¶ 47 ***Harper Plaintiffs' Expert Dr. Wesley Pegden.*** "Dr. Pegden was qualified and accepted as an expert at trial in probability."

> In this case, Dr. Pegden used . . . outlier analysis to evaluate whether and to what extent the 2021 Plans were drawn with the intentional and extreme use of partisan considerations. To do so, using a computer program, Dr. Pegden began with the enacted plans, made a sequence of small random changes to the maps while respecting certain nonpartisan

> constraints, and then evaluated the partisan characteristics of the resulting comparison maps.

The trial court noted that "Dr. Pegden applied these constraints in a 'conservative' way, to 'avoid second-guessing the mapmakers' choices in how they implemented the districting criteria." The court observed that Dr. Pegden's algorithm repeated this process "billions or trillions of times": "begin[ning] with the enacted map, mak[ing] a small random change complying with certain constraints, and us[ing] historical voting data to evaluate the partisan characteristics of the resulting map."

¶ 48 Based on Dr. Pegden's analysis, the court found "that the enacted congressional plan is more favorable to Republicans than 99.9999% of the comparison maps his algorithm generated." Accordingly, the court determined that "the enacted congressional map is more carefully crafted to favor Republicans than at least 99.9999% of all possible maps of North Carolina satisfying the nonpartisan constraints imposed in [Dr. Pegden's] algorithm." In every "run" of the analysis, the court found, "the enacted congressional plan was in the most partisan 0.000031% of the approximately one trillion maps generated by making tiny random changes to the district's boundaries." "[I]f the districting had not been drawn to carefully optimize its partisan bias," the court stated, "we would expect naturally that making small random changes to the districting would not have such a dramatic and consistent partisan effect."

¶ 49 The court found similar extremes regarding North Carolina's legislative districts. Regarding the North Carolina House, the court determined based on Dr. Pegden's analysis that "the enacted House map was more favorable to Republicans than 99.99999% of the comparison maps generated by his algorithm making small random changes to the district boundaries." Accordingly, the court found "that the enacted map is more carefully crafted for Republican partisan advantage than at least 99.9999% of all possible maps of North Carolina satisfying [the nonpartisan] constraints." Regarding the North Carolina Senate, the court determined "that the enacted Senate map was more favorable to Republicans than 99.9% of comparison maps." Accordingly, the court found "that the enacted Senate map is more carefully crafted for Republican partisan advantage than at least 99.9% of all possible maps of North Carolina satisfying [the nonpartisan] constraints." "These results," the court determined, "cannot be explained by North Carolina's political geography."

¶ 50 ***NCLCV Plaintiffs' Expert Dr. Moon Duchin.*** "Dr. Duchin was qualified and accepted as an expert at trial in the field of redistricting." The trial court noted that Dr. Duchin's analysis "uses a Close-Votes-Close-Seats

principle, [in which] 'an electoral climate with a roughly 50-50 split in partisan preference should produce a roughly 50-50 representational split.' " The trial court observed that "Close-Votes-Close-Seats is not tantamount to a requirement for proportionality. Rather, it is closely related to the principle of Majority Rule, which is where 'a party or group with more than half of the votes should be able to secure more than half of the seats.' "

¶ 51 Based on Dr. Duchin's analysis, the trial court found "that the political geography of North Carolina today does not lead only to a district map with partisan advantage given to one political party." Rather, the court determined, "[t]he Enacted Plans behave as though they are built to resiliently safeguard electoral advantage for Republican candidates." The results of Dr. Duchin's analysis, the court found, "reveal a partisan skew in close elections." For instance, the court determined that in a recent statewide election in which the Republican candidate won by less than 500 total votes,

> [t]he Enacted Plans would have converted that near tie at the ballot box into a resounding Republican victory in seat share across the board: Republicans would have won 10 (71%) of North Carolina's congressional districts, 28 (56%) of North Carolina's Senate districts, and 68 (57%) of North Carolina's House districts. Nor is that election unusual.

In fact, the court found "that in every single one of the 52 elections decided within a 6-point margin, the Enacted Plans give Republicans an outright majority in the state's congressional delegation, the State House, and the State Senate." "This is true[,]" the court noted, "even when Democrats win statewide by clear margins." Or, more plainly, "more Democratic votes usually do not mean more [D]emocratic seats." Accordingly, the trial court determined that "[t]he Enacted Plans resiliently safeguard electoral advantage for Republican candidates. This skewed result is not an inevitable feature of North Carolina's political geography." Rather, the court found, "[t]he plan is designed in a way that safeguards Republican majorities in any plausible election outcome, including those where Democrats win more votes by clear margins."

¶ 52 Next, the court specified that these findings were consistent across all three of the enacted maps. First, regarding the enacted congressional plan, the court found that "a clear majority of Democratic votes does not translate into a majority of seats." The court determined "that

the Enacted Congressional Plan achieves these results by the familiar means of 'packing' and 'cracking' Democratic voters across the state."

¶ 53 Second, the court found that

> [t]he Enacted Senate Plan effectuates the same sort of partisan advantage as the Enacted Congressional Plan. The Enacted Senate Plan consistently creates Republican majorities and precludes Democrats from winning a majority in the Senate even when Democrats win more votes. Even in an essentially tied election or a close Democratic victory, the Enacted Senate Plan gives Republicans a Senate majority, and sometimes even a veto-proof 30-seat majority. And that result holds even when Democrats win by larger margins.

"As with the Enacted Congressional Plan, the [c]ourt [found] that the Enacted Senate Plan achieves its partisan goals by packing Democratic voters into a small number of Senate districts and then cracking the remaining Democratic voters by splitting them across other districts . . . ."

¶ 54 Third, the court likewise determined that

> the Enacted House Plan is also designed to systematically prevent Democrats from gaining a tie or a majority in the House. In close elections, the Enacted House Plan always gives Republicans a substantial House majority. That Republican majority is resilient and persists even when voters clearly express a preference for Democratic candidates.

"As with the Enacted Congressional Plan and the Enacted Senate Plan, the [c]ourt [found] that the Enacted House Plan achieves this resilient pro-Republican bias by the familiar mechanisms of packing and cracking Democratic voters . . . ."

¶ 55 ***Plaintiff Common Cause's Expert Dr. Daniel Magleby.*** "Dr. Magleby was qualified and accepted as an expert at trial in the fields of political geography and legislative and congressional elections, mathematical modeling and political phenomena and measurements of gerrymandering." Like plaintiffs' previous experts, Dr. Magleby "used a peer-reviewed algorithm . . . to generate a set of unbiased maps against which he compared the enacted House, Senate, and congressional maps." "Dr. Magleby . . . used this algorithm to develop a set of between

20,000 and 100,000 maps, from which he took a random sample of 1,000 maps that roughly met the North Carolina Legislature's 2021 criteria for drawing districts." Using voting data from statewide races between 2016 and 2020, Dr. Magleby compared expected performance under the enacted maps with performance in the neutral sample maps. More specifically, Dr. Magleby's analysis utilized "median-mean" calculations. Median-mean calculations compare "the average Democratic vote share" in districts statewide with "the median Democratic vote share" in those districts "by lining up the enacted . . . districts from least Democratic to most Democratic and identifying the districts that fell in the middle. In a nonpartisan map, a low median-mean difference is expected."

¶ 56 Based on Dr. Magleby's analysis, the trial court found "that the level of partisan bias in seats in the House maps went far beyond expected based on the neutral political geography of North Carolina." Specifically, the court determined "that the median-mean bias in the enacted maps was far more extreme than expected in nonpartisan maps." In fact, the court found, "[n]o randomly generated map had such an extreme median-mean share—meaning that . . . no simulated map . . . was as extreme and durable in terms of partisan advantage."

¶ 57 ***Legislative Defendants' Expert Dr. Michael Barber.***

> Dr. Barber was qualified and accepted as an expert at trial in the areas of political geography, partisanship statistical analysis, and redistricting.
>
> . . . Dr. Barber analyzed the Enacted Plans, as well as NCLCV Plaintiffs' Optimized Maps, in the context of the partisan gerrymandering claims brought by Plaintiffs challenging the North Carolina Senate and North Carolina House of Representatives Districts.
>
> . . . Dr. Barber utilized a publicly-available and peer-reviewed redistricting simulation algorithm to generate 50,000 simulated district maps in each county grouping in which there are multiple districts in both the North Carolina House of Representatives and the North Carolina Senate. In Dr. Barber's simulations, the model generates plans that adhere to the restrictions included in the North Carolina Constitution as well as the *Stephenson* criteria of roughly equal population, adherence to county cluster boundaries, minimization of county traversals within clusters, and

> geographic compactness. Only after the simulated district plans are complete is the partisan lean of each district in each plan computed . . . .

¶ 58 Although Dr. Barber was qualified as an expert, the trial court found that "Dr. Barber's method is not without limitations." "Because it is impossible for a redistricting algorithm to account for all non-partisan redistricting goals[,]" the court noted, "differences between the range of his simulated plans and the 2021 Plans may be the result of non-partisan goals the algorithm failed to account for, rather than of partisan goals." The court observed that "under Dr. Barber's analysis, it is plausible that the 2021 Plans were prepared without partisan data or considerations." The court noted Dr. Barber's subsequent conclusion that "the advantage between the expected Republican seat share in the state legislature compared to the statewide Republican vote share in the recent past is more due to geography than partisan activity by Republican map drawers." Notably, the court did not adopt Dr. Barber's findings as its own as it did for plaintiffs' experts and later explicitly rejected his conclusions regarding the impact of political geography on the enacted maps.

¶ 59 ***Legislative Defendants' Expert Dr. Andrew Taylor.*** "Dr. Taylor was qualified and accepted as an expert at trial in the areas of political science, political history of North Carolina[ ] and its constitutional provisions, and the comparative laws and Constitutions in other states and jurisdictions." The trial court reviewed Dr. Taylor's analysis of the enacted maps under political science principles, including noting that "in political science, an election is generally regarded as 'equal' so long as '[e]ach person has one vote to elect one legislator who has one vote in the legislature,' and departures even from that ideal are tolerated." Likewise, the court noted Dr. Taylor's opinion that "[i]n political science, equal outcomes are not generally accepted as a necessary facet of equal elections, administering such a rule would seem to be unworkable, and voting is not a feature of party participation but of individual participation as a citizen." The court further noted Dr. Taylor's opinion that "purportedly 'fair' redistricting plans are not understood in the political-science field as germane to free speech, [because free speech] can occur regardless of the shapes and sizes of districts." "For many of these reasons," the court noted, "measuring gerrymanders can be elusive, problematic, and beyond the consensus of political scientists."

¶ 60 The trial court also noted Dr. Taylor's opinion that the "significant change in North Carolina's political geography over the past thirty years . . . 'is not the result of redistricting[,]' " but is instead "a function of slow social and economic forces, changes in the state's citizenry, and party

ideology." As with Dr. Barber's similar conclusion noted above, the trial court again later explicitly rejected Dr. Taylor's conclusions regarding the impact of political geography on the enacted maps.

¶ 61 ***Legislative Defendants' Rebuttal Expert Sean Trende.*** "Mr. Trende was qualified and accepted as an expert at trial in the areas of political science, redistricting, drawing redistricting maps[,] and analyzing redistricting maps." The trial court noted that Mr. Trende used color-coded maps of North Carolina counties "noting the number of counties in which a majority of voters voted for the Republican presidential candidate in the past decade (between 70 and 76 counties) and whether the Republican candidate performed better in a county than nationally." It is unclear how, if at all, the trial court considered Mr. Trende's testimony. This concluded the trial court's review of the expert testimony.

¶ 62 After considering the analysis of each expert, the trial court engaged in a district-by-district analysis of each of the three enacted maps: those for the North Carolina Senate, North Carolina House, and Congress, respectively.

¶ 63 ***North Carolina Senate Districts.*** The trial court found that the following North Carolina Senate district groupings minimized Democratic districts and maximized safe Republican districts through the "packing" and "cracking" of Democratic voters as the "result of intentional, pro-Republican partisan redistricting": the Granville-Wake Senate County Grouping; the Cumberland-Moore Senate County Grouping; the Guilford-Rockingham Senate County Grouping; the Forsyth-Stokes Senate County Grouping; the Iredell-Mecklenburg Senate County Grouping; the Northeastern Senate County Grouping (Bertie County, Camden County, Currituck County, Dare County, Gates County, Hertford County, Northampton County, Pasquotank County, Perquimans County, Tyrrell County, Carteret County, Chowan County, Halifax County, Hyde County, Martin County, Pamlico County, Warren County, and Washington County); and the Buncombe-Burke-McDowell Senate County Grouping. The trial court did not find any of the Senate district groupings to not be the result of intentional, pro-Republican redistricting through packing and cracking.

¶ 64 ***North Carolina House of Representatives Districts.*** The trial court found that the following North Carolina House district groupings minimized Democratic districts and maximized safe Republican districts through the "packing" and "cracking" of Democratic voters as the "result of intentional, pro-Republican partisan redistricting": the Guilford

House County Grouping; the Buncombe House County Grouping; the Mecklenburg House County Grouping; the Pitt House County Grouping; the Durham-Person House County Grouping; the Forsyth-Stokes House County Grouping; the Wake House County Grouping; the Cumberland House County Grouping; and the Brunswick-New Hanover House County Grouping. Notably, however, the trial court found the Duplin-Wayne House County Grouping and the Onslow-Pender House County Grouping "to not be the result of intentional, pro-Republican partisan redistricting."

¶ 65 ***North Carolina Congressional Districts.*** Next, the trial court found "that the 2021 Congressional plan is a partisan outlier intentionally and carefully designed to maximize Republican advantage in North Carolina's Congressional delegation." The court found that the enacted congressional map "fails to follow and subordinates the Adopted Criteria's requirement[s]" regarding splitting counties and VTDs. Further, the court found

> that the enacted congressional plan fails to follow, and subordinates, the Adopted Criteria's requirement to draw compact districts. The [c]ourt [found] that the enacted congressional districts are less compact than they would be under a map-drawing process that adhered to the Adopted Criteria and prioritized the traditional districting criteria of compactness.

Further, "when compared to the 1,000 computer-simulated plans[,]" the court found that "the enacted congressional plan is a statistical outlier" in regard to the total number of Republican-favoring districts it creates.

¶ 66 Next, the court noted four types of analyses in particular that confirm the "extreme partisan outcome" of the congressional map that "cannot be explained by North Carolina's political geography or by adherence to Adopted Criteria": (1) "mean-median difference" analysis; (2) "efficiency gap" analysis ("measur[ing] . . . the degree to which more Democratic or Republican votes are wasted across an entire districting plan"); (3) "the lopsided margins test"; and (4) "partisan symmetry" analysis. Based on these methods, the trial court found "that the enacted congressional plan subordinates the Adopted Criteria and traditional redistricting criteria for partisan advantage."

¶ 67 Next, the trial court considered "whether the congressional plan is a statistical partisan outlier at the regional level." Here, the court found "that the enacted congressional plan's districts in each region examined exhibit[ed] political bias when compared to the computer-simulated

districts in the same regions." These included the Piedmont Triad area, the Research Triangle area, and the Mecklenburg County area. "The [c]ourt [found] that the packing and cracking of Democrats in [these regions] could not have resulted naturally from the region's political geography or the districting principles required by the Adopted Criteria." "The enacted congressional map[,]" the court determined, "was therefore designed in order to accomplish the legislature's predominant partisan goals." Later, the court again confirmed "that the enacted congressional plan's partisan bias goes beyond any 'natural' level of electoral bias caused by North Carolina's political geography or the political composition of the state's voters, and this additional level of partisan bias . . . can be directly attributed to the map-drawer's intentional efforts to favor the Republican Party."

¶ 68 Next, as it did for the North Carolina House and Senate districts, the trial court engaged in a district-by-district analysis of all fourteen enacted congressional districts. After individual analysis, the court found all fourteen districts "to be the result of intentional, pro-Republican partisan redistricting."

¶ 69 Finally, the trial court noted that "elections are decided by any number of factors." Statistical analyses, the court observed, "treat the candidates as inanimate objects" and "assume that voters will vote along party lines." In essence, the court doubted that a computer analysis could ever "take the human element out of the human." "Notwithstanding these doubts," though, the court "conclude[d] based upon a careful review of all of the evidence that the Enacted Maps are a result of intentional, pro-Republican partisan redistricting." This concluded the court's factual findings regarding plaintiffs' partisan gerrymandering claims.

b. Plaintiffs' Intentional Racial Discrimination and Racial Vote Dilution Claims

¶ 70 Second, the trial court considered plaintiffs' intentional racial discrimination and racial vote dilution claims. Beginning with intentional racial discrimination, the court found that "[t]here is no express language showing discriminatory intent within the text of the session laws establishing the Enacted Plans." Next, the court noted plaintiffs' circumstantial evidence of racial discrimination, including testimony from plaintiff Common Cause's expert James Leloudis II, regarding the historical connection between North Carolina's past racial gerrymandering practices and the current plans.

¶ 71 The trial court then considered plaintiffs' racial vote dilution claims. After reviewing the evidence presented by plaintiffs' and Legislative

Defendants' experts on this matter, the court found that "[r]ace was not the predominant, overriding factor in drawing the districts in the Enacted Plans." The court found that "[t]he General Assembly did not subordinate traditional race-neutral districting principles, including compactness, contiguity, and respect for political subdivisions to *racial* considerations." Accordingly, the court found that a district-by-district analysis of racial vote dilution, as it had previously performed for the extreme partisan gerrymandering claim, was not necessary. This concluded the trial court's findings regarding plaintiffs' intentional racial discrimination and racial vote dilution claims.

c. Plaintiffs' Whole County Provision Claims

¶ 72 Finally, the court made findings regarding plaintiffs' whole county provision claim. Here, the court noted that under the enacted plans, 35 senate districts and 107 North Carolina House districts split counties. The court observed that the Senate districts divided 15 total counties, while the House districts divided 37 total counties. The court noted that in instances where "multiple county groupings were possible under the Supreme Court's interpretation of the Whole County Provision[,] . . . groupings were chosen from the range of legally possible groupings." "Within each remaining county grouping containing a district challenged under the Whole County Provision," the court found, "the district line's traversal of a county line occurs because of the need to comply with the equal-population rule required by law and memorialized in the Adopted Criteria."

2. Trial Court's Conclusions of Law

¶ 73 After making these extensive findings of fact, the trial court concluded as a matter of law that claims of extreme partisan gerrymandering present purely political questions that are nonjusticiable under the North Carolina Constitution. Accordingly, the court concluded that the enacted maps are not unconstitutional as a result of partisan gerrymandering.

a. Standing

¶ 74 First, the court addressed plaintiffs' standing to bring their various claims. Because "[i]ndividual private citizens and voters of a county have standing to sue to seek redress from an alleged violation of N.C. Const. art II, §§ 3 and 5[,]" the court held, "the Individual NCLCV Plaintiffs challenging a district based upon the Whole County Provision have standing." However, based on its legal conclusion that "Plaintiffs have not stated any cognizable claim for partisan gerrymandering under the various provisions of the North Carolina Constitution[,]" the court concluded that all plaintiffs lack standing for these claims.

¶ 75 Finally, the court addressed NCLCV Plaintiffs' and Common Cause Plaintiffs' standing to bring claims of intentional racial discrimination and racial vote dilution under the North Carolina Constitution. Because the court found "there to be no factual basis underlying these asserted claims," it concluded that "there is a lack of the requisite 'direct injury'—i.e., the deprivation of a constitutionally guaranteed personal right. Accordingly, [the court concluded that] these Plaintiffs do not have standing for these claims." Similarly, the court concluded that "Plaintiff Common Cause lacks standing for its claim requesting a declaratory judgment . . . directing the legislative process to be undertaken in redistricting."

b. Partisan Gerrymandering Claims

¶ 76 Next, the court addressed plaintiffs' partisan gerrymandering claims under various provisions of the North Carolina Constitution. Here, the court determined that plaintiffs' claims amounted to political questions that are nonjusticiable under the North Carolina Constitution. Specifically, after surveying the history of the constitutional provisions under which plaintiffs brought their claims, the court concluded that "redistricting is an inherently political process" that "is left to the General Assembly."

¶ 77 The court then addressed each of plaintiffs' constitutional claims. First, the court held that the enacted maps do not violate the free elections clause, which mandates that "[a]ll elections shall be free." N.C. Const. art. I, § 10. The court noted that "[w]hile the Free Elections Clause has been part of our constitutional jurisprudence since the 1776 Constitution, there are very few reported decisions that construe the clause." Based on a survey of the clause's history, the court "conclude[d] that the Free Elections Clause does not operate as a restraint on the General Assembly's ability to redistrict for partisan advantage."

¶ 78 Second, the trial court addressed plaintiffs' claims under the free speech clause and the equal protection clause. After reviewing the historical background of the addition of these clauses to the constitution in 1971, the court concluded that "the incorporation of the Free Speech Clause and the Equal Protection Clause to the North Carolina Constitution of 1971 was not intended to bring about a fundamental change to the power of the General Assembly." Accordingly, the court refused to "assume that . . . the Equal Protection Clause and Free Speech Clause impose new restrictions on the political process of redistricting."

¶ 79 From this historical foundation, the court concluded that "the Enacted Maps do not violate the Equal Protection Clause." The court

concluded that although "[i]t is true that there is a fundamental right to vote[,] . . . [r]edistricting and the political considerations that are part of that process do not impinge on the right to vote. Nothing about redistricting affects a person's right to cast a vote." Accordingly, and because political affiliation is not a suspect class, the court concluded that "[a]ny impingement is limited and distant and as such is subject to rational basis review." The court then concluded "that the plans are amply supported by a rational basis and thus do not violate the Equal Protection Clause."

¶ 80 Third, the court likewise concluded that "the Enacted Plans do not violate the Free Speech Clause." Specifically, the court concluded that "plaintiffs are free to engage in speech no matter what the effect the Enacted Plans have on their district."

¶ 81 Fourth, the trial court concluded that "the Enacted Plans do not violate the Right of Assembly Clause." Specifically, the court noted that "Plaintiffs remain free to engage in their associational rights and rights to petition no matter what effect the Enacted Plans have on their district."

¶ 82 In total, the trial court concluded that "[t]he objective constitutional constraints that the people of North Carolina have imposed on legislative redistricting are found in Article II, Sections 3 and 5 of the 1971 Constitution and not in the Free Elections, Equal Protection, Freedom of Speech[,] or Freedom of Assembly Clauses found in Article I of the 1971 Constitution." "Therefore, the [c]ourt conclude[d] that our Constitution does not address limitations on considering partisan advantage in the application of its discretionary redistricting decisions and Plaintiffs' claims on the basis of 'extreme partisan advantage' fail."

c. Justiciability

¶ 83 Next, the court again addressed justiciability. First, the court considered whether the North Carolina Constitution delegates the responsibility and oversight of redistricting exclusively to the General Assembly. Citing article II, sections 3, 5, and 20, the court concluded that "[t]he constitutional provisions relevant to the issue before [it] establish that redistricting is in the exclusive province of the legislature."

¶ 84 Second, the court considered "whether satisfactory and manageable criteria or standards exist for judicial determination of the issue." Here, relying on its analysis of the decision of the Supreme Court of the United States in *Rucho*, 139 S. Ct. at 2506–07, regarding the justiciability of partisan gerrymandering claims in *federal* courts, the trial court

"determine[d] that satisfactory and manageable criteria or standards do not exist for judicial determination of the issue and thus the partisan gerrymandering claims present a political issue beyond our reach."

¶ 85 In reaching this conclusion, the court noted that it

> agree[s] with the United States Supreme Court that excessive partisanship in districting leads to results that are incompatible with democratic principles. Rucho, 139 S. Ct[.] at 2504. Furthermore, it has the potential to violate "the core principle of republican government . . . that the voters should choose their representatives, not the other way around." *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 567 U.S. 787, 824 . . . (2015). Also, it can represent "an abuse of power that, at its core, evinces a fundamental distrust of voters, serving the self-interest of the political parties at the expense of the public good." *LULAC v. Perry*, 548 U.S. 399, 456 . . . (2006) (Stevens, J.[,] concurring in part and dissenting in part) (quotation and citation omitted)).

The court then added that it "neither condones the enacted maps nor their anticipated potential results" and that it has a "disdain for having to deal with issues that potentially lead to results incompatible with democratic principles and subject our State to ridicule." Nevertheless, the court concluded that because redistricting "is one of the purest political questions which the legislature alone is allowed to answer[,]" judicial action "in the manner requested . . . would be usurping the political power and prerogatives of an equal branch of government." Accordingly, the trial court concluded that plaintiffs' partisan gerrymandering claims are nonjusticiable.

d. Intentional Racial Discrimination and Racial Vote Dilution

¶ 86 Next, the trial court addressed plaintiffs' claims of intentional racial discrimination and racial vote dilution. The court "conclude[d] that based upon the record before [it], Plaintiffs have failed to prove the merit of their claim."

¶ 87 Here, the court noted that "[t]he North Carolina Constitution's guarantees of 'substantially equal voting power' and 'substantially equal legislative representation' are violated when a redistricting plan deprives minority voters of 'a fair number of districts in which their votes can be

effective,' measured based on 'the minority's rough proportion of the relevant population[,]' " quoting *Bartlett v. Strickland*, 556 U.S. 1, 28–29 (2009) (Souter, J., dissenting). The court then stated that "[a]n act of the General Assembly can violate North Carolina's Equal Protection Clause if discriminatory purpose was 'a motivating factor.' " "And whether discriminatory purpose was a motivating factor[,]" the court observed, "can be 'inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another.' " "To determine whether this is true," the court stated, "the court may weigh the law's historical background, the sequence of events leading up to the law, departures from normal procedure, legislative history, and the law's disproportionate impact."

¶ 88 Based upon these standards, the court then concluded that "NCLCV Plaintiffs and Plaintiff Common Cause have failed to satisfy their burden of establishing that race was the predominant motive behind the way in which the Enacted Plans were drawn." The court first reached this conclusion based on plaintiffs' "fail[ure] to show a predominant racial motive through direct [or circumstantial] evidence." Second, the court concluded, "Plaintiffs have failed to establish that the General Assembly failed to adhere to traditional districting principles *on account of racial considerations*." Third, the court concluded that "Plaintiffs have failed to make the requisite evidentiary showing that the General Assembly sought to dilute the voting strength of Blacks based upon their race, or that Blacks have less of an opportunity to vote for or nominate members of the electorate less than those of another racial group." Although the court agreed with plaintiffs' showing "that a substantial number of Black voters are affiliated with the Democratic Party[,]" it nevertheless concluded that plaintiffs had not shown

> how the General Assembly targeted this group on the basis of race instead of partisanship. Black voters who also happen to be Democrats have therefore been grouped into the partisan intent of the General Assembly. There is nothing in the evidentiary record before th[e] [c]ourt showing that race *and* partisanship were *coincident* goals predominating over all other factors in redistricting.

Accordingly, the court rejected plaintiffs' claims of intentional racial discrimination within the enacted plans.

¶ 89 Second, the court addressed plaintiffs' claims of racial vote dilution in violation of the free elections clause. Having previously concluded that the free elections clause should be narrowly interpreted to not apply

in the redistricting context, the court concluded that "NCLCV Plaintiffs' claim that the Enacted Plans unnecessarily dilute the voting power of citizens on account of race in violation of the Free Elections Clause of Art. I, § 10 is without an evidentiary or legal basis." Accordingly, the court rejected this claim.

e. Whole-County Provision Claims

¶ 90 Next, the trial court addressed plaintiffs' claims under the whole county provision of article II, sections 3 and 5 of the North Carolina Constitution. Although the boundaries of certain legislative districts under the enacted plans indeed crossed county lines, the court "conclude[d] that the counties grouped and then divided in the formation of the specific districts at issue for this claim were the minimum necessary, and contained the minimum number of traversals and maintained sufficient compactness, to comply with the one-person-one-vote standard in such a way that it met the equalization of population requirements set forth in *Stephenson v. Bartlett*, 355 N.C. 354, 383[–]84 . . . (2002)." Accordingly, the court "conclude[d] that the manner by which the counties at issue for this specific claim were traversed was not unlawful because it was predominantly for traditional and permissible redistricting principles, including for partisan advantage, which are allowed to be taken into account in redistricting."

f. Declaratory Judgment Claim

¶ 91 Finally, the trial court addressed plaintiff Common Cause's declaratory judgment claim regarding the redistricting process laid out in *Stephenson* and *Dickson v. Rucho*, 368 N.C. 481 (2015). On this issue, the court stated that "[t]he requirement in *Stephenson* that districts required by the VRA be drawn first was put in place to alleviate the conflict and tension between the WPC and VRA." But, the court noted, "[t]here is nothing in *Stephenson* that requires any particular analysis prior to making a decision as to whether VRA districts are necessary." Accordingly, the court concluded that "[t]he fact is, whether correct or not, the Legislative Defendants made a decision that no VRA Districts are required." The court then stated that, in this situation, "[w]hat Plaintiff Common Cause asks of this [c]ourt is to impose a judicially-mandated preclearance requirement . . . [that] does not exist in *Stephenson*." Therefore, the court concluded as a matter of law "that Plaintiff Common Cause is not entitled to a Declaratory Judgment or Injunctive Relief."

3. Trial Court's Decree

¶ 92 Following these extensive factual findings and conclusions of law, the trial court issued its ultimate decree. Specifically, the trial court

ordered that (1) plaintiffs' requests for declaratory judgment are denied; (2) plaintiffs' requests for permanent injunctive relief are denied; (3) the court's judgment fully and finally resolves all claims of plaintiffs, judgment is entered in favor of Legislative Defendants, and plaintiffs' claims are dismissed with prejudice; and (4) the candidate filing period for the 2022 primary and municipal elections is set to resume at 8:00 a.m. on Thursday, 24 February 2022, and shall continue through and end at 12:00 noon on Friday, 4 March 2022.

D. Present Appeal

¶ 93 Pursuant to this Court's 8 December 2021 order certifying the case for discretionary review prior to determination by the Court of Appeals, all plaintiffs filed notices of appeal to this Court from the trial court's final judgment on 11 and 12 January 2022. The parties' briefs and arguments before this Court largely echoed the arguments made before the trial court. Namely, plaintiffs asserted that the enacted plans constitute extreme partisan gerrymandering in violation of the free elections clause, equal protection clause, free speech clause, and freedom of assembly clause of the North Carolina Constitution and that these state constitutional claims were justiciable in state court. Legislative Defendants argued that plaintiffs' claims presented nonjusticiable political questions and therefore did not violate any of the asserted state constitutional provisions. The Court also accepted amicus briefs from several interested parties. Due to the time-sensitive nature of this case, oral arguments were calendared and heard in a special session on 2 February 2022.

II. Legal Analysis

¶ 94 Now, this Court must determine whether plaintiffs' claims are justiciable under the North Carolina Constitution and, if so, whether Legislative Defendants' enacted plans for congressional and state legislative districts violate the free elections clause, equal protection clause, free speech clause, and freedom of assembly clause of our constitution. After careful consideration, we conclude that partisan gerrymandering claims are justiciable under the North Carolina Constitution and that Legislative Defendants' enacted plans violate each of these provisions of the North Carolina Constitution beyond a reasonable doubt.

A. Standing

¶ 95 **[1]** As a threshold issue, we must determine whether plaintiffs have standing to bring their claims. As noted above, the trial court ruled that individual NCLCV Plaintiffs had standing to challenge the enacted plans

under the whole county provision but that plaintiffs lacked standing to bring their partisan gerrymandering claims because they had "not stated any cognizable claim for partisan gerrymandering under the various provisions of the North Carolina Constitution." The court further determined that NCLCV Plaintiffs and plaintiff Common Cause likewise lacked standing to bring their intentional racial discrimination and racial vote dilution claims under the North Carolina Constitution. Specifically, the court ruled that "[b]ecause . . . there [is] no factual basis underlying these asserted claims, there is a lack of the requisite 'direct injury'—i.e., the deprivation of a constitutionally guaranteed personal right."

¶ 96 We cannot agree. As this Court held in *Committee to Elect Dan Forest v. Employees Political Action Committee*, "the federal injury-in-fact requirement has no place in the text or history of our Constitution." 376 N.C. 558, 2021-NCSC-6, ¶ 73. Rather, in the case of direct constitutional challenges to statutes or other acts of government, we require only the requisite "concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." *Id.* ¶ 64 (quoting *Stanley v. Dep't of Cons. and Dev.*, 284 N.C. 15, 28 (1973)). Accordingly, as a "prudential principle of judicial self-restraint" and not as a limitation on the judicial power, we have required that a person challenging government action be directly injured or adversely affected by it. *Id.* ¶ 63. This prudential requirement that the person challenging a statute be directly injured or adversely affected thereby is purely to ensure that the putative injury belongs to them and not another, and hence that they "can be trusted to battle the issue." *Id.* ¶ 64 (citing *Stanley*, 284 N.C. at 28). Accordingly, "[t]he 'direct injury' required in this context could be, *but is not necessarily limited to*, 'deprivation of a constitutionally guaranteed right or an invasion of his property rights,' " *id.* ¶ 62 (emphasis added), and "[w]hen a person alleges the infringement of a legal right . . . *arising under* . . . the North Carolina Constitution, . . . the legal injury itself gives rise to standing," *id.* ¶ 82 (emphasis added). This direct injury requirement does not require a showing that a party will in fact prevail under the constitutional theory they advance. Rather, alleging the violation of a legal right which belongs to them, even if widely shared with others and even if they are not entitled to relief under their theory of the legal right, is sufficient to show the requisite "concrete adverseness" in our courts which we, for purely pragmatic reasons, require in the resolution of constitutional questions. To hold otherwise would resuscitate an injury-in-fact requirement as a barrier to remedy by the courts in another form.

¶ 97 The trial court contravened the concrete adverseness rationale for the direct injury requirement by concluding that plaintiffs lacked standing because their partisan gerrymandering claims, which they contended violated their constitutional rights under the free elections clause, equal protection clause, free speech clause, and freedom of assembly clause, were not "cognizable."[6] The allegation of violations of these constitutional rights was sufficient to generate an actual controversy and hence concrete adverseness, whether or not their theory of the violation ultimately prevailed in the courts. For example, in *Baker v. Carr*, from which this Court in part derived its concrete adverseness rationale, *see Comm. to Elect Dan Forest*, ¶ 64, the Supreme Court of the United States announced for the first time that claims of vote dilution were cognizable and justiciable under the Equal Protection Clause. *See generally Baker v. Carr*, 369 U.S. 186 (1962); *see also Comm. to Elect Dan Forest*, ¶ 46 ("[T]he only injury asserted [in *Baker*] is the impairment of a constitutional right broadly shared and divorced from any 'factual' harm experienced by the plaintiffs."). The constitutional right to equal protection of the laws existed although the *Baker* Court had not yet extended it to the precise theory the plaintiffs advanced. Similarly, here, the plaintiffs all had standing to challenge the maps based on their allegation of violations of their constitutional rights under the free elections clause, equal protection clause, free speech clause, and freedom of assembly clause of our Declaration of Rights, which are injuries to legal rights that they directly suffered, irrespective of whether courts previously or the court below determined their particular theory under those rights ultimately entitled them to prevail.

¶ 98 Finally, the court also determined that "the organizational Plaintiffs each seek to vindicate rights enjoyed by the organization under the North Carolina Constitution" and that "organizational Plaintiffs each have members who would otherwise have standing to sue in their own right, the interests each seeks to protect are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." We agree.

¶ 99 Taken together, the trial court's findings are sufficient to establish that each individual and organizational plaintiff here meets the standing requirements under the North Carolina Constitution as summarized above. Accordingly, the trial court erred in ruling to the contrary.

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6. The trial court also conflated the existence of a "cognizable" claim under the state constitution with one that is justiciable. A claim may violate the constitution yet not be justiciable because it is a political question.

B. The Political Question Doctrine

¶ 100 **[2]** We next address Legislative Defendants' contention that plaintiffs' claims present only nonjusticiable political questions. Whether partisan gerrymandering claims present a nonjusticiable "purely political question" under North Carolina law is a question of first impression. We have held that certain claims raising "purely political question[s]" are "nonjusticiable under separation of powers principles." *Hoke Cnty. Bd. of Educ.* v. *State*, 358 N.C. 605, 618 (2004). Purely political questions are those questions which have been wholly committed to the "sole discretion" of a coordinate branch of government, and those questions which can be resolved only by making "policy choices and value determinations." *Bacon v. Lee*, 353 N.C. 696, 717 (2001) (quoting *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986)). Purely political questions are not susceptible to judicial resolution. When presented with a purely political question, the judiciary is neither constitutionally empowered nor institutionally competent to furnish an answer. *See Hoke Cnty. Bd. of Educ.*, 358 N.C. at 638–39 (declining to reach the merits after concluding that "the proper age at which children should be permitted to attend public school is a nonjusticiable political question reserved for the General Assembly").

¶ 101 The trial court and Legislative Defendants rely in part on *Rucho* and other federal cases. These cases may be instructive, but they are certainly not controlling. We have previously held that "[w]hile federal standing doctrine can be instructive as to general principles . . . and for comparative analysis, the nuts and bolts of North Carolina standing doctrine are not coincident with federal standing doctrine." *Goldston v. State*, 361 N.C. 26, 35 (2006). This principle extends to all justiciability doctrines. "Federal justiciability doctrines—standing, ripeness, mootness, and the prohibition against advisory opinions—are not explicit within the constitutional text, but are the fruit of judicial interpretation of Article III's extension of the 'judicial Power' to certain 'Cases' or 'Controversies.' " *Comm. to Elect Dan Forest*, 376 N.C. 558, 2021-NCSC-6, ¶ 35. Originally, federal courts showed great reluctance to involve themselves in policing redistricting practices at all. The result was both the grossly unequal apportionment of representation of legislative and congressional seats and the drawing of district lines in pursuit of partisan advantage.[7]

7. Before the "reapportionment revolution" of *Baker v. Carr* and its progeny in the 1960s, "states had much more leeway over when, and even if, to redraw district boundaries. One result was that in many states, district lines remained frozen for decades—often leading to gross inequalities in district populations and substantial partisan biases." Erik J. Engstrom, *Partisan Gerrymandering and the Construction of American Democracy* 13 (2013). "Connecticut, for instance, kept the exact same congressional district lines for

The judicial repudiation of any role in redistricting was summarized in *Colegrove v. Green*, where the Supreme Court declared a challenge to the drawing of congressional districting lines in Illinois nonjusticiable under the Fourteenth Amendment. 328 U.S. 549, 556 (1946). Writing for the Court, Justice Frankfurter reasoned that "effective working of our Government revealed this issue to be of a peculiarly political nature and therefore not [fit] for judicial determination." *Id.* at 552. "Authority for dealing with such problems resides elsewhere." *Id.* at 554. The Court concluded, revealing the prudential basis of its reasoning, that "[c]ourts *ought not* to enter this political thicket." *Id.* at 556 (emphasis added).

¶ 102 In the landmark decision of *Baker v. Carr*, the Supreme Court reversed course and held in a case involving claims that malapportionment violates the Equal Protection Clause of the Fourteenth Amendment that such claims are justiciable since they do not present political questions. 369 U.S. 186, 209 (1962). The *Baker* Court began its justiciability analysis by noting that "the mere fact that the suit seeks protection of a political right does not mean it presents a political question. Such an objection is little more than a play upon words." *Id.* (cleaned up). After reviewing cases to discern the threads that, in various formulations, comprise a nonjusticiable political question, the Court identified what has become the standard definition of the political question doctrine under federal law:

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

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70 years (1842–1912)." *Id.* at 8. Other state legislatures redrew maps whenever they wanted. "In every year from 1862 to 1896, with one exception, at least one state redrew its congressional district boundaries. Ohio, for example, redrew its congressional district boundaries six times between 1878 and 1890." *Id.* Moreover, "parties were willing to push partisan advantage to the edge. To do so, partisan mapmakers carved states into districts with narrow, yet winnable, margins." *Id.*

Id. at 217. The Court in *Baker* held that the plaintiffs' claim under the Equal Protection Clause, unlike prior claims under the Guaranty Clause, was justiciable because it presented, *inter alia*, "no question decided, or to be decided, by a political branch of government coequal with th[e] Court" and no "policy determinations for which judicially manageable standards are lacking," as "[j]udicial standards under the Equal Protection Clause are well developed and familiar," which are "that a discrimination reflects no policy, but simply arbitrary and capricious action." Id. at 226. Accordingly, over a dissent written by Justice Frankfurter and joined by Justice Harlan, the Court entered the political thicket. The Court did not in that decision announce a remedy for the violation of the Equal Protection Clause but in later cases held that the principle of "one person, one vote" required as close to mathematical equality as practicable in the drawing of congressional districts and "substantial equality" in the drawing of legislative districts. *Cf. Wesberry v. Sanders*, 376 U.S. 1, 7–8 (1964) (holding that "as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's"); *Reynolds v. Sims*, 377 U.S. 533, 579 (1964) ("So long as the divergences from a strict population standard are based on legitimate considerations incident to the effectuation of a rational state policy, some deviations from the equal-population principle are constitutionally permissible with respect to the apportionment of seats in either or both of the two houses of a bicameral state legislature.").

¶ 103 Although federal courts concluded that malapportionment claims were justiciable, the Supreme Court of the United States did not expressly hold that a partisan gerrymandering claim was justiciable until *Davis v. Bandemer*, where it held that a partisan gerrymandering claim existed under the Fourteenth Amendment that did not present a nonjusticiable political question.[8] 478 U.S. 109, 124 (1986) (plurality opinion), *abrogated by Rucho*, 139 S. Ct. 2484. The plurality opinion in *Bandemer* identified the claim as being "that each political group in a State should have the same chance to elect representatives of its choice as any other political group," and although the claim was distinct from that in *Reynolds* involving districts of unequal size, "[n]evertheless, the issue is one of representation, and we decline to hold that such claims are never justiciable." *Id.* The plurality adopted as a test that

8. As noted in the plurality opinion in *Bandemer*, the Supreme Court did address a partisan gerrymandering claim in *Gaffney v. Cummings*, by holding that a districting plan which incorporated a "political fairness principle" across the plan did not violate the Equal Protection Clause; however, no concern about justiciability was raised in *Gaffney*. 412 U.S. 735, 751–52 (1973).

"unconstitutional discrimination occurs only when the electoral system is arranged in a manner that will consistently degrade a voter's or a group of voters' influence on the political process as a whole." *Id.* at 132. Justice O'Connor concurred in the judgment, arguing in part that the Court's decision would result in a requirement for "roughly proportional representation."[9] *Id.* at 147 (O'Connor, J., concurring in the judgment).

¶ 104 Eighteen years later the Supreme Court overruled *Bandemer* in *Vieth v. Jubelirer*, 541 U.S. 267 (2004), a challenge to Pennsylvania's 2001 congressional redistricting plan on the grounds that it was a political gerrymander. Justice Scalia wrote the plurality opinion, in which three other justices joined, and would have also held partisan gerrymandering claims to be nonjusticiable political questions because they lack a "judicially discernable and manageable standard[,]" *id.* at 306—"judicially discernible in the sense of being relevant to some constitutional violation[,]" *id.* at 288. Justice Kennedy concurred in the judgment but refused to hold partisan gerrymandering nonjusticiable because "in another case a standard might emerge." *Id.* at 312 (Kennedy, J., concurring in the judgment).

¶ 105 In *Rucho*, completing its retreat from *Bandemer*, the Supreme Court of the United States abandoned the field in policing partisan gerrymandering claims. The Supreme Court held that claims alleging that North Carolina's and Maryland's congressional districts were unconstitutionally gerrymandered for partisan gain were nonjusticiable in federal court. *Rucho*, 139 S. Ct. at 2493–2508. It reached this conclusion because it could find "no legal standards discernible in the [United States] Constitution for" resolving partisan gerrymandering claims, "let alone limited and precise standards that are clear, manageable, and politically neutral." *Id.* at 2500.

¶ 106 Three concerns appear to have motivated the Court in *Rucho*. The first premise which concerned the Court in *Rucho* was the absence of a "judicially discernable" standard, that is, one that is "relevant to some constitutional violation." *Vieth*, 541 U.S. at 288; *see Rucho*, 139 S. Ct. at 2507 (" '[J]udicial action must be governed by *standard*, by *rule*,' and must be 'principled, rational, and based upon reasoned distinctions' founded in the [United States] Constitution or laws." (first alteration in

9. The plurality responded that their decision did not reflect "a preference for proportionality *per se* but a preference for a level of parity between votes and representation sufficient to ensure that significant minority voices are heard and that majorities are not consigned to minority status." *Davis v. Bandemer*, 478 U.S. 109, 125 n.9 (1986).

original) (quoting *Vieth*, 541 U.S. at 278)). In essence, the Supreme Court concluded that no provision of the United States Constitution supplied a cognizable legal basis for challenging the practice of partisan gerrymandering. *See, e.g.*, *Rucho*, 139 S. Ct. at 2501 ("[T]he one-person, one-vote . . . requirement does not extend to political parties."); *id.* at 2502 ("[O]ur racial gerrymandering cases [do not] provide an appropriate standard for assessing partisan gerrymandering."); *id.* at 2504 ("[T]here are no restrictions on speech, association, or any other First Amendment activities in the districting plans at issue."); *id.* at 2506 ("The North Carolina District Court further concluded that the 2016 Plan violated the Elections Clause and Article I, § 2. We are unconvinced by that novel approach.").

¶ 107 The second premise underpinning *Rucho*'s political-question holding was the absence of a standard that the Court deemed to be "clear, manageable[,] and politically neutral." *Id.* at 2500. This rationale was particularly pressing because, "while it is illegal for a jurisdiction to depart from the one-person, one-vote rule, or to engage in racial discrimination in districting, 'a jurisdiction may engage in constitutional political gerrymandering' " under federal law. *Id.* at 2497 (quoting *Hunt v. Cromartie*, 526 U.S. 541, 551 (1999)). According to the Court, "the question is one of degree," and "it is vital in such circumstances that the Court act only in accord with especially clear standards." *Id.* at 2498. However, the Court held the plaintiffs had not supplied standards to answer the question, "At what point does permissible partisanship become unconstitutional?" *Id.* at 2501. Moreover, the tests adopted by the lower courts were unsatisfactory because they failed to articulate such a standard that was sufficiently "clear" and "manageable." *Id.* at 2503–05. Finally, the dissent's proposed test, using "a State's own districting criteria as a neutral baseline" was unmanageable because "it does not make sense to use criteria that will vary from State to State and year to year." *Id.* at 2505.

¶ 108 A third consideration animating the Court's decision was a prudential evaluation of the role of federal courts in the constitutional system. *Rucho*, 139 S. Ct. at 2494 (framing the question presented as "whether there is an 'appropriate role for the *Federal Judiciary*' in remedying the problem of partisan gerrymandering" (emphasis added) (quoting *Gill v. Whitford*, 138 S. Ct. 1916, 1926 (2018))); *id.* at 2507 ("Consideration of the impact of today's ruling on democratic principles cannot ignore the effect of the unelected and politically unaccountable branch of the Federal Government assuming such an extraordinary and unprecedented role."); *id.* (advocating action through states, including by state supreme courts on state law grounds); *id.* at 2508 (suggesting Congress could act); *id.* at 2499 ("But federal courts are not equipped to apportion

political power as a matter of fairness, nor is there any basis for concluding that they were authorized to do so.").

¶ 109 In summary, federal courts initially forswore virtually any role in the "political thicket" of apportionment. *See Colegrove*, 328 U.S. at 556. However, in *Baker* and its progeny, the Supreme Court of the United States entered that thicket at least to the extent of policing malapportionment. *See Baker*, 369 U.S. 186. The Court's reasons for entering the thicket are relevant today: the Supreme Court recognized that absent its intervention to enforce constitutional rights, our system of self-governance would be representative and responsive to the people's will in name only. The Court entered the political thicket for a time as well to review partisan gerrymandering claims in *Bandemer*, but ultimately rejected that decision in *Vieth*, and in *Rucho*, the Court removed such claims from the purview of federal courts altogether. The premises that animated the Court in *Rucho* are substantially the same as those that kept it from policing malapportionment claims in the first place: the perception that there is no "discernable" right to such claims cognizable in the federal Constitution, a prudential evaluation that courts are ill-equipped to hear such claims, and a belief that courts should not involve themselves in "political" matters.

¶ 110 However, simply because the Supreme Court has concluded partisan gerrymandering claims are nonjusticiable in federal courts, it does not follow that they are nonjusticiable in North Carolina courts, as Chief Justice Roberts himself noted in *Rucho*. *Rucho*, 139 S. Ct. at 2507 ("Provisions in state statutes and state constitutions can provide standards and guidance for state courts to apply."). First, our state constitution "is more detailed and specific than the federal Constitution in the protection of the rights of its citizens." *Corum v. Univ. of N.C. Through Bd. of Governors*, 330 N.C. 761, 783 (1992). Second, state law provides more specific neutral criteria against which to evaluate alleged partisan gerrymanders, and those criteria would not require our court system to consider fifty separate sets of criteria, as would federal court involvement. Finally, *Rucho* was substantially concerned with the role of federal courts in policing partisan gerrymandering, while recognizing the independent capacity of state courts to review such claims under state constitutions as a justification for judicial abnegation at the federal level. The role of state courts in our constitutional system differs in important respects from the role of federal courts.

¶ 111 Having canvassed relevant federal decisions, we now consider whether as a matter of state law plaintiffs' partisan gerrymandering

claims are justiciable under the North Carolina Constitution. We conclude that they are.

C. The Question Presented Is Not Committed to the "Sole Discretion" of the General Assembly

¶ 112 Under North Carolina law, courts will not hear "purely political questions." This Court has recognized two criteria of political questions: (1) where there is "a textually demonstrable constitutional commitment of the issue" to the "sole discretion" of a "coordinate political department[,]" *Bacon v. Lee*, 353 N.C. 696, 717 (2001) (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)); and (2) those questions that can be resolved only by making "policy choices and value determinations[,]" *id.* (quoting *Japan Whaling Ass'n v. American Cetacean Soc'y*, 478 U.S. 221, 230 (1986)).

¶ 113 We first consider the issue of whether there is a textually demonstrable commitment of the issue to the "sole discretion" of a coordinate branch of government. The constitution vests the responsibility for apportionment of legislative districts in the General Assembly under article II of our state constitution. Article II provides: "The General Assembly . . . shall revise the senate districts and the apportionment of Senators among those districts." N.C. Const. art. II, § 3; *see* N.C. Const. art. II, § 5 (stating the same requirement for the North Carolina House). Legislative Defendants contend that "a delegation of a political task to a single political branch of government impliedly forecloses the other branches of government from undertaking that task" and that these provisions evidence such a textual commitment. They argue that this Court "has repeatedly acknowledged that this constitutional text is a grant of unreviewable political discretion to the legislative branch." This argument—that gerrymandering claims are categorically nonjusticiable because reapportionment is committed to the sole discretion of the General Assembly—is flatly inconsistent with our precedent interpreting and applying constitutional limitations on the General Assembly's redistricting authority. We have interpreted and applied both the expressly enumerated limitations contained in article II, sections 3 and 5, and the limitations contained in other constitutional provisions such as the equal protection clause. *Stephenson v. Bartlett*, 355 N.C. 354, 370–71, 378–81 (2002) (determining whether the General Assembly's use of its article II power to apportion legislative districts complied with federal law in accordance with article I, sections 3 and 5 of our constitution, and our state's equal protection clause in article I, section 19); *Blankenship v. Bartlett*, 363 N.C. 518, 525–26 (2009) (holding that General Assembly's exercise of its power under article IV, section 9 to establish the election of superior

court judges in judicial districts must comport with our state's equal protection clause in article I, section 19). Legislative Defendants' argument is, essentially, an effort to turn back the clock to the time before courts entered the political thicket to review districting claims in *Baker v. Carr*. Yet, as the facts of this case demonstrate, the need for this Court to continue to enforce North Carolinians' constitutional rights has certainly not diminished in the intervening years.

¶ 114 Relatedly, but more specifically, Legislative Defendants argue that even if certain gerrymandering claims may be justiciable, claims alleging partisan gerrymandering in violation of state constitutional provisions are nonjusticiable because this Court has endorsed the consideration of partisan advantage in the redistricting process. In support of this proposition, Legislative Defendants cite to our decision in *Stephenson*, where we stated the following in full:

> The General Assembly may consider partisan advantage and incumbency protection in the application of its discretionary redistricting decisions, *see Gaffney v. Cummings*, 412 U.S. 735, 93 S. Ct. 2321, 37 L. Ed. 2d 298 (1973), but it must do so in conformity with the State Constitution. To hold otherwise would abrogate the constitutional limitations or "objective constraints" that the people of North Carolina imposed on legislative redistricting and reapportionment in the State Constitution.

355 N.C. at 371. Legislative Defendants misread this statement. We did not conclude that the text of our state constitution permits the General Assembly to "consider partisan advantage and incumbency protection"; we concluded that *federal law* permitted that consideration by citing to the decision of *Gaffney v. Cummings*, 412 U.S. 735 (1973). *See Stephenson*, 355 N.C. at 371. Moreover, *Gaffney* in no way supports Legislative Defendants' argument that we have endorsed their interest in securing partisan advantage to any extent and which results in systematically disfavoring voters of one political party. In *Gaffney*, the Supreme Court of the United States rejected a partisan gerrymandering claim to an apportionment plan that pursued a principle of "political fairness" in order to "allocate political power to the parties *in accordance with their voting strength*." *Gaffney*, 412 U.S. at 754 (emphasis added). We expressly reserved the question of whether the General Assembly could consider such criteria "in conformity with the State Constitution," while also affirming the applicability of "constitutional limitations" that the people imposed on the legislative redistricting

process in other provisions of the North Carolina Constitution, such as the equal protection clause. *Stephenson*, 355 N.C. at 371. Simply put, resolving *Stephenson* did not require us to decide the legality of partisan gerrymandering under the North Carolina Constitution.

¶ 115 The commitment of responsibility for apportionment to the General Assembly in article II provides no support for the Legislative Defendants' argument. First, the list of criteria the General Assembly is required to consider by that section does *not* include "partisan advantage." *See* N.C. Const. art. II, § 3. Furthermore, we cannot infer the non-justiciability of partisan gerrymandering purely from the structural fact that the decennial apportionment of legislative districts is committed to a "political" branch. The General Assembly has the legislative power of apportionment under article II, but exercise of that power is subject to other "constitutional limitations." *Stephenson*, 355 N.C. at 371. Put another way, the mere fact that responsibility for reapportionment is committed to the General Assembly does not mean that the General Assembly's decisions in carrying out its responsibility are fully immunized from any judicial review. That startling proposition is, again, entirely inconsistent with our modern redistricting precedents and, on a more fundamental level, inconsistent with this Court's obligation to enforce the provisions of the North Carolina Constitution dating to 1787.

¶ 116 *Stephenson* itself is incompatible with Legislative Defendants' argument. *Stephenson* was a vote-dilution challenge under the equal protection clause of our state constitution. If *Stephenson* concluded that redistricting decisions were exclusively constitutionally committed to the General Assembly because of article II, then no other constitutional limitations would be applicable. Plainly they are. *See id.* at 379.

¶ 117 This case does not ask us to remove all discretion from the redistricting process. The General Assembly will still be required to make choices regarding how to reapportion state legislative and congressional districts in accordance with traditional neutral districting criteria that will require legislators to exercise their judgment. Rather, this case asks how constitutional limitations in our Declaration of Rights limit the General Assembly's power to apportion districts under article II. It is thus analogous to *Cooper v. Berger*, 370 N.C. 392 (2018), in that it "involves a conflict between two competing constitutional provisions," and it "involves an issue of constitutional interpretation, which this Court has a duty to decide." *Id.* at 412.

¶ 118 More fundamentally, Legislative Defendants' argument that the textual grant of a power to a "political" branch is sufficient to render

exercise of that power unreviewable strikes at the foundation stone of our state's constitutional caselaw—*Bayard v. Singleton*, 1 N.C. (Mart.) 5 (1787). In *Bayard*, the courts of North Carolina first asserted the power and duty of judicial review of legislative enactments for compliance with the North Carolina Constitution, and to strike down laws in conflict therewith. *Id.* at 7. In holding that we had the power of judicial review we specifically reasoned that if "members of the General Assembly" could violate some constitutional rights, "they might with equal authority, not only render themselves the Legislators of the State for life, without any further election of the people, [but] from thence transmit the dignity and authority of legislation down to their heirs male forever." *Id.* It was out of concern for the very possibility that the legislature might intercede in the elections for their own office, which our constitution delegates the legislature power over, in contravention of the constitutional rights of the people to elect their own representatives that led this Court to assert the power of judicial review. To conclude that the mere commitment of the apportionment power in article II to the General Assembly renders its apportionment decisions unreviewable would require us to betray our most fundamental constitutional duty. "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." *Corum v. Univ. of N.C.*, 330 N.C. 761, 783 (1992).

¶ 119 The General Assembly has the power to apportion legislative and congressional districts under article II and state law, but exercise of that power is subject to other "constitutional limitations," including the Declaration of Rights. The question is whether the General Assembly complied with provisions of the Declaration of Rights in its exercise of the apportionment power. There is no textually demonstrable commitment of that issue to the legislative branch.

¶ 120 In determining whether plaintiffs' claims would require the court to make "policy choices and value determinations," *Bacon*, 353 N.C. at 717, we must determine whether, as plaintiffs argue, the Declaration of Rights of the North Carolina Constitution prohibits partisan gerrymandering and, if so, whether the application of those claims would require such determinations. As we long ago established and have since repeatedly affirmed, "[t]his Court is the ultimate interpreter of our State Constitution." *Corum*, 330 N.C. at 783 (citing *Bayard*, 1 N.C. (Mart.) 5). So too when it comes to reapportionment. *Stephenson*, 355 N.C. at 370–71, 378–81; *Blankenship*, 363 N.C. at 525–26.

D. Partisan Gerrymandering Violates the Declaration of Rights in the North Carolina Constitution and Is Justiciable

¶ 121 Plaintiffs argue that Legislative Defendants' districting plans violate the free elections clause, equal protection clause, free speech clause, and freedom of assembly clause of our constitution's Declaration of Rights. Accordingly, we must examine the text and structure of the Declaration of Rights as well as the intent and history of these constitutional provisions to determine whether the rights plaintiffs allege are protected by the Declaration of Rights and whether this Court is empowered by the constitution to guarantee those rights.

¶ 122 Before examining specific provisions in detail, we make some general observations about the Declaration of Rights in article I of our constitution. First, "[t]he Declaration of Rights was passed by the Constitutional Convention on 17 December 1776, the day before the Constitution itself was adopted, manifesting the primacy of the Declaration in the minds of the framers."[10] *Corum*, 330 N.C. at 782. The Declaration of Rights preceded the constitution, and hence the rights reserved by the people preceded the division of power among the branches therein. "The relationship is not that exhibited by the U.S. Constitution with its appended Bill of Rights, the latter adding civil rights to a document establishing the basic institutions of government. Instead, North Carolina's declaration of rights . . . is logically, as well as chronologically, prior to the constitutional text." John V. Orth & Paul M. Newby, *The North Carolina Constitution* 5–6 (2d ed. 2013). That logical and chronological primacy is preserved in our present constitution, with the Declaration of Rights now incorporated in the text of the constitution itself as article I.

¶ 123 Second, early in this Court's history we "recognized the supremacy of rights protected in Article I and indicated that [we] would only apply

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10. The primacy of the Declaration of Rights over the powers allocated in the constitutional text in the minds of the framers is fitting for a people so opposed to government tyranny coalesced in any source. North Carolinians preceded the Revolution by ten years through the Regulator Movement opposing the Royal Governor William Tryon. They preceded the Declaration of Independence with the Halifax Resolves. After the Revolution they only belatedly approved by convention the federal Constitution because of its failure to include a Bill of Rights, an implicit rejection of the notion that structural protections of rights, like the separation and division of powers, would suffice. It is worth noting that a leading argument for the adoption of a federal Bill of Rights, in the words of Thomas Jefferson, was "the legal check which [such a Bill would put] into the hands of the judiciary," as "a body, which if rendered independent, and kept strictly to their own department merits great confidence for their learning and integrity." Laurence H. Tribe, *American Constitutional Law* 8 & n.8 (3d ed. 2000) (quoting 14 The Papers of Thomas Jefferson 659 (Julian P. Boyd ed., 1958)).

the rules of decision derived from the common law and such acts of the legislature that are consistent with the Constitution." *Corum*, 330 N.C. at 783 (citing *Trs. of the Univ. of N.C. v. Foy*, 5 N.C. 57 (1805)). In tying judicial review to the primacy of the Declaration of Rights, we recognized that

> [t]he fundamental purpose for [the Declaration's] adoption was to provide citizens with protection from the State's encroachment upon these rights. Encroachment by the State is, of course, accomplished by the acts of individuals who are clothed with the authority of the State. The very purpose of the Declaration of Rights is to ensure that the violation of these rights is never permitted by anyone who might be invested under the Constitution with the powers of the State.

Id. at 782–83 (citing *State v. Manuel*, 20 N.C. 144 (1838)); *see also id.* at 782 ("The civil rights guaranteed by the Declaration of Rights in Article I of our Constitution are individual and personal rights entitled to protection against state action . . . .").

¶ 124 Finally, the framers of our Declaration of Rights and constitution guarded against not only abuses of executive power but also the tyrannical accumulation of power that subverts democracy in the legislative branch. William Hooper, a North Carolina delegate to the Continental Congress, urged that the state constitution prevent legislators from making "their own political existence perpetual." Letter from William Hooper to the Provincial Congress of North Carolina (Oct. 26, 1776), *in* 10 *Colonial and State Records of North Carolina* 867–68, *available at* https://docsouth.unc.edu/csr/index.php/document/csr10-0407. John Adams, "already a renowned authority on constitutionalism," Orth & Newby at 5, submitted two letters of advice to the Convention, recommending that to prevent the legislature from "vot[ing] itself perpetual" the constitution must divide the General Assembly into two chambers so each could check the other. Essay by John Adams on "Thoughts on Government" (March 1776), *in* 11 *Colonial and State Records of North Carolina* 321, 324, *available at* https://docsouth.unc.edu/csr/index.php/document/csr11-0189. And so the framers did create two chambers, and we have maintained that division to this day. *See* N.C. Const. of 1776, § 1; N.C. Const. art. II, § 1.

¶ 125 Despite these protections, the primacy of the Declaration of Rights suggests that our framers did not believe that division of power alone

would be sufficient to protect their civil and political rights and prevent tyranny. Accordingly, they enshrined their rights in the Declaration of Rights. They also created a state judiciary invested with the "judicial power." *See* N.C. Const. of 1776, § 1; N.C. Const. art. IV, § 1. This independent judiciary was another structural protection. In *Bayard*, we concluded that our courts have the power, and indeed the obligation, to review legislative enactments for compliance with the North Carolina Constitution and to strike down unconstitutional laws. 1 N.C. (Mart.) at 7. The Court reasoned that if we abdicated this power and obligation, legislators could make themselves "Legislators of the State for life" and insulate themselves from "any further election of the people." *Id.* Giving effect to the will of the people through popular sovereignty and the rights protected by the Declaration of Rights, including the rights to free and frequent elections, were central to our recognition of the necessity of judicial review.

¶ 126 Having reviewed these structural and historical aspects of the Declaration of Rights, we now turn to the text to analyze whether plaintiffs' partisan gerrymandering claims have a discernible basis therein. Indeed, the very text of the Declaration of Rights calls us back time and again to itself, the source of constitutional meaning, by providing that "[a] frequent recurrence to fundamental principles is absolutely necessary to preserve the blessings of liberty." N.C. Const. art I, § 35.[11] In a leading case from Virginia, construing a cognate provision of the Virginia Declaration of Rights, Judge Roane defined "fundamental principles" as

> those great principles growing out of the Constitution, by the aid of which, in dubious cases, the Constitution may be explained and preserved inviolate; those landmarks, which it may be necessary to resort to, on account of the impossibility to foresee or provide for cases within the spirit, but without the letter of the Constitution.

Kamper v. Hawkins, 3 Va. (1 Va. Cas.) 20, 40 (1793); *see* Orth & Newby at 92 (discussing same). These "landmarks" serve as an important backdrop to aid in interpreting the "spirit" of the North Carolina Constitution and the scope of the sweeping provisions of its Declaration of Rights.

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11. By this text, "[a]ll generations are solemnly enjoined to return *ad fontes* (to the sources) and rethink for themselves the implications of the fundamental principles of self-government that animated the revolutionary generation." John V. Orth & Paul M. Newby, *The North Carolina Constitution* 91 (2d ed. 2013).

¶ 127 North Carolina's Declaration of Rights as it exists today in article I was forged not only out of the revolutionary spirit of 1776 but also the reconstruction spirit of 1868. *See* John L. Sanders, *Our Constitutions: An Historical Perspective*, https://www.sosnc.gov/documents/guides/legal/North_Carolina_Constitution_Historical.pdf ("Drafted and put through the convention by a combination of native Republicans and a few carpetbaggers, . . . [f]or its time, [the Constitution of 1868] was a progressive and democratic instrument of government."); *id.* ("The Constitution of 1868 incorporated the 1776 Declaration of Rights into the Constitution as Article I and added several important guarantees."); *id.* ("[T]he Constitution of 1971 brought forward much of the 1868 language with little or no change."). Our Declaration of Rights begins with the declaration of two fundamental principles, the costly fruit paid in the blood of the Civil War and Revolutionary War, respectively: equality of persons and the democratic principle of popular sovereignty.[12] Article I, sections 1 and 2 provide:

> Section 1. The equality and rights of persons.
>
> We hold it to be self-evident that all persons are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, the enjoyment of the fruits of their own labor, and the pursuit of happiness.
>
> Sec[tion] 2. Sovereignty of the people.
>
> All political power is vested in and derived from the people; all government of right originates from the people, is founded upon their will only, and is instituted solely for the good of the whole.

N.C. Const. art. I, §§ 1–2.

¶ 128 Under article I, section 1, equality logically precedes sovereignty, as equality is "self-evident." Article I, section 1 recognizes the self-evident fundamental principle of equality; however, that does not mean it is not a source of cognizable rights by its own terms as well. *See*, *e.g.*, *Tully v. City of Wilmington*, 370 N.C. 527, 533, 536 (2018) (holding each person's "inalienable right" to the "enjoyment of the fruits of their own labor" protects the fundamental right to "pursue his chosen profession free from" unreasonable government interference). This section deliberately borrowed the language of the Declaration of Independence, which

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12. Article I, section 1 originates from the 1868 constitution, while article I, section 2, originates from the 1776 constitution.

was quoted and expanded upon in the Gettysburg Address just a few years prior to the 1868 Reconstruction Convention. Article I, section 1's recognition of the first principle that "all persons are created equal" is universal.

¶ 129 Article I, section 2 locates the source of all "political power" under the Declaration of Rights in "the people." N.C. Const. art. I, § 2. It specifies that "all government of right" can only "originate[ ] from the people." *Id.* This "government of right" is only established when it is "founded upon [the people's] will only," and "instituted solely for the good of the whole." *Id.* Section 2 of the Declaration of Rights can fruitfully be read together with the first clause of section 3. N.C. Const. art. I, § 3, cl. 1 ("The people of this State have the inherent, sole, and exclusive right of regulating the internal government and police thereof . . . ."). "These two sections contain both a general and a specific *assertion of democratic theory*." Orth & Newby at 48 (emphasis added). Section 2's declaration that "[a]ll political power is vested in and derived from the people" is an "abstract statement of principle." *Id.* Meanwhile, section 3's declaration that "the people of this State have the inherent, sole, and exclusive right of regulating the internal government and police thereof," is "a specific local application of the general rule." *Id.* These sections "now serve as a fuller theoretical statement" of the core democratic principle: "the revolutionary faith in popular sovereignty." *Id.*; *see Thrift v. Bd. of Comm'rs*, 122 N.C. 31, 37 (1898) ("Our theory of government, *proceeding directly from the people, and resting upon their will*, is essentially different — at least, in principle — from that of England . . . ." (emphasis added)). Under popular sovereignty, the democratic theory of our Declaration of Rights, the "political power" of the people which is "vested in and derives from [them]," is channeled through the proper functioning of the democratic processes of our constitutional system to the people's representatives in government. N.C. Const. art. I, § 2. Only when those democratic processes function as provided by our constitution to channel the will of the people can government be said to be "founded upon their will only." *Id.*

¶ 130 The principle of equality and the principle of popular sovereignty are the two most fundamental principles of our Declaration of Rights. N.C. Const. art. I, §§ 1–2. The principle of equality, adopted into our Declaration of Rights from the Declaration of Independence and the Gettysburg Address, provides that "all persons are created equal." N.C. Const. art. I, § 1. Meanwhile, under the principle of popular sovereignty, the "political power" of the people is channeled through the proper functioning of the democratic processes of our constitutional system

to the people's representatives in government. N.C. Const. art. I, § 2. While these are two separate fundamental principles under our present constitutional system, one cannot exist without the other. Equality, being logically as well as chronologically prior, is essential to popular sovereignty. *See* Abraham Lincoln, "On Slavery and Democracy," *I Speeches and Writings*, 484 (1989) ("As I would not be a *slave*, so I would not be a *master*. This expresses my idea of democracy. Whatever differs from this, to the extent of the difference, is no democracy."); "Address at Gettysburg, Pennsylvania," *II Speeches and Writings* at 536 (connecting "the proposition that all men are created equal" to "government of the people, by the people, for the people"). Consequently, sections 1 and 2 of our Declaration of Rights, when read together, declare a commitment to a fundamental principle of democratic and political equality. The principle of political equality, from the Halifax Resolves and the Declaration of Independence to Lincoln's Gettysburg Address and the Reconstruction Convention to our Declaration of Rights today, can mean only one thing—to be effective, the channeling of "political power" from the people to their representatives in government through the democratic processes envisioned by our constitutional system must be done on equal terms. If through state action the ruling party chokes off the channels of political change on an unequal basis, then government ceases to "derive[ ]" its power from the people or to be "founded upon their will only," and the principle of political equality that is fundamental to our Declaration of Rights and our democratic constitutional system is violated. N.C. Const. art. I, §§ 1, 2; *see Bayard*, 1 N.C. (Mart.) at 7 (recognizing this principle in holding that judicial review is needed to prevent legislators from permanently insulating themselves from popular will); *see also* John Hart Ely, *Democracy and Distrust* 103 (1980) ("In a representative democracy value determinations are to be made by our elected representatives, and if in fact most of us disapprove we can vote them out of office. Malfunction occurs when the *process* is undeserving of trust, when [ ] the ins are choking off the channels of political change to ensure that they will stay in and the outs will stay out.").

¶ 131 In *Dickson v. Rucho*, we held a partisan gerrymandering challenge that legislative reapportionment plans violated the "Good of the Whole" clause failed because that argument "is not based upon a justiciable standard." 368 N.C. 481, 534 (2015). Of course, the judgment in *Dickson* was vacated on federal law grounds, 137 S. Ct. 2186 (2017). However, taken as a valid proposition of state law, it does not follow that sections 1 and 2 *in toto* provide no guidance for determining the constitutionality and justiciability of partisan gerrymandering or do not aid in construing other constitutional provisions. The principle of political equality which

we have articulated is a fundamental principle of our Declaration of Rights. *See* N.C. Const. art. I, § 35. Such fundamental principles guide us in part through the light they throw on other constitutional provisions. Accordingly, interpreting article I, section 2, we have held that "[t]his is a government of the people, by the people, and for the people, founded upon the will of the people, and in which the will of the people, legally expressed, must control" and reasoned that "[i]n construing [other] provisions of the constitution, we should keep in mind" this fundamental principle. *State ex rel. Quinn v. Lattimore*, 120 N.C. 426, 428–29 (1897). While plaintiffs do not contend the enacted plans constitute partisan gerrymanders in violation of article I, sections 1 and 2, the fundamental principle of political equality underpinning those sections guides our interpretation of other provisions of the Declaration of Rights.

¶ 132 Plaintiffs allege Legislative Defendants' enacted plans violate the free elections clause under section 10, the free speech clause under section 14, the freedom of assembly clause under section 12, and the equal protection clause under section 19 of the Declaration of Rights as partisan gerrymanders. Along with guidance from the fundamental principles described above, in construing these provisions in the Declaration of Rights, we are mindful that:

> 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. Our Constitution is more detailed and specific than the federal Constitution in the protection of the rights of its citizens. We give our Constitution a liberal interpretation in favor of its citizens with respect to those provisions which were designed to safeguard the liberty and security of the citizens in regard to both person and property.

Corum, 330 N.C. at 783 (cleaned up). More broadly, "a Constitution should generally be given, not essentially a literal, narrow, or technical interpretation, but one based upon broad and liberal principles designed to ascertain the purpose and scope of its provisions." *Elliott v. Gardner*, 203 N.C. 749, 753 (1932). In interpreting these provisions, we remain mindful of our "duty to follow a reasonable, workable, and effective interpretation that maintains the people's express wishes." *Stephenson v. Bartlett*, 355 N.C. 354, 382 (2002).

1. Free Elections Clause

¶ 133 Plaintiffs first argue that partisan gerrymandering violates the free elections clause in section 10 of our Declaration of Rights. The free elections clause has no analogue in the federal Constitution and is, accordingly, a provision that makes the state constitution "more detailed and specific than the federal Constitution in the protection of the rights of its citizens." *Corum*, 330 N.C. at 783. This clause provides, in laconic terms, "[a]ll elections shall be free." N.C. Const. art. I, § 10.

¶ 134 We turn to the history of the free elections clause. *See Sneed v. Greensboro City Bd. of Educ.*, 299 N.C. 609, 613 (1980) (noting in constitutional interpretation we consider "the history of the . . . provision and its antecedents"). The free elections clause was included in the 1776 Declaration of Rights. It was modeled on a nearly identical clause in Virginia's declaration of rights. *See* Va. Const. of 1776, Declaration of Rights, § 6 (1776); Earle H. Ketcham, *The Sources of the North Carolina Constitution of 1776*, 6 N.C. Hist. Rev. 215, 221 (1929). The Virginia clause was derived from a clause in the English Bill of Rights of 1689, a product of the Glorious Revolution of 1688. Ketcham, *The Sources of the North Carolina Constitution of 1776*, 6 N.C. Hist. Rev. at 221. That provision provided "election of members of parliament ought to be free." Bill of Rights 1689, 1 W. & M. Sess. 2 c. 2 (Eng.). This provision of the 1689 English Bill of Rights was adopted in response to the king's efforts to manipulate parliamentary elections by diluting the vote in different areas to attain "electoral advantage," leading to calls for a "free and lawful parliament" by the participants of the Glorious Revolution. J.R. Jones, *The Revolution of 1688 in England* 148 (1972); Gary S. De Krey, *Restoration and Revolution in Britain: A Political History of the Era of Charles II and the Glorious Revolution* 241, 247–48, 250 (2007). Avoiding the manipulation of districts that diluted votes for electoral gain was, accordingly, a key principle of the reforms following the Glorious Revolution.

¶ 135 North Carolina's free elections clause was enacted following the passage of similar clauses in other states, including Pennsylvania and Virginia. *See* John V. Orth, *North Carolina Constitutional History*, 70 N.C. L. Rev. 1759, 1797–98 (1992). Pennsylvania's free elections clause was enacted in response to laws that manipulated elections for representatives to Pennsylvania's colonial assembly. *League of Women Voters of Pa. v. Pennsylvania*, 645 Pa. 1, 178 A.3d 737, 804 (2018). Pennsylvania's version of the free elections clause was intended to end "the dilution of

the right of the people of [the] Commonwealth to select representatives to govern their affairs," *League of Women Voters of Pa.*, 645 Pa. at 108, 178 A.3d 737 at 808, and to codify an "explicit provision[ ] to establish protections of the right of the people to fair and equal representation in the governance of their affairs[,]" *id.* at 104, 178 A.3d 737 at 806.

¶ 136 Under North Carolina law, our free elections clause was also intended for that purpose. This clause was enacted with the preceding clause requiring "frequent elections," which provides that "[f]or redress of grievances and for amending and strengthening the laws, elections shall be often held." N.C. Const. art. I, § 9. Construing these provisions *in pari materia*, it follows that the "elections" which the prefatory clause of section 9 calls for must be "free" as well as "frequent." As a matter of fundamental principle, these sections "concern[ ] the application of the principle of popular sovereignty, first stated in Section 2." Orth & Newby at 55. The free elections clause, accordingly, provides "free elections" as the most fundamental democratic process by which the principle of popular sovereignty is applied, and the government "derive[s]" its power from the people and is "founded upon their will only." N.C. Const. art. I, § 2; *see also Quinn*, 120 N.C. at 426.

¶ 137 The free elections clause reflects the principle of the Glorious Revolution that those in power shall not attain "electoral advantage" through the dilution of votes and that representative bodies—in England, parliament; here, the legislature—must be "free and lawful." De Krey, *Restoration and Revolution in Britain* at 250. Legislative Defendants argue and the trial court concluded that the free elections clause could not be read to speak on partisan gerrymandering because Patrick Henry, one of the drafters of the Virginia free elections clause on which ours was based, engaged in the practice of partisan gerrymandering "to the detriment of James Madison" at the time of that clause's drafting.

¶ 138 We are unpersuaded by this evidence. First, the framers of our constitution did not establish fixed rules preemptively attempting to address every possible contingency. Thus, Legislative Defendants' attempt to fix the meaning of these provisions by sole reference to the practices thought permissible at the time they were enacted is not only inconsistent with hundreds of years of constitutional development, but it is also inconsistent with the intent of the people as expressed in their choice to espouse broad principles rather than narrow rules. Furthermore, the framers of North Carolina's constitution repeatedly articulated their intent to make the North Carolina Constitution responsive to the broader

principles of the Glorious Revolution.[13] The framers of North Carolina's constitution, such as James Iredell, believed that the American Revolution represented the fulfillment of the same principles vindicated by England's Glorious Revolution. *See generally* Speech by James Iredell to the Edenton District Superior Court Grand Jury (May 1778), *in* 13 *Colonial and State Records of North Carolina* 434–36, *available at* https://docsouth.unc.edu/csr/index.php/document/csr13-0498. And in 1775, prior to the drafting of the state constitution, North Carolina's delegates to the Continental Congress urged North Carolina to fight British attempts to infringe "those glorious Revolution principles." Circular letter from William Hooper, Joseph Hewes, and Richard Caswell to the inhabitants of North Carolina, *in* 10 *Colonial and State Records of North Carolina* 23. Finally, North Carolina's leaders demanded the election of delegates to the Provincial Congress "be free and impartial." Minutes of the North Carolina Council of Safety (Aug. 22, 1776), *in* 10 *Colonial and State Records of North Carolina* 702. These primary sources indicate that our founders did not hold the limited view that the only requirement for an election to be a "free" election was that those qualified had access to the ballot box, although that is also within the ambit of the clause; rather, they adhered to the broad principles of the Glorious Revolution—that all attempts to manipulate the electoral process, especially through vote dilution on a partisan basis, as in the "rotten boroughs" of England, would be prohibited. Such a reading is consonant with section 2, which adopts the principle of popular sovereignty in order that the government be "founded upon [the people's] will only." N.C. Const. art. I, § 2.

¶ 139 Moreover, the precise wording of the free elections clause has changed over time. It originally read, "[E]lections of Members to serve as Representatives in General Assembly ought to be free." In 1868, in concert with its adoption of the equality principle in section 1, the Reconstruction Convention amended the free elections clause to read "[a]ll elections ought to be free." In 1971, the present version was adopted, changing "ought to" to the command "shall." This change was intended to "make it clear" that the free elections clause, along with other

13. The trial court concluded the free elections clause in our Declaration of Rights "does not operate as a restraint on the General Assembly's ability to redistrict for partisan advantage," based in part on the history of the free elections clauses in the Virginia Declaration of Rights and the English Bill of Rights. But based on the history we have recounted, the perceived unfairness of drawing of borough lines for partisan advantage was a central concern of the Glorious Revolution, and the framers of the North Carolina Declaration of Rights and Constitution in 1776 expressed a strong commitment to the principles of the Glorious Revolution, including an insistence on elections being "impartial."

"rights secured to the people by the Declaration of Rights[,] are commands and not mere admonitions to proper conduct on the part of government." *N.C. State Bar v. DuMont*, 304 N.C. 627, 639 (1982) (quoting John L. Sanders, "The Constitutional Development of North Carolina," in *North Carolina Manual* 87, 94 (1979)). Accordingly, though those in power during the early history of our state may have viewed the free elections clause as a mere "admonition" to adhere to the principle of popular sovereignty through elections, a modern view acknowledges this is a constitutional requirement.

¶ 140 Finally, from the earliest language, the framers evidenced an intent to enshrine a broad principle of "free" elections, and this language is a direct application of the principle of popular sovereignty in section 2. *See* N.C. Const. art. 1, § 2. Since the Reconstruction Convention of 1868, it must also be textually read in concord with—and as giving effect to—the fundamental principle of equality, that "all persons are created equal," announced in section 1. *See* N.C. Const. art. 1, § 1. Therefore, even if "free" originally meant the electoral process would be available for some, at least since 1868, it must also mean that voters must not be denied voting power on an equal basis in harmony with this fundamental principle. Although our understanding of what is required to maintain free elections has evolved over time, there is no doubt these fundamental principles establish that elections are not free if voters are denied equal voting power in the democratic processes which maintain our constitutional system of government. When the legislature denies to certain voters this substantially equal voting power, including when the denial is on the basis of voters' partisan affiliation, elections are not free and do not serve to effectively ascertain the will of the people. This violates the free elections clause as interpreted against the backdrop of the fundamental principles in our Declaration of Rights. Accordingly, for an election to be free and the will of the people to be ascertained, each voter must have substantially equal voting power and the state may not diminish or dilute that voting power on a partisan basis.

¶ 141 Thus, partisan gerrymandering, through which the ruling party in the legislature manipulates the composition of the electorate to ensure that members of its party retain control, is cognizable under the free elections clause because it can prevent elections from reflecting the will of the people impartially and by diminishing or diluting voting power on the basis of partisan affiliation. Partisan gerrymandering prevents election outcomes from reflecting the will of the people and such a claim is cognizable under the free elections clause.

2. Equal Protection Clause

¶ 142 Plaintiffs also argue that partisan gerrymandering is cognizable under the equal protection clause because partisan gerrymandering may violate every individual voter's fundamental right to vote on equal terms and the fundamental right to substantially equal voting power. We agree.

¶ 143 The equal protection clause provides that "[n]o person shall be denied the equal protection of the laws." N.C. Const. art. I, § 19. This clause was added to our Declaration of Rights with the adoption of the 1971 constitution. Although the language of this provision mirrors the federal Equal Protection Clause, "[i]t is beyond dispute that this Court 'ha[s] the authority to construe [the State Constitution] differently from the construction by the United States Supreme Court of the Federal Constitution, as long as our citizens are thereby accorded no lesser rights than they are guaranteed by the parallel federal provision.' " *Stephenson*, 355 N.C. at 381 n.6 (second alteration in original) (quoting *State v. Carter*, 322 N.C. 709, 713 (1988)). Our state constitution provides greater protection of voting rights than the federal Constitution. *Blankenship v. Bartlett*, 363 N.C. 518, 522–24 (2009); *Stephenson*, 355 N.C. at 376, 380–81, 381 n.6.

¶ 144 The equal protection clause in section 19 of our Declaration of Rights requires that if a government classification "impermissibly interferes with the exercise of a fundamental right a strict scrutiny must be given the classification." *Northampton Cnty. Drainage Dist. No. One v. Bailey*, 326 N.C. 742, 746 (1990).

¶ 145 We have held that under our equal protection clause, "the right to vote on equal terms is a fundamental right." *Stephenson*, 355 N.C. at 378 (quoting *Northampton*, 326 N.C. at 747). In *Stephenson*, we further held that our equal protection clause protects "the fundamental right of each North Carolinian to substantially equal voting power." 355 N.C. at 379. Under our state constitution, the fundamental right to vote in elections, which is the central democratic process in our constitutional system through which the "political power" that inheres in the people under the fundamental principles of our Declaration of Rights is channeled to the people's representatives in government, encompasses "the principles of substantially equal voting power and substantially equal legislative representation." *Id.* at 382.

¶ 146 Accordingly, our state constitution's equal protection clause in article I, section 19 provides greater protections in redistricting cases than the federal constitution. In *Stephenson*, we also held that the use of single-member and multi-member districts in a redistricting plan

violated our state's equal protection clause. It did so because voters in multi-member districts had a greater opportunity to influence representatives, as "those living in [multi-member] districts may call upon a contingent of responsive Senators and Representatives to press their interests, while those in a single-member district may rely upon only one Senator or Representative." *Id.* at 379. This "classification of voters" between single-member districts and multi-member districts created an "impermissible distinction among similarly situated citizens[,]" implicated "the fundamental right to vote on equal terms," *id.* at 378, and restricted the right to "substantially equal voting power and substantially equal legislative representation[,]" *id.* at 382. Accordingly, the redistricting plan triggered strict scrutiny, not because the government drew a distinction on the basis of a protected classification, but because the distinction the government drew implicated a fundamental right. *Id.* at 378. Under *Stephenson*, the fundamental right to substantially equal voting power is more expansive than any analogous fundamental right under the Equal Protection Clause of the Fourteenth Amendment, since that provision does not prohibit the use of single-member and multi-member legislative districts in one map. *See Fortson v. Dorsey*, 379 U.S. 433, 437 (1965) (holding that the use of multi-member and single-member districts in the same legislative map did not violate the Equal Protection Clause where there was "no mathematical disparity" between voters).

¶ 147 Furthermore, the equal protection clause in article I, section 19 applies in circumstances where the federal Equal Protection Clause is silent. In *Blankenship v. Bartlett*, we held that our state's equal protection clause "requires a heightened level of scrutiny of judicial election districts," because it implicates the fundamental "right to vote on equal terms in representative elections," although federal courts have held the one-person, one-vote standard of the federal Equal Protection Clause is inapplicable to state judicial elections. *Blankenship*, 363 N.C. at 522–23 (citing *Chisom v. Roemer*, 501 U.S. 380 (1991)).

¶ 148 We hold here that partisan gerrymandering claims are cognizable under the equal protection clause of our Declaration of Rights. "[T]he fundamental right to vote on equal terms[,]" *Stephenson*, 355 N.C. at 378, includes the right to "substantially equal voting power and substantially equal legislative representation[,]" *id.* at 382. This necessarily encompasses the opportunity to aggregate one's vote with likeminded citizens to elect a governing majority of elected officials who reflect those citizens' views. Designing districts in a way that denies voters substantially equal voting power by diminishing or diluting their votes on the basis of party affiliation deprives voters in the disfavored party of the opportunity

to aggregate their votes to elect such a governing majority. Like the distinctions at issue in *Stephenson*, drawing distinctions between voters on the basis of partisanship when allocating voting power diminishes the "representational influence" of voters. *Id.* at 377. Except, in the case of partisan gerrymandering, the effect on the representational influence is more severe because those who have been deprived equal voting power lack the same opportunity as those from the favored party to elect a governing majority, even when they vote in numbers that would garner voters of the favored party a governing majority. Accordingly, those voters have far fewer legislators who are "responsive" to their concerns and who can together "press their interests." *Id.* at 379.

¶ 149 Our reading of the equal protection clause is most consistent with the fundamental principles in our Declaration of Rights of equality and popular sovereignty—together, political equality. *See* N.C. Const. art. I, §§ 1, 2. Popular sovereignty requires that for a government to be "of right" it must be "founded upon [the people's] will only." N.C. Const. art. I, § 2. In a statewide election, ascertaining the will of the people is straightforward. But in legislative elections, voters only have equal "representational influence" if results fairly reflect the will of the people not only district by district, but in aggregate, and on equal terms. *See Stephenson*, 355 N.C. at 377 (examining the effect of single-member and multi-member districts across the state). Otherwise, the "will" on which the government "is founded" is not that of the people of this state but that of the ruling party.

¶ 150 We conclude that when on the basis of partisanship the General Assembly enacts a districting plan that diminishes or dilutes a voter's opportunity to aggregate with likeminded voters to elect a governing majority—that is, when a districting plan systematically makes it harder for one group of voters to elect a governing majority than another group of voters of equal size—the General Assembly unconstitutionally infringes upon that voter's fundamental rights to vote on equal terms and to substantially equal voting power. Classifying voters on the basis of partisan affiliation so as to dilute their votes in this manner is subject to strict scrutiny because it burdens a fundamental right and is presumed unconstitutional unless narrowly tailored to a compelling governmental interest. *See Northampton*, 326 N.C. at 746 ("[I]f a classification impermissibly interferes with the exercise of a fundamental right a strict scrutiny must be given the classification. Under the strict scrutiny test the government must demonstrate that the classification it has imposed is necessary to promote a compelling governmental interest.").

3. Free Speech Clause and Freedom of Assembly Clause

¶ 151 Finally, plaintiffs argue that partisan gerrymandering is cognizable under the free speech clause under section 14 and the freedom of assembly clause under section 12 of our Declaration of Rights. We agree.

¶ 152 Our free speech clause provides that "[f]reedom of speech and of the press are two of the great bulwarks of liberty and therefore shall never be restrained." N.C. Const. art. I, § 14. Our freedom of assembly clause provides, in pertinent part, that "[t]he people have a right to assemble together to consult for their common good, to instruct their representatives, and to apply to the General Assembly for redress of grievances." *Id.* § 12. These provisions textually differ from their federal analogues, and we have construed them to provide greater protection than those provisions.

¶ 153 In *Corum*, this Court construed the free speech clause in our Declaration of Rights. 330 N.C. at 781. The plaintiff alleged "retaliation against plaintiff for his exercise of certain free speech rights." *Id.* at 766. He brought a claim for, *inter alia*, a direct cause of action under article I, section 14 of the state constitution. *Id.* We reasoned that "[t]he words 'shall never be restrained' are a direct personal guarantee of each citizen's right of freedom of speech[,]" *id.* at 781; that this provision "is self-executing[,]" *id.* at 782; and, accordingly, "the common law, which provides a remedy for every wrong, will furnish the appropriate action for the adequate redress of a violation of that right[,]" *id.* We observed concerning the free speech clause that

> [t]his great bulwark of liberty is one of the fundamental cornerstones of individual liberty and one of the great ordinances of our Constitution. Freedom of speech is equal, if not paramount, to the individual right of entitlement to just compensation for the taking of property by the State. Certainly, the right of free speech should be protected at least to the extent that individual rights to possession and use of property are protected. A direct action against the State for its violations of free speech is essential to the preservation of free speech.

Id. (cleaned up). Under the Court's decision in *Corum*, government action that burdens people because of disfavored speech or association violates the free speech clause. *Id.* at 766. The retaliation in *Corum* involved the allegation that government actors conditioned the plaintiff's public employment (in that case, through demotion) on limitations upon

the plaintiff's free speech and expression. *See id*. at 776. In essence, by allegedly conditioning a public right or benefit (the plaintiff's employment) on speech, the government accomplished indirectly what it could not have accomplished directly, and it penalized plaintiff's protected free speech rights based on his views.

¶ 154 In recognizing a direct cause of action for plaintiff's retaliation claim under the free speech clause, we construed the clause more expansively than the Supreme Court of the United States has construed the Free Speech Clause of the First Amendment, since that Court has not recognized a comparable direct constitutional claim under that provision for retaliation. Even when federal free speech principles are persuasive, we reserve the right to extend the reach of our free speech clause beyond the scope of the First Amendment. *See Libertarian Party v. State*, 365 N.C. 41, 47 (2011).

¶ 155 Free speech and freedom of assembly rights are essential to the preservation of our constitutional system. We have held that the "associational rights rooted in the free speech and assembly clauses" are "of utmost importance to our democratic system." *Libertarian Party*, 365 N.C. at 49. In *Libertarian Party*, we reasoned that "citizens form parties to express their political beliefs and to assist others in casting votes in alignment with those beliefs." *Id*. at 49.

¶ 156 The role of free speech is also central in our democratic system. As one scholar has noted:

> Once one accepts the premise of the Declaration of Independence—that governments derive 'their just powers from the consent of the governed'—it follows that the governed must, in order to exercise their right of consent, have full freedom of expression both in forming individual judgments and in forming the common judgment.

Thomas I. Emerson, *The System of Freedom of Expression* 7 (1970). Since 1776, the people of North Carolina have founded our constitutional system on the premise that "[a]ll political power is vested in and derived from the people" and that "government of right" must "originate [ ] from the people" and be "founded upon their will only." N.C. Const. art. I, § 2. Since 1868, they have recognized that "all persons are created equal." N.C. Const. art. I, § 1. And since 1971, they have recognized that "[f]reedom of speech" is one "of the great bulwarks of liberty" and therefore "shall never be restrained." N.C. Const. art. I, § 14.

¶ 157 Partisan gerrymandering violates the freedoms of speech and association and undermines their role in our democratic system. In *Corum*, we recognized that under the free speech clause, state officials may not penalize people for the exercise of their protected rights. But partisan gerrymandering does just that. When legislators apportion district lines in a way that dilutes the influence of certain voters based on their prior political expression—their partisan affiliation and their voting history—it imposes a burden on a right or benefit, here the fundamental right to equal voting power on the basis of their views. When the General Assembly systematically diminishes or dilutes the power of votes on the basis of party affiliation, it intentionally engages in a form of viewpoint discrimination and retaliation that triggers strict scrutiny. *See State v. Petersilie*, 334 N.C. 169, 182 (1993). This practice subjects certain voters to disfavored status based on their views, undermines the role of free speech and association in formation of the common judgment, and distorts the expression of the people's will and the channeling of the political power derived from them to their representatives in government based on viewpoint.

4. The Declaration of Rights and the Law of Partisan Gerrymandering Summarized

¶ 158 In summary, the two most fundamental principles of our Declaration of Rights are equality and popular sovereignty. N.C. Const. art. I, §§ 1, 2. Together, they reflect the democratic theory of our constitutional system: the principle of political equality. The principle of political equality, from the Halifax Resolves and the Declaration of Independence to Lincoln's Gettysburg Address and the Reconstruction Convention to our Declaration of Rights today, can mean only one thing—to be effective, the channeling of "political power" from the people to their representatives in government through the democratic processes envisioned by our constitutional system must be done on equal terms. If through state action the ruling party chokes off the channels of political change on an unequal basis, then government ceases to "derive[ ]" its power from the people or to be "founded upon their will only," and the principle of political equality that is fundamental to our Declaration of Rights and our constitutionally enacted representative system of government is violated.

¶ 159 This principle is reflected in various provisions of our Declaration of Rights. The free elections clause under section 10 guarantees the central democratic process by which the people's political power is transferred to their representatives. The equal protection clause prohibits government from burdening on the basis of partisan affiliation the fundamental right to equal voting power. And the free speech clause and the freedom

of assembly clause prohibit discriminating against certain voters by depriving them of substantially equal voting power, which is a form of impermissible viewpoint discrimination and retaliation for engaging in protected political activity.

¶ 160 Partisan gerrymandering of legislative and congressional districts violates the free elections clause, the equal protection clause, the free speech clause, and the freedom of assembly clause, and the principle of democratic and political equality that reflects the spirits and intent of our Declaration of Rights. To comply with the constitutional limitations contained in the Declaration of Rights which are applicable to redistricting plans, the General Assembly must not diminish or dilute on the basis of partisan affiliation any individual's vote. The fundamental right to vote includes the right to enjoy "substantially equal voting power and substantially equal legislative representation." *Stephenson*, 355 N.C. at 382. The right to equal voting power encompasses the opportunity to aggregate one's vote with likeminded citizens to elect a governing majority of elected officials who reflect those citizens' views. When, on the basis of partisanship, the General Assembly enacts a districting plan that diminishes or dilutes a voter's opportunity to aggregate with likeminded voters to elect a governing majority—that is, when a districting plan systematically makes it harder for individuals because of their party affiliation to elect a governing majority than individuals in a favored party of equal size—the General Assembly deprives on the basis of partisan affiliation a voter of his or her right to equal voting power.

¶ 161 This diminution or dilution of a voter's voting power on the basis of his or her views can be measured either by comparing the number of representatives that a group of voters of one partisan affiliation can plausibly elect with the number of representatives that a group of voters of the same size of another partisan affiliation can plausibly elect, or by comparing the relative chances of voters from each party electing a supermajority or majority of representatives under various possible electoral conditions. Similarly, the diminution or dilution of voting power based of partisan affiliation in this way suffices to show a burden on that voter's speech and associational rights. Accordingly, such a plan is subject to strict scrutiny and is unconstitutional unless the General Assembly can demonstrate that the plan is "narrowly tailored to advance a compelling governmental interest." *Stephenson*, 355 N.C. at 377. Achieving partisan advantage incommensurate with a political party's level of statewide voter support is neither a compelling nor a legitimate governmental interest, as it in no way serves the government's interest in maintaining the democratic processes which function to channel the

people's will into a representative government as secured in the above provisions in the Declaration of Rights.

¶ 162 Here, the partisan gerrymandering violation is based on the redistricting plan as a whole, not a finding with regard to any individual district.[14] Certainly it is possible, as the plaintiffs and the trial court demonstrated, to identify which individual districts in the state legislative maps ignore traditional redistricting principles to achieve a partisan outcome that otherwise would not occur. It is possible to identify the most gerrymandered individual districts. But here the violation is statewide because of the evidence that on the whole, the districts have been drawn such that voters supporting one political party have their votes systematically devalued by having less opportunity to elect representatives to seats, compared to an equal number of voters in the favored party. The effect is stark and even more severe than what this Court identified in *Stephenson* as the equal protection clause violation arising from the use of both single-member and multi-member districts in a redistricting plan. *See Stephenson*, 355 N.C. at 379–82.

¶ 163 We do not believe it prudent or necessary to, at this time, identify an exhaustive set of metrics or precise mathematical thresholds which conclusively demonstrate or disprove the existence of an unconstitutional partisan gerrymander. *Cf. Reynolds v. Sims*, 377 U.S. 533, 578 (1964) ("What is marginally permissible in one [case] may be unsatisfactory in another, depending on the particular circumstances of the case. Developing a body of doctrine on a case-by-case basis appears to us to provide the most satisfactory means of arriving at detailed constitutional requirements in the area of . . . apportionment."). As in *Reynolds*, "[l]ower courts can and assuredly will work out more concrete and specific standards for evaluating state legislative apportionment schemes in the context of actual litigation." *Id.* However, as the trial court's findings of fact indicate, there are multiple reliable ways of demonstrating the existence of an unconstitutional partisan gerrymander. In particular, mean-median difference analysis; efficiency gap analysis; close-votes, close-seats analysis; and partisan symmetry analysis may be useful in assessing whether the mapmaker adhered to traditional neutral districting criteria and whether a meaningful partisan skew necessarily results from North Carolina's unique political geography.[15] If some combination

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14. This is not to rule out the possibility that under an equal protection theory or a free speech theory there may be a circumstance where a single district is a partisan gerrymander but that is not the situation here.

15. Further, while adherence to neutral districting criteria primarily goes to whether the map is justified by a compelling governmental interest, the disregarding of neutral

of these metrics demonstrates there is a significant likelihood that the districting plan will give the voters of all political parties substantially equal opportunity to translate votes into seats across the plan, then the plan is presumptively constitutional.

¶ 164 To be sure, the evidence in this case and in prior partisan gerrymandering cases provides ample guidance as to possible bright-line standards that could be used to distinguish presumptively constitutional redistricting plans from partisan gerrymanders. There is such a thing as a plan that creates a level playing field for all voters. Indeed, historically, there is evidence indicating that most redistricting plans actually have provided for partisan fairness instead of partisan advantage. *See*, *e.g.*, *Common Cause v. Rucho*, 318 F. Supp. 3d 777, 886–87 (M.D.N.C. 2018), *rev'd on other grounds*, 139 S. Ct. 2484 (2019) (finding that North Carolina's efficiency gap of 19.4% was the largest of all states studied and that between 1972 and 2016, the distribution of efficiency gaps centered on zero "meaning that, on average, the districting plans in [t]his sample did not tend to favor either party"). Those who deny such standards exist ignore what the public sees and experiences and what political scientists have demonstrated.

¶ 165 Several possible bright-line standards have emerged in the political science literature and in the parties' briefing before this Court. For example, Dr. Duchin testified at the trial to having analyzed North Carolina historical election data over a period of years, by using a simple overlay method, overlaying the maps onto data from all 52 of the statewide elections since 2012 to determine whether "close votes" resulted in "close seats," as one would see in all of the alternative maps to the enacted plans. Under this method, which Dr. Duchin has written about extensively, a plan which persistently resulted in the same level of partisan advantage to one party when the vote was closer than 52%, could be considered presumptively unconstitutional. As Dr. Duchin noted, "I don't think you get that large and durable [an effect of partisan skew] by accident."

¶ 166 Second, at the trial court below, Dr. Daniel Magleby presented a report in rebuttal of the testimony of Dr. Barber, in which he proposed using the measurement of the mean-median difference to determine the degree of partisan skew in a particular instance. His report described the method as follows:

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criteria such as compactness, contiguity, and respect for political subdivisions, particularly when the effect of the map subordinates those criteria to pursuit of partisan advantage, may also be some evidence a map burdens the fundamental right to equal voting power.

> One of the simplest measures of symmetry we can apply to redistricting scenarios is the median-mean difference (see Katz, King and Rosenblatt 2020; MacDonald and Best 2015; Best et al. 2017) . . . We find [the median-mean difference] by taking the mean (average) of the district-level vote share and comparing it to the median district-level vote-share, the district-level vote share for which there are an equal number of districts with higher vote shares as there are districts with lower vote shares. When the median and mean are equal, the distribution of districts is symmetrical and the map will treat the parties with symmetry. If the median-mean is not zero, it means the map will not treat vote cast for the parties equally.

Thus, based on Dr. Magelby's testimony, any mean-median difference that is not zero could be treated as presumptively unconstitutional. However, using the actual mean-median difference measure, from 1972 to 2016 the average mean-median difference in North Carolina's congressional redistricting plans was 1%. *Common Cause*, 318 F. Supp. 3d at 893. That measure instead could be a threshold standard such that any plan with a mean-median difference of 1% or less when analyzed using a representative sample of past elections is presumptively constitutional.

¶ 167 With regard to the efficiency gap measure, courts have found "that an efficiency gap above 7% in any districting plan's first election year will continue to favor that party for the life of the plan." *Whitford v. Gill*, 218 F. Supp. 3d 837, 905 (W.D. Wis. 2016), *rev'd on other grounds*, 138 S. Ct. 1916 (2018). It is entirely workable to consider the seven percent efficiency gap threshold as a presumption of constitutionality, such that absent other evidence, any plan falling within that limit is presumptively constitutional. The efficiency gap, like other measures of partisan symmetry, "is not premised on strict proportional representation, but rather on the notion that the magnitude of the winner's bonus should be approximately the same for both parties." *Common Cause*, 318 F. Supp. 3d at 889.

¶ 168 Other manageable standards appear in the evidence before the trial court as well. Legislative Defendants' own expert witness proposed using computer simulations to draw redistricting plans solely on the basis of traditional redistricting criteria, with any adopted redistricting plan with a partisan bias that fell within the middle 50% of simulation results being presumptively constitutional. It was also suggested that the legislature could be required to draw districts "within 5% of the median

outcome expected from nonpartisan redistricting criteria, at a statewide level, across a range of electoral circumstances." The development of such metrics in this and future cases is precisely the kind of reasoned elaboration of increasingly precise standards the United States Supreme Court utilized in the one-person, one-vote context. *See*, *e.g.*, *Brown v. Thomson*, 462 U.S. 835, 842–43 (1983) ("Our decisions have established, as a general matter, that an apportionment plan with a maximum population deviation under 10% falls within this category of minor deviations. A plan with larger disparities in population, however, creates a prima facie case of discrimination and therefore must be justified by the State." (citations omitted)).

¶ 169 There may be other standards the parties wish to suggest to the trial court. These are primarily questions of what evidence might be relevant to prove a redistricting plan's discriminatory effect under the free elections and equal protection clauses and a discriminatory burden to a right or benefit on the basis of protected political activity amounting to viewpoint discrimination and retaliation under the free speech and freedom of assembly clauses of the state constitution. Because this is not a strict proportionality requirement, there is no magic number of Democratic or Republican districts that is required, nor is there any constitutional requirement that a particular district be competitive or safe. To be clear, the fact that one party commands fifty-nine percent of the statewide vote share in a given election does not entitle the voters of that party to have representatives of its party comprise fifty-nine percent of the North Carolina House, North Carolina Senate, or North Carolina congressional delegation. But those voters are entitled to have substantially the same opportunity to electing a supermajority or majority of representatives as the voters of the opposing party would be afforded if they comprised fifty-nine percent of the statewide vote share in that same election. What matters here, as in the one-person, one-vote context, is that each voter's vote carries roughly the same weight when drawing a redistricting plan that translates votes into seats in a legislative body.

¶ 170 Once a plaintiff shows that a map infringes on their fundamental right to equal voting power under the free elections clause and equal protection clause or that it imposes a burden on that right based on their views such that it is a form of viewpoint discrimination and retaliation based on protected political activity under the free speech clause and the freedom of assembly clause, the map is subject to strict scrutiny and is presumptively unconstitutional and "the government must demonstrate that the classification it has imposed is necessary to promote a compelling governmental interest." *Northampton*, 326 N.C. at 746. As

noted above, partisan advantage—that is, achieving a political party's advantage across a map incommensurate with its level of statewide voter support—is neither a compelling nor a legitimate governmental interest, as it in no way serves the government's interest in maintaining the democratic processes which function to channel the people's will into a representative government.[16] Rather, compelling governmental interests in the redistricting context include the traditional neutral districting criteria expressed in article II, sections 3 and 5 of the North Carolina Constitution. Incumbency protection may ordinarily be a permissible governmental interest if it is applied evenhandedly, is not perpetuating a prior unconstitutional redistricting plan, and is consistent with the equal voting power requirements of the state constitution; however, incumbency protection is not a compelling governmental interest that justifies the denial to a voter of the fundamental right to substantially equal voting power under the North Carolina Constitution. Other widely recognized traditional neutral redistricting criteria, such as compactness of districts and respect for other political subdivisions, may also be compelling governmental interests. If the General Assembly has created a map that infringes on individual voter's fundamental right to equal voting power and cannot show that the map is narrowly tailored to a compelling governmental interest, courts must conclude the map is unconstitutional and forbid its use.

¶ 171 The dissent contends that the partisan gerrymandering claims we recognize as violating both fundamental principles and particular provisions of our Declaration of Rights are not cognizable claims under that document. Our fundamental disagreement stems in one respect from a difference in method. Here, we have "recurre[d]" to those "fundamental principles" by which "[a]ll generations are solemnly enjoined to return *ad fontes* (to the sources) and [to] rethink for themselves the implications of the fundamental principles of self-government that animated the revolutionary generation." Orth & Newby, at 91. In this light, the dissenters insist that the only way to discern the meaning of provisions of the North Carolina Constitution is to adhere to their own assessment of historical practice. In so doing, they interpret the state constitution in a manner the Framers and the constitution they enacted firmly rejected. If constitutional provisions forbid only what they were understood

16. Political fairness, or the effort to apportion to each political party a share of seats commensurate with its level of statewide support, is a permissible redistricting criterion. *See Gaffney*, 412 U.S. at 736. However, achieving such a goal involves a government's prioritization of, rather than diminution and dilution of, each person's right to substantially equal voting power.

to forbid at the time they were enacted, then the free elections clause has nothing to say about slavery and the complete disenfranchisement of women and minorities. In short, the dissent's view compels the conclusion that there is no constitutional bar to denying the right to vote to women and black people. Fortunately, the Framers and the people of North Carolina chose to adopt a constitution containing provisions which "provide[s] the elasticity which ensures the responsive operation of government." *State ex rel. Martin v. Preston*, 325 N.C. 438, 458 (1989).

¶ 172 Second, our disagreement with the dissenting opinion is compelled in part by our divergent views of the role of the courts in conducting judicial review for constitutionality. The justification for judicial review in North Carolina is motivated by the concern for securing both the fundamental rights contained in our Declaration of Rights and our constitution, and for ensuring the effective functioning of the democratic system of government established by the same. In North Carolina, we presume the legislature has complied with the constitution. Where legislation does not violate a particular constitutional limitation, and particularly where it does not violate the rights protected by the Declaration of Rights, the presumption that the issue will be resolved through the ordinary political process is justified, and legislation will be upheld if there is a rational basis supporting it. However, in *Bayard v. Singleton* and since, we have identified two circumstances justifying judicial review by this Court. First, we will protect constitutional rights and, although they are by no means the only enforceable provisions of our constitution, the "civil rights guaranteed by the Declaration of Rights in Article I of our Constitution," in particular. *Corum*, 330 N.C. at 782. "The very purpose of the Declaration of Rights is to ensure that the violation of these rights is never permitted by anyone who might be invested under the Constitution with the powers of the State," including the General Assembly. *Id.* at 783. Accordingly, "[w]e give our Constitution a liberal interpretation in favor of its citizens with respect to those provisions which were designed to safeguard the liberty and security of the citizens in regard to both person and property." *Id.* Fundamentally, "[i]t is the state judiciary that has the responsibility to protect the state constitutional rights of [its people]; this obligation to protect the fundamental rights of individuals is as old as the State." *Id.* Indeed, we have recognized this duty since *Bayard*, where we held that legislation violated the right to a trial by jury. 1 N.C. (Mart.) at 7. *Bayard* justified review of all such rights on the ground that any erosion of rights endangered other rights. *See id.* (justifying review of "right to a decision of his property by a trial by jury" on the grounds that "if the Legislature could take away this right, and require him to stand condemned in his property without

a trial, it might with as much authority require his life to be taken away without a trial by jury, and that he should stand condemned to die, without the formality of any trial at all").

¶ 173 Further this court has recognized an even greater justification for judicial review of acts that restrict the democratic processes through which the "political power" is channeled to the people's representatives, and which undermine the very democratic system created by our constitution. In *Bayard*, this Court justified judicial review of acts of the coordinate branches not only because without it they might violate fundamental rights, but also on the grounds of an even greater harm that without judicial review "the members of the General Assembly . . . might with equal authority, . . . render themselves the Legislators of the State for life, without any further election of the people." *Id*. Just as it is the duty of this Court under *Bayard* to guarantee constitutional rights protecting liberty, person, and property, it is the duty of this Court under *Bayard* to protect the democratic processes through which the "political power" of the people is exercised, and that each person's voice is heard on "equal" terms through the vote. N.C. Const. art. I, §§ 2, 1; *see*, *e.g.*, *Stephenson* 355 N.C. at 379 (recognizing "the fundamental right of each North Carolinian to substantially equal voting power"); *Northampton*, 326 N.C. at 747 (holding the "right to vote on equal terms is a fundamental right"); *People ex rel. Van Bokkelen*, 73 N.C. at 225 (holding it to be "too plain for argument" that the General Assembly's malapportionment of election districts "is a plain violation of fundamental principles"); Ely, *Democracy and Distrust* at 103 ("Malfunction occurs when the *process* is undeserving of trust, when [ ] the ins are choking off the channels of political change to ensure that they will stay in and the outs will stay out.").

¶ 174 Partisan gerrymandering claims do not require the making of "policy choices and value determinations." *Bacon*, 353 N.C. at 717. As we have discussed, such claims are discernable under the North Carolina Constitution and precedent. Moreover, we have described several manageable standards for evaluating the extent to which districting plans dilute votes on the basis of partisan affiliation. Accordingly, we hold partisan gerrymandering claims are justiciable in North Carolina courts under the free elections clause, equal protection clause, free speech clause, and freedom of assembly clause of the Declaration of Rights.

E. Legislative Defendants' Elections Clause Argument

¶ 175 Legislative Defendants also argue that "the federal constitution bars plaintiffs['] claims against the congressional plan" under the Elections

Clause, U.S. Const. art. I, § 4, cl. 1, because the word "Legislature" in that clause forbids state courts from reviewing whether a congressional districting plan violates the state's own constitution. We disagree. This argument, which was not presented at the trial court, is inconsistent with nearly a century of precedent of the Supreme Court of the United States affirmed as recently as 2015. It is also repugnant to the sovereignty of states, the authority of state constitutions, and the independence of state courts, and would produce absurd and dangerous consequences.

¶ 176 First, this theory contradicts the holding of *Rucho*, where the Supreme Court of the United States, in an opinion authored by Chief Justice Roberts, said that "[p]rovisions in . . . *state constitutions* can provide standards and guidance for *state courts* to apply" in a case addressing the justiciability of partisan gerrymandering claims in *congressional* plans. 139 S. Ct. at 2507 (emphases added).

¶ 177 Second, a long line of decisions by the Supreme Court of the United States confirm the view that state courts may review state laws governing federal elections to determine whether they comply with the state constitution. *See Smiley v. Holm*, 285 U.S. 355, 368 (1932) (holding the Elections Clause does not "endow the Legislature of the state with power to enact laws in any manner other than that in which the *Constitution of the state* has provided" (emphasis added)). The state legislature's enactment of election laws reflects an exercise of the lawmaking power; accordingly, the legislature must comply with all of "the conditions which attach to the making of state laws," *id.* at 365, including "restriction[s] imposed by state Constitutions upon state Legislatures when exercising the lawmaking power," *id.* at 369; *see also Ariz. State Leg. v. Ariz. State Indep. Redistricting Comm'n*, 576 U.S. 787, 817–18 (2015) ("Nothing in [the Elections] Clause instructs, nor has this Court ever held, that a state legislature may prescribe regulations on the time, place, and manner of holding federal elections in defiance of provisions of the State's constitution."); *Growe v. Emison*, 507 U.S. 25, 33–34 (1993) (emphasizing "[t]he power of the judiciary of a State to require valid reapportionment" of congressional districts and rejecting the federal district court's "mistaken view that federal judges need defer only to the Minnesota Legislature and not at all to the State's courts").

F. The 2021 Enacted Plans Violate the Declaration of Rights as Partisan Gerrymanders

¶ 178 **[3]** Now, we must apply these legal principles to the 2021 enacted plans in order to determine if the current maps constitute partisan gerrymanders in violation of the North Carolina Constitution's Declaration

of Rights. We conclude that they do and therefore enjoin the enacted plans from use in any future elections and, in accordance with N.C.G.S. § 120-2.4(a), provide the General Assembly the opportunity to submit new redistricting plans that satisfy all provisions of the North Carolina Constitution.

¶ 179 As discussed above, the General Assembly triggers strict scrutiny under the free elections clause and the equal protection clause of the North Carolina Constitution when, on the basis of partisan affiliation, it deprives a voter of his or her fundamental right to substantially equal voting power. This fundamental right encompasses the opportunity to aggregate one's vote with likeminded citizens to elect a governing majority of elected officials who reflect those citizens' views. When on the basis of partisanship the General Assembly enacts a districting plan that diminishes or dilutes a voter's opportunity to aggregate with likeminded voters to elect a governing majority—that is, when a districting plan systematically makes it harder for one group of voters to elect a governing majority than another group of voters of equal size—the General Assembly infringes upon that voter's fundamental right to vote. Similarly, this action is subject to strict scrutiny under the free speech clause and freedom of assembly clause because it burdens voters on the basis of protected political activity.

¶ 180 To trigger strict scrutiny, a party alleging that a redistricting plan violates this fundamental right must demonstrate that the plan makes it systematically more difficult for a voter to aggregate his or her vote with other likeminded voters, thus diminishing or diluting the power of that person's vote on the basis of his or her views. Such a demonstration can be made using a variety of direct and circumstantial evidence, including but not limited to: median-mean difference analysis; efficiency gap analysis; close-votes-close seats analysis, partisan symmetry analysis; comparing the number of representatives that a group of voters of one partisan affiliation can plausibly elect with the number of representatives that a group of voters of the same size of another partisan affiliation can plausibly elect; and comparing the relative chances of groups of voters of equal size who support each party of electing a supermajority or majority of representatives under various possible electoral conditions. Evidence that traditional neutral redistricting criteria were subordinated to considerations of partisan advantage may be particularly salient in demonstrating an infringement of this right.

¶ 181 The right to vote on equal terms is a fundamental right in this state and thus when a challenging party demonstrates that a redistricting plan, on the basis of partisan affiliation, infringes upon his or her fundamental

right to substantially equal voting power, strict scrutiny is the appropriate standard for reviewing that act. *See Stephenson*, 355 N.C. at 377 ("Strict scrutiny . . . applies when the classification impermissibly interferes with the exercise of a fundamental right . . . ." (cleaned up)). Strict scrutiny is "this Court's highest tier of review." *Id.* "Under strict scrutiny, a challenged governmental action is unconstitutional if the State cannot establish that it is narrowly tailored to advance a compelling governmental interest." *Id.* Within the redistricting context, compliance with traditional neutral districting principles, including those enumerated in article II, sections 3 and 5 of the North Carolina Constitution, may constitute a compelling governmental interest. Partisan advantage, however, is not a compelling governmental interest.

¶ 182 Here, we apply this standard to each of the three 2021 enacted maps: the congressional map, the North Carolina House map, and the North Carolina Senate map. As noted previously, we have adopted in full the extensive and detailed factual findings of the trial court summarized above and have attached the maps themselves to this opinion.

1. Congressional Map

¶ 183 First, we apply this constitutional standard to the 2021 congressional map. Based on the trial court's factual findings, we conclude that the 2021 congressional map constitutes partisan gerrymandering that, on the basis of partisan affiliation, violates plaintiffs' fundamental right to substantially equal voting power.

¶ 184 Numerous factual findings compel this conclusion. For instance, based on Dr. Mattingly's ensemble analysis, the trial court found "that the Congressional Map is the product of intentional, pro-Republican partisan redistricting. Indeed, the court found that

> [a]cross [the] 80,000 simulated nonpartisan plans, not a single one had the same or more Democratic voters packed into the three most Democratic districts—*i.e.*, the districts Democrats would win no matter what—in comparison to the enacted plan. And not a single one had the same or more Republican voters in the next seven districts—i.e., the competitive districts—in comparison to the enacted plan.

¶ 185 Accordingly, the court found that "[t]he Congressional map is 'an extreme outlier' that is 'highly non-responsive to the changing opinion of the electorate.' " The court found that this high non-responsiveness was a product of "cracking Democrats from the more competitive districts and

packing them into the most heavily Republican and heavily Democratic districts," which the court described as "the key signature of intentional partisan redistricting."

¶ 186 Based on Dr. Cooper's analysis, the court observed that "[a]lthough North Carolina gained an additional congressional seat as a result of population growth that came largely from the Democratic-leaning Triangle (Raleigh-Durham-Chapel Hill) and the Charlotte metropolitan areas, the number of anticipated Democratic seats under the enacted map actually decreases, with only three anticipated Democratic seats, compared with the five seats that Democrats won in the 2020 election." This decrease, the court observed, is enacted "by splitting the Democratic-leaning counties of Guilford, Mecklenburg, and Wake among three congressional districts each." The court further noted that "[t]here was no population-based reason" for these splits.

¶ 187 Based on Dr. Pegden's analysis, the court found "that the enacted congressional plan is more favorable to Republicans than 99.9999% of the [billions or trillions of] comparison maps his algorithm generated." Accordingly, the court determined that "the enacted congressional map is more carefully crafted to favor Republicans than at least 99.9999% of all possible maps of North Carolina satisfying the nonpartisan constraints imposed in [Dr. Pegden's] algorithm."

¶ 188 Based on Dr. Duchin's analysis, the trial court found "that the political geography of North Carolina today does not lead only to a district map with partisan advantage given to one political party." Rather, the court determined, "[t]he Enacted Plans behave as though they are built to resiliently safeguard electoral advantage for Republican candidates."

¶ 189 Based on Dr. Cooper's close-votes-close-seats analysis, the trial court found that individual congressional districts were drawn to favor certain current or future Republican representatives. For instance, the court found that the congressional map "places the residences of an incumbent Republican representative and an incumbent Democratic representative within a new, overwhelmingly Republican district, NC-11, 'virtually guaranteeing' that the Democratic incumbent will lose her seat." Similarly, the court observed that "[t]he 2021 Congressional Plan includes one district where no incumbent congressional representative resides . . . [which] 'overwhelmingly favors' the Republican candidate based on the district's partisan lean."

¶ 190 The trial court found that the congressional map constituted a statistical partisan outlier on the regional level, as well. Specifically, the court found that "that the enacted congressional plan[s] districts in

each region examined exhibit[ed] political bias when compared to the computer-simulated districts in the same regions."

¶ 191 More broadly, though, the trial court found that "[t]he congressional district map is best understood as a single organism given that the boundaries drawn for a particular congressional district in one part of the state will necessarily affect the boundaries drawn for the districts elsewhere in the state." Accordingly, the court found "that the 'cracking and packing' of Democratic voters in [larger urban] counties has 'ripple effects throughout the map.' "

¶ 192 The trial court considered several different types of statistical analysis in confirming that the "extreme partisan outcome" of the congressional map that "cannot be explained by North Carolina's political geography or by adherence to Adopted Criteria." These included: (1) "mean-median difference" analysis; (2) "efficiency gap" analysis; (3) "the lopsided margins test"; and (4) "partisan symmetry" analysis.

¶ 193 In sum, the trial court found "that the 2021 Congressional Plan is a partisan outlier intentionally and carefully designed to maximize Republican advantage in North Carolina's Congressional delegation." The court found that the enacted congressional map "fails to follow and subordinates the Adopted Criteria's requirement[s]" regarding splitting counties and VTDs. Further, the court found "that the enacted congressional plan fails to follow, and subordinates, the Adopted Criteria's requirement to draw compact districts. The [c]ourt [found] that the enacted congressional districts are less compact than they would be under a map-drawing process that adhered to the Adopted Criteria and prioritized the traditional districting criteria of compactness." Ultimately, the court "concluded based upon a careful review of all the evidence that the [congressional map is] a result of intentional, pro-Republican partisan redistricting."

¶ 194 Based on these findings and numerous others, it is abundantly clear and we so conclude that the 2021 congressional map substantially diminishes and dilutes on the basis of partisan affiliation plaintiffs' fundamental right to equal voting power, as established by the free elections clause and the equal protection clause, and constitutes viewpoint discrimination and retaliation burdening the exercise of rights guaranteed by the free speech clause and the freedom of assembly clause of the North Carolina Constitution. The General Assembly has substantially diminished the voting power of voters affiliated with one party on the basis of partisanship—indeed, in this case, the General Assembly has done so intentionally. Accordingly, we must review the congressional map under strict scrutiny.

¶ 195 Legislative Defendants have not shown the 2021 congressional map is narrowly tailored to a compelling governmental interest, and therefore the map fails strict scrutiny. As noted above, partisan advantage is neither a compelling nor a legitimate governmental interest. Rather, given an infringement of plaintiffs' fundamental right to substantially equal voting power, the General Assembly must show that the map is narrowly tailored to meet traditional neutral districting criteria, including those expressed in article II, sections 3 and 5 of the North Carolina Constitution, those expressed in the General Assembly's own Adopted Criteria, or other articulable neutral principles. Here, the General Assembly has failed to make that showing. Indeed, the trial court explicitly found that the congressional maps demonstrate a *subordination* of traditional neutral criteria, including compactness and minimizing county and VTD splits, in favor of partisan advantage. We conclude that the General Assembly has not demonstrated that the congressional map, *despite* its extreme partisan bias, is nevertheless carefully calibrated toward advancing some compelling neutral priority. Accordingly, the congressional map fails strict scrutiny and must be rejected.

2. State House Map

¶ 196 Next, we apply this constitutional standard to the 2021 North Carolina State House map. Based on the trial court's factual findings, we conclude that the 2021 State House map constitutes partisan gerrymandering that, on the basis of partisan affiliation, violates plaintiffs' fundamental right to substantially equal voting power.

¶ 197 Numerous factual findings compel this conclusion. For instance, based on Dr. Mattingly's ensemble analysis, the trial court found that

> [t]he North Carolina House maps show that they are the product of an intentional, pro-Republican partisan redistricting over a wide range of potential election scenarios. Elections that under typical maps would produce a Democratic majority in the North Carolina House give Republicans a majority under the enacted maps. Likewise, maps that would normally produce a Republican majority under nonpartisan maps produce a Republican supermajority under the enacted maps. Among every possible election that Dr. Mattingly analyzed, the partisan results were more extreme than what would be seen from nonpartisan maps.

¶ 198 Indeed, the court found that "the enacted plan shows a systematic bias toward the Republican party, favoring Republicans in every single one of the 16 elections [Dr. Mattingly] considered." The court determined that the state House "map is also especially anomalous under elections where a non-partisan map would almost always give Democrats the majority in the House because the enacted map denied Democrats that majority. The probability that this partisan bias arose by chance, without an intentional effort by the General Assembly, is 'astronomically small.' " Further, the court found that the mapmakers' selective failure to preserve municipalities in the House map, when they did preserve them in the Senate map, was based solely on considerations of partisan advantage.

¶ 199 Based on Dr. Pegden's analysis, the court found that "the enacted House map was more favorable to Republicans than 99.99999% of the comparison maps generated by his algorithm making small random changes to the district boundaries." Accordingly, the court found "that the enacted map is more carefully crafted for Republican partisan advantage than at least 99.9999% of all possible maps of North Carolina satisfying [the nonpartisan] constraints."

¶ 200 Based on Dr. Cooper's analysis, the trial court found that "Legislative Defendants' exercise of . . . discretion in the . . . House 2021 Plans resulted in . . . House district boundaries that enhanced the Republican candidates' partisan advantage, and this finding is consistent with a finding of partisan intent."

¶ 201 Based on Dr. Duchin's close-votes-close-seats analysis, the court found that the House map is "designed to systematically prevent Democrats from gaining a tie or a majority in the House. In close elections, the Enacted House Plan always gives Republicans a substantial House majority. That Republican majority is resilient and persists even when voters clearly express a preference for Democratic candidates." "As with the Enacted Congressional Plan . . . , the [c]ourt [found] that the Enacted House Plan achieves this resilient pro-Republican bias by the familiar mechanisms of packing and cracking Democratic voters . . . ."

¶ 202 Based on Dr. Magleby's median-mean differential analysis, the trial court found "that the level of partisan bias in seats in the House maps went far beyond expected based on the neutral political geography of North Carolina." Specifically, the court determined "that the median-mean bias in the enacted maps was far more extreme than expected in nonpartisan maps." In fact, the court found, "[n]o randomly generated map had such an extreme median-mean share—meaning

that . . . no simulated map . . . was as extreme and durable in terms of partisan advantage."

¶ 203 Finally, based on all of the evidence presented, the trial court found that the following North Carolina House district groupings minimized Democratic districts and maximized safe Republican districts through the "packing" and "cracking" of Democratic voters as the "result of intentional, pro-Republican partisan redistricting": the Guilford House County Grouping; the Buncombe House County Grouping; the Mecklenburg House County Grouping; the Pitt House County Grouping; the Durham-Person House County Grouping; the Forsyth-Stokes House County Grouping; the Wake House County Grouping; the Cumberland House County Grouping; and the Brunswick-New Hanover House County Grouping. Ultimately, the court "conclude[d] based upon a careful review of all the evidence that the [House map is] a result of intentional, pro-Republican partisan redistricting."

¶ 204 Based on these findings and numerous others, it is abundantly clear and we so conclude that the 2021 North Carolina House map substantially diminishes and dilutes on the basis of partisan affiliation plaintiffs' fundamental right to equal voting power, as established by the free elections clause and the equal protection clause, and constitutes viewpoint discrimination and retaliation burdening the exercise of rights guaranteed by the free speech clause and the freedom of assembly clause of the North Carolina Constitution. Accordingly, we review the House map under strict scrutiny.

¶ 205 Legislative Defendants have not shown the 2021 House map is narrowly tailored to a compelling governmental interest, and therefore the map fails strict scrutiny. As noted already, partisan advantage is neither a compelling nor a legitimate governmental interest. Rather, the General Assembly must show that the map is narrowly tailored to meet traditional neutral districting criteria, including those expressed in article II, sections 3 and 5 of the North Carolina Constitution, those expressed in the General Assembly's own Adopted Criteria, or other articulable neutral principles. Here, as with the congressional map above, the General Assembly has failed to make that showing. Given the breadth and depth of the evidence that partisan advantage predominated over any traditional neutral districting criteria in the creation of the House map, the General Assembly has not demonstrated that the House map, *despite* its extreme partisan bias, is nevertheless carefully calibrated toward advancing some neutral priority. Indeed, the evidence establishes that the General Assembly subordinated these neutral priorities, such as

preserving municipalities, in favor of partisan advantage. Accordingly, the North Carolina House map fails strict scrutiny and must be rejected.

3. State Senate Map

¶ 206 Third and finally, we apply this constitutional standard to the 2021 North Carolina State Senate map. Based on the trial court's factual findings, we conclude that the 2021 State Senate map constitutes partisan gerrymandering that, on the basis of partisan affiliation, violates plaintiffs' fundamental right to substantially equal voting power.

¶ 207 As with the two previous maps, numerous factual findings compel our conclusion. For instance, based on Dr. Cooper's analysis, the court found that "Legislative Defendants' exercise of . . . discretion in the Senate . . . Plans resulted in . . . district boundaries that enhanced the Republican candidates' partisan advantage, and this finding is consistent with a finding of partisan intent."

¶ 208 Based on Dr. Mattingly's ensemble analysis, the court found "that the State . . . Senate plans are extreme outliers that 'systematically favor the Republican Party to an extent which is rarely, if ever, seen in the non-partisan collection of maps.' " The court found that this intentional partisan redistricting in the Senate "is especially effective in preserving Republican supermajorities in instances in which the majority or the vast majority of plans in Dr. Mattingly's ensemble would have broken it." Specifically, the court found that the Senate plan "is an outlier or extreme outlier in elections where Democrats win a vote share between 47.5% and 50.5%. This range is significant because many North Carolina elections have this vote fraction, and this is the range where the non-partisan ensemble shows that Republicans lose the super-majority."

¶ 209 Based on Dr. Pegden's analysis, the court determined "that the enacted Senate map was more favorable to Republicans than 99.9% of comparison maps." Accordingly, the court found "that the enacted Senate map is more carefully crafted for Republican partisan advantage than at least 99.9% of all possible maps of North Carolina satisfying [the nonpartisan] constraints."

¶ 210 Based on Dr. Duchin's close-votes-close-seats analysis, the court found that

> [t]he Enacted Senate Plan effectuates the same sort of partisan advantage as the Enacted Congressional Plan. The Enacted Senate Plan consistently creates Republican majorities and precludes Democrats

> from winning a majority in the Senate even when Democrats win more votes. Even in an essentially tied election or in a close Democratic victory, the Enacted Senate Plan gives Republicans a Senate majority, and sometimes even a veto-proof 30-seat majority. And that result holds even when Democrats win by larger margins.

"As with the Enacted Congressional Plan, the [c]ourt [found] that the Enacted Senate Plan achieves its partisan goals by packing Democratic voters into a small number of Senate districts and then cracking the remaining Democratic voters by splitting them across other districts . . . ."

¶ 211 Finally, based on all of the evidence presented at trial, the trial court found that the following North Carolina Senate district groupings minimized Democratic districts and maximized safe Republican districts through the "packing" and "cracking" of Democratic voters as the "result of intentional, pro-Republican partisan redistricting": the Granville-Wake Senate County Grouping; the Cumberland-Moore Senate County Grouping; the Guilford-Rockingham Senate County Grouping; the Forsyth-Stokes Senate County Grouping; the Iredell-Mecklenburg Senate County Grouping; the Northeastern Senate County Grouping (Bertie County, Camden County, Currituck County, Dare County, Gates County, Hertford County, Northampton County, Pasquotank County, Perquimans County, Tyrrell County, Carteret County, Chowan County, Halifax County, Hyde County, Martin County, Pamlico County, Warren County, and Washington County); and the Buncombe-Burke-McDowell Senate County Grouping. The trial court did not find any of the Senate district groupings it considered to not be the result of intentional, pro-Republican redistricting through packing and cracking. Ultimately, the court "concluded based upon a careful review of all the evidence that the [Senate map is] a result of intentional, pro-Republican partisan redistricting.

¶ 212 Based on these findings and numerous others, it is abundantly clear and we so conclude that the 2021 North Carolina Senate map substantially diminishes and dilutes on the basis of partisan affiliation plaintiffs' fundamental right to equal voting power, as established by the free elections clause and the equal protection clause, and constitutes viewpoint discrimination and retaliation burdening the exercise of rights guaranteed by the free speech clause and the freedom of assembly clause of the North Carolina Constitution. Accordingly, we review the Senate map under strict scrutiny.

¶ 213 Conducting that review, we conclude that Legislative Defendants have not shown the 2021 Senate map is narrowly tailored to a compelling governmental interest and therefore the map fails strict scrutiny. Partisan advantage is not a compelling governmental interest. Rather, the General Assembly must show that the Senate map is narrowly tailored to meet traditional neutral districting criteria, including those expressed in article II, sections 3 and 5 of the North Carolina Constitution, those expressed in the General Assembly's own Adopted Criteria, or other articulable neutral principles. Here, as with the congressional and House maps above, the General Assembly has failed to make that showing. Given the breadth and depth of the evidence that partisan advantage predominated over any traditional neutral districting criteria in the creation of the Senate map, the General Assembly has not demonstrated that the Senate map, *despite* its extreme partisan bias, is nevertheless carefully calibrated toward advancing some compelling neutral priority. To the contrary, the evidence demonstrates that the Senate map prioritized considerations of partisan advantage above traditional neutral districting principles. Accordingly, the North Carolina Senate map fails strict scrutiny and must be rejected.

G. Compliance with *Stephenson* requirements

¶ 214 **[4]** Finally, we further hold that under *Stephenson*, the General Assembly was required to conduct a racially polarized voting analysis prior to drawing district lines. Notably, the General Assembly's responsibility to conduct a racially polarized voting analysis arises from our state constitution and decisions of this Court, including primarily *Stephenson*, and not from the VRA itself, or for that matter from any federal law. In *Stephenson*, this Court sought to harmonize several sections of our state constitution—namely the whole county provision of article II, sections 3(3) and 5(3) and the supremacy clause of article I, section 3—in light of the federal requirements established by Section 5 and Section 2 of the VRA. 355 N.C. at 359. Of course, since the 2013 decision of the Supreme Court of the United States in *Shelby County v. Holder*, 570 U.S. 529 (2013), in which it held that the coverage formula for the preclearance requirement under Section 5 of the VRA was no longer justified under the Fourteenth Amendment and held that section was unconstitutional, North Carolina has not been subject to that preclearance requirement.

¶ 215 Nevertheless, the *Stephenson* Court ruling relied exclusively on interpretation of the North Carolina Constitution. Indeed, after the *Stephenson* defendants initially removed the case to federal district court, the district court remanded the case, stating that "the redistricting

process was a matter primarily within the province of the states, that plaintiffs have challenged the 2001 legislative redistricting plans solely on the basis of state constitutional provisions, that the complaint 'only raises issues of state law,' and that defendants' removal of th[e] suit from state court was inappropriate." *Stephenson*, 355 N.C. at 358. Further, when the *Stephenson* defendants "subsequently filed a notice of appeal from the District Court's order with the United States Court of Appeals for the Fourth Circuit[,] . . . [t]he Fourth Circuit denied defendants' motion to stay the District Court's order of remand." *Id.*

¶ 216 Here, as in *Stephenson*, plaintiffs' claims arise under the same provisions of the North Carolina Constitution implicated in *Stephenson*—namely article I, sections 3 and 5 and article II, sections 3 and 5. Here, as in *Stephenson*, this Court serves as the highest and final authority in interpreting those state constitutional provisions. And here, as in *Stephenson*, we hold that compliance with those provisions, when read in harmony, requires the General Assembly to conduct racially polarized voting analysis within their decennial redistricting process in order to assess whether any steps must be taken to avoid the dilution of minority voting strength.

III. Conclusion

¶ 217 Article I, section 2 of the North Carolina Constitution establishes that "[a]ll political power is vested in and derived from the people," that "all government of rights originates from the people," and "is founded upon their will only." N.C. Const. art I, § 2. Furthermore, article I, section 1 of the constitution provides that "all persons are created equal." N.C. Const. art I, § 1. Subsequent constitutional provisions within the Declaration of Rights, including the free elections clause, the equal protection clause, the free speech clause, and the freedom of assembly clause, protect fundamental rights of the people in order to ensure, among other things, that their government is indeed "founded upon their will only." *See id.*

¶ 218 When North Carolinians claim that acts of their government violate these fundamental rights, and particularly when those acts choke off the democratic processes that channel political power from the people to their representatives, it is the solemn duty of this Court to review those acts to enforce the guarantees of our constitution. *See Corum*, 330 N.C. at 783. Such judicial review ensures that despite present day challenges our constitution's most fundamental principles are preserved. Indeed,

"[a] frequent recurrence to fundamental principles is absolutely necessary to preserve the blessings of liberty." N.C. Const. art I, § 35.

¶ 219 Today, this Court recurs to those fundamental principles. Specifically, we have considered whether partisan gerrymandering claims present a justiciable question, whether constitutional provisions supply administrable standards, and whether, having applied these standards, the General Assembly's 2021 enacted plans constitute such a violation of plaintiffs' constitutional rights.

¶ 220 First, we hold that claims of partisan gerrymandering are justiciable under the North Carolina Constitution. Although the primary responsibility for redistricting is constitutionally delegated to the General Assembly, this is not a delegation of unlimited power; the exercise of this power is subject to restrictions imposed by other constitutional provisions, including the Declaration of Rights. Further, as demonstrated through our analysis of the constitutional provisions at issue and the extensive factual findings of the trial court, claims of partisan gerrymandering can be carefully discerned and governed by manageable judicial standards.

¶ 221 Second, we hold that the General Assembly infringes upon voters' fundamental rights when, on the basis of partisan affiliation, it deprives a voter of his or her right to substantially equal voting power, as established by the free elections clause and the equal protection clause in our Declaration of Rights. We hold it also constitutes viewpoint discrimination and retaliation based on protected political activity in violation of the free speech clause and the freedom of assembly clause in our Declaration of Rights. When a redistricting plan creates such an infringement of fundamental rights, strict scrutiny must be applied to determine whether the plan is nevertheless narrowly tailored to advance a compelling governmental interest.

¶ 222 Here, we hold that the General Assembly's 2021 enacted plans are partisan gerrymanders that on the basis of partisan affiliation substantially infringe upon plaintiffs' fundamental right to equal voting power. Finally, we hold that the enacted plans fail strict scrutiny and must therefore be struck down.

¶ 223 We reverse the trial court's judgment and remand this case to that court to oversee the redrawing of the maps by the General Assembly or, if necessary, by the court. In accordance with our 4 February 2022 order and our decision today, the General Assembly shall now have the

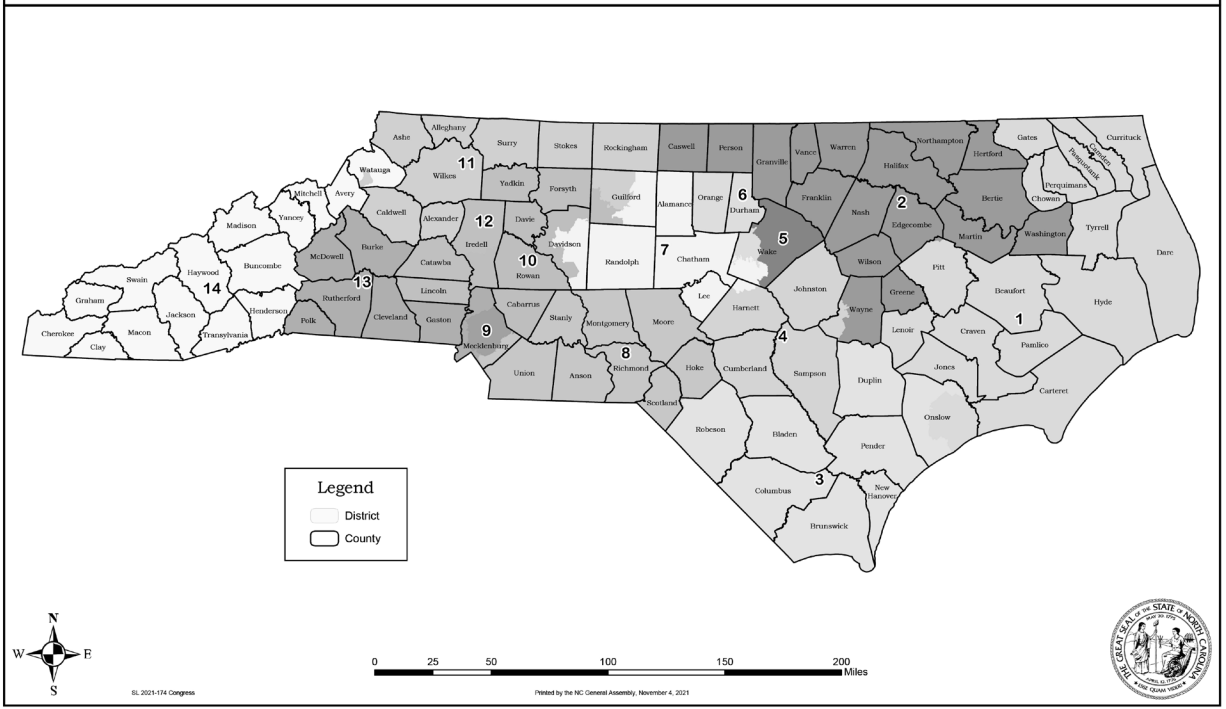
opportunity to submit new congressional and state legislative districting plans that satisfy all provisions of the North Carolina Constitution.[17] It is the sincere hope of this Court that these new maps ensure that the channeling of "political power" from the people to their representatives in government through elections, the central democratic process envisioned by our constitutional system, is done on equal terms so that ours is a "government of right" that "originates from the people" and speaks with their voice.

REVERSED AND REMANDED.

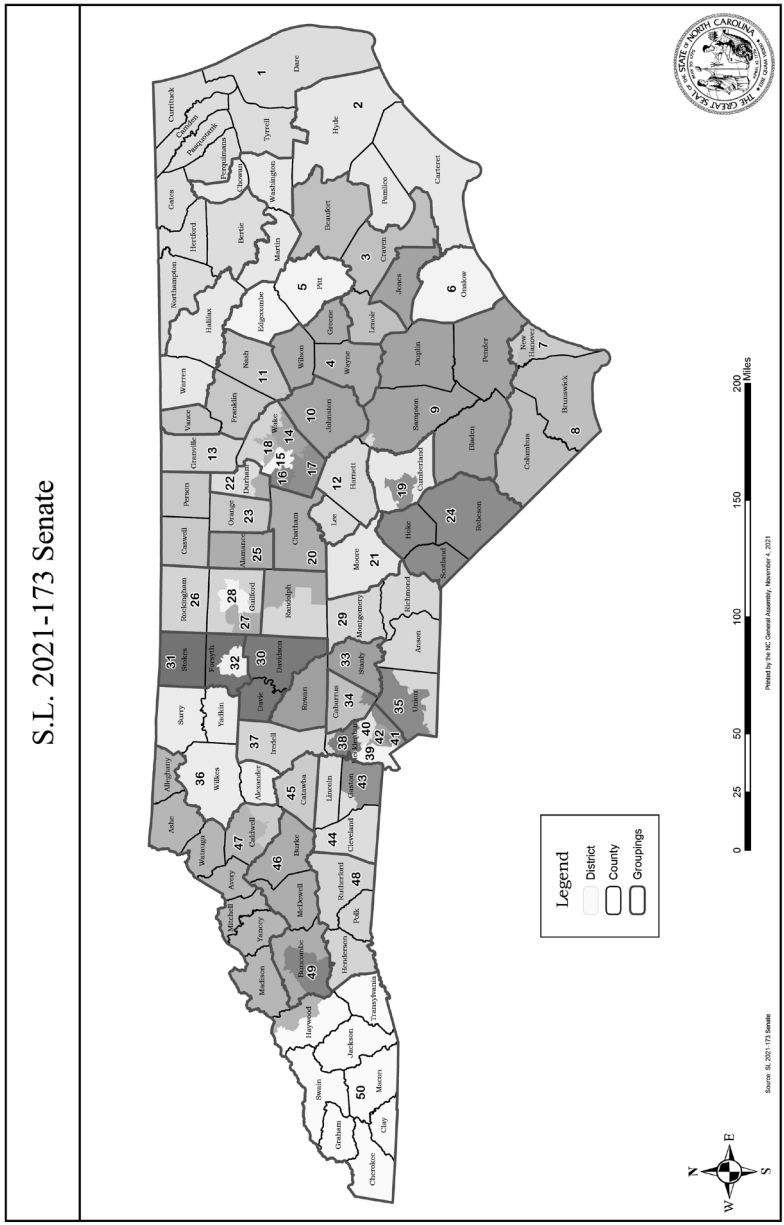
17. In doing so, we hold they must also conduct racially polarized voting analysis to comply with the constitutional requirements under *Stephenson*. As we have reversed the judgment of the trial court based on its conclusions about the partisan gerrymandering claims, we decline to determine whether NCLCV Plaintiffs could also prevail on their minority vote dilution claim or whether plaintiff Common Cause could prevail on its intentional racial discrimination claim at this time.

Appendix

S.L. 2021-174 Congress



– Ex. 38 –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150
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Printed by the NC General Assembly, November 4, 2021
Source: SL 2021-173 Senate
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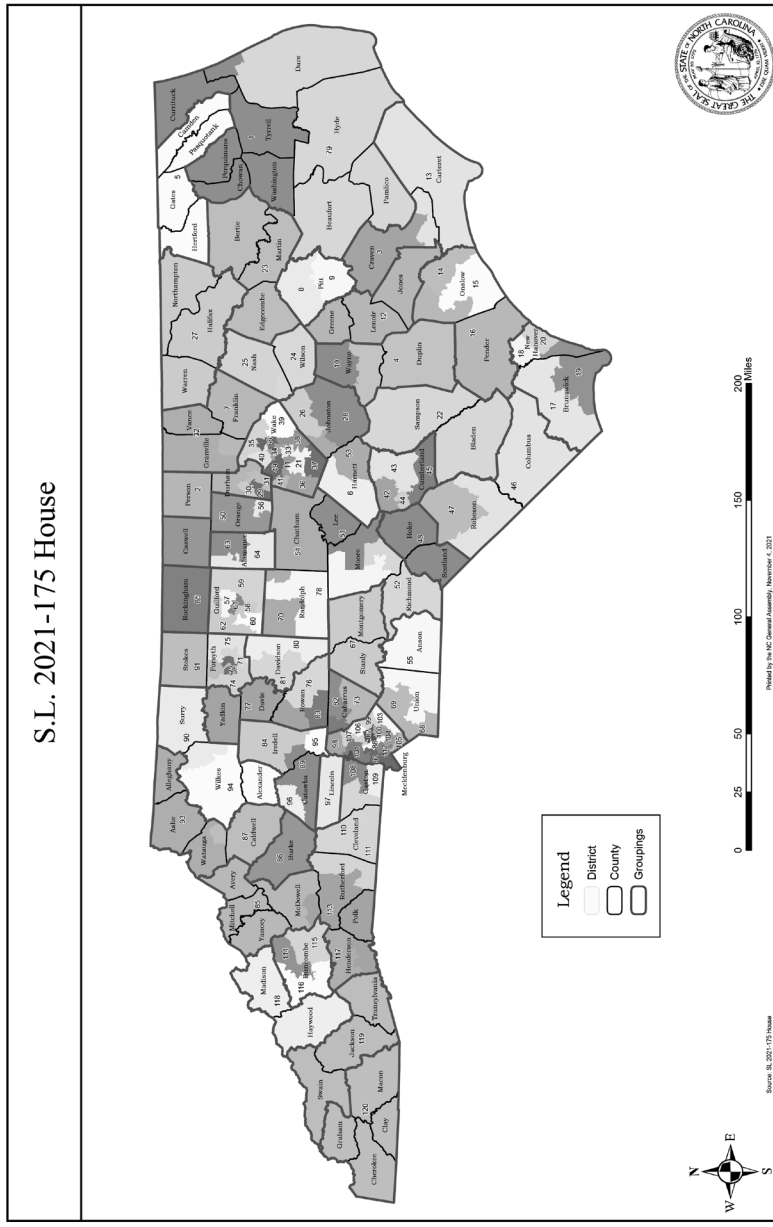
S.L. 2021-175 House
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Printed by the NC General Assembly, November 4, 2021
THE GREAT SEAL OF THE STATE OF NORTH CAROLINA
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Justice MORGAN concurring.

¶ 224 While I fully join my learned colleagues in my agreement with the majority opinion in this case, in my view the dispositive strength of the Free Elections Clause warrants additional observations in light of the manner in which it has been postured and addressed. The substantive construction of the constitutional provision is buttressed by the contextual construction of the brief, yet potent, directive.

¶ 225 The entirety of article I, section 10 of the North Carolina Constitution states: "All elections shall be free." N.C. Const. art. I, § 10. The dissenting view of this Court, the order of the trial court, and the presentations of Legislative Defendants have largely declined the opportunity to address the manner in which the term "free" should be interpreted as compared to plaintiffs' significant reliance on the applicability of the Free Elections Clause. In this regard, plaintiffs' invocation of the constitutional provision has either been cast as inapplicable to this case or relegable to a diminished role. To the extent that the word "free" in article I, section 10 has been construed here by Legislative Defendants, they conflate the right to a free election with the right to be free to participate in the election process, stating "there is no barrier between any voter and a ballot or a ballot box, no restriction on the candidates the voter may select, and no bar on a person's ability to seek candidacy for any office" and also citing the proposition that "[t]he meaning [of North Carolina's Free Elections Clause] is plain: free from interference or intimidation," quoting John V. Orth & Paul Martin Newby, *The North Carolina State Constitution* 56 (2d ed. 2013). And curiously, instead of focusing on how elections *must* be free, the dissent chooses to focus on how the General Assembly should be free to create legislative election maps admittedly based on politically partisan considerations.

¶ 226 In my view, a free election is uninhibited and unconstrained in its ability to have the prevailing candidate to be chosen in a legislative contest without the stain of the outcome's predetermination. Commensurate with the General Assembly's constitutional authority to draw legislative maps is one's constitutional right to participate in legislative elections which shall be free of actions—such as the General Assembly's creation of the legislative redistricting maps here—which are tantamount to the predetermination of elections and, hence, constitute constitutional abridgement.

Justice EARLS joins in this concurring opinion.

Chief Justice NEWBY dissenting.

¶ 227 How should a constitution be interpreted? Should its meaning be fixed or changing? If changing, to whom have the people given the task of changing it? When judges change the meaning of a constitution, does this undermine public trust and confidence in the judicial process? Traditionally, honoring the constitutional role assigned to the legislative branch, this Court has stated that acts of the General Assembly are presumed constitutional and deserving of the most deferential standard of review: To be unconstitutional, an act of the General Assembly must violate an explicit provision of our constitution beyond a reasonable doubt. We have recognized that our constitution allows the General Assembly to enact laws unless expressly prohibited by its text. This approach of having a fixed meaning and a deferential standard of review ensures a judge will perform his or her assigned role and not become a policymaker.

¶ 228 With this decision, unguided by the constitutional text, four members of this Court become policymakers. They wade into the political waters by mandating their approach to redistricting. They change the time-honored meaning of various portions of our constitution by inserting their interpretation to reach their desired outcome. They justify this activism because their understanding of certain constitutional provisions has "evolved over time." They lament that the people have not placed a provision in our constitution for a "citizen referendum" and use the absence of such a provision to justify their judicial activism to amend our constitution. The majority says courts must protect constitutional rights. This is true. Courts are not, however, to judicially amend the constitution to create those rights. As explicitly stated in our constitution, the people alone have the authority to alter our foundational document, and the people have the final say.

¶ 229 In its analysis, the majority misstates the history, the case law of this Court, and the meaning of various portions of our Declaration of Rights. In its remedy the majority replaces established principles with ambiguity, basically saying that judges alone know which redistricting plan will be constitutional and accepted by this Court based on analysis by political scientists. This approach ensures that the majority now has and indefinitely retains the redistricting authority, thereby enforcing its policy preferences.

¶ 230 Generally, the majority takes a sweeping brush and enacts its own policy preferences of achieving statewide proportionality as determined by political scientists and approved by judges. While mentioning

traditional, neutral redistricting criteria, its primary focus is instead on the final partisanship analysis to achieve statewide parity.

¶ 231 The majority requires the General Assembly to finalize corrected maps within two weeks of the 4 February 2022 order along with an accompanying political science analysis. The majority invites others, who have not been elected by the people, to provide alternative maps without that same required analysis, thus inviting private parties to usurp legislative authority to make the laws with respect to redistricting without explanation. The majority forces this directive into an artificial timeline which could support the majority's adopting its own maps.

¶ 232 A recent opinion poll found that 76% of North Carolinians believe judges decide cases based on partisan considerations. N.C. Comm'n on the Admin. of L. & Just., *Final Report* 67 (2017). Today's decision, which dramatically departs from our time-honored standard of requiring proof that an explicit provision of the constitution is violated beyond a reasonable doubt, will solidify this belief.[1]

¶ 233 The people speak through the express language of their constitution. They have assigned specific tasks to each branch of government. When each branch stays within its lane of authority, the will of the people is achieved. When a branch grasps a task assigned to another, that incursion violates separation of powers and thwarts the will of the people. This decision, with its various policy determinations, judicially amends the constitution. Furthermore, it places redistricting squarely in the hands of four justices and not the legislature as expressly assigned by the constitution. The majority's determinations violate the will of the people, making us a government of judges, not of the people. I respectfully dissent.

I. Standard of Review

¶ 234 The question presented here is whether the enacted plans violate the North Carolina Constitution. While the standard of review is significant in all cases, it is particularly important in cases challenging the constitutionality of a statute.

> The idea of one branch of government, the judiciary, preventing another branch of government, the

1. It does not help public confidence that in an unprecedented act, a member of the majority used social media to publicize this Court's initial order when it was released, despite the fact that the case was still pending. *See* Anita Earls (@Anita_Earls), Twitter (Feb. 4, 2022, 6:28 PM), https://twitter.com/Anita_Earls/status/1489742665356910596 ("Based on the trial court's factual findings, we conclude that the congressional and legislative maps . . . are unconstitutional beyond a reasonable doubt." (alteration in original)).

> legislature, through which the people act, from exercising its power is the most serious of judicial considerations. *See Hoke v. Henderson*, 15 N.C. (4 Dev.) 1, 8 (1833) ("[T]he exercise of [judicial review] is the gravest duty of a judge, and is always, as it ought to be, the result of the most careful, cautious, and anxious deliberation."), *overruled in part on other grounds by Mial v. Ellington*, 134 N.C. 131, 162, 46 S.E. 961, 971 (1903); *Trs. of Univ. of N.C. v. Foy*, 5 N.C. (1 Mur.) 58, 89 (1805) (Hall, J., dissenting) ("A question of more importance than that arising in this case [the constitutionality of a legislative act] cannot come before a court. . . . [W]ell convinced, indeed, ought one person to be of another's error of judgment . . . when he reflects that each has given the same pledges to support the Constitution."). Since its inception, the judicial branch has exercised its implied constitutional power of judicial review with "great reluctance," *Bayard v. Singleton*, 1 N.C. (Mart.) 5, 6 (1787), recognizing that when it strikes down an act of the General Assembly, the Court is preventing an act of the people themselves, *see Baker v. Martin*, 330 N.C. 331, 336–37, 410 S.E.2d 887, 890 (1991).

State ex rel. McCrory v. Berger, 368 N.C. 633, 650, 781 S.E.2d 248, 259 (2016) (Newby, J., concurring in part and dissenting in part) (footnote omitted).

¶ 235 All political power resides in the people, N.C. Const. art. I, § 2, and the people act through the General Assembly, *Baker*, 330 N.C. at 337, 410 S.E.2d at 891. Unlike the United States Constitution, the North Carolina Constitution "is in no matter a grant of power." *McIntyre v. Clarkson*, 254 N.C. 510, 515, 119 S.E.2d 888, 891 (1961) (quoting *Lassiter v. Northampton Cnty. Bd. of Elections*, 248 N.C. 102, 112, 102 S.E.2d 853, 861 (1958), *aff'd*, 360 U.S. 45, 79 S. Ct. 985 (1959)). Rather, "[a]ll power which is not limited by the Constitution inheres in the people." *Id.* at 515, 119 S.E.2d at 891 (quoting *Lassiter*, 248 N.C. at 112, 102 S.E.2d at 861). Because the General Assembly serves as "the agent of the people for enacting laws," *State ex rel. Martin v. Preston*, 325 N.C. 438, 448, 385 S.E.2d 473, 478 (1989), the General Assembly has plenary power, and a restriction on the General Assembly is in fact a restriction on the people themselves, *Baker*, 330 N.C. at 338–39, 410 S.E.2d at 891–92. Therefore, this Court presumes that legislation is constitutional, and

a constitutional limitation upon the General Assembly must be (1) express and (2) proved beyond a reasonable doubt. *Id.* at 334, 410 S.E.2d at 889. When this Court looks for constitutional limitations on the General Assembly's authority, it looks to the plain text of the constitution.[2]

¶ 236 This standard of review is illustrated by the landmark case of *Bayard v. Singleton*, the nation's first reported case of judicial review. The majority cites *Bayard* in an effort to support its contention that judicial interference is necessary here "to prevent legislators from permanently insulating themselves from popular will." But *Bayard*, rightly understood, was simply about the authority of the Court to declare unconstitutional a law which violated an *express* provision of the constitution. It was not about limiting the General Assembly's authority to make discretionary political decisions within its express authority. *Bayard* involved a pointed assault on a clearly expressed and easily discernible *individual* right in the 1776 constitution, the right to a trial by jury "in all controversies at Law respecting Property." N.C. Const. of 1776, § XIV. There the court weighed the General Assembly's ability to enact a statute that abolished the right to a jury trial for property disputes—for some citizens in some instances—in direct contradiction of the express text of the constitution, the fundamental law of the land:

> That by the Constitution every citizen had undoubtedly a right to a decision of his property by a trial by jury. For that if the Legislature could take away this right, and require him to stand condemned in his property without a trial, it might with as much authority require his life to be taken away without a trial by jury, and that he should stand condemned to die, without the formality of any trial at all: that if the members of the General Assembly could do this, they might with equal authority, not only render themselves the Legislators of the State for life, without any further election of the people, from thence transmit the dignity and authority of legislation down to their heirs male forever.

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2. Furthermore, "[i]ssues concerning the proper construction of the Constitution of North Carolina 'are in the main governed by the same general principles which control in ascertaining the meaning of all written instruments.' " *State v. Webb*, 358 N.C. 92, 97, 591 S.E.2d 505, 510 (2004) (quoting *State ex rel. Martin v. Preston*, 325 N.C. 438, 449, 385 S.E.2d 473, 478 (1989)). "In interpreting our Constitution—as in interpreting a statute—where the meaning is clear from the words used, we will not search for a meaning elsewhere." *Id.* (quoting *Preston*, 325 N.C. at 449, 385 S.E.2d at 479).

Bayard, 1 N.C. at 7. Thus, the holding of *Bayard v. Singleton* is easily understood: A statute cannot abrogate an express provision of the constitution because the constitution represents the fundamental law and express will of the people; it is the role of the judiciary to perform this judicial review. The *Bayard* holding, however, does not support the proposition that this Court has the authority to involve itself in a matter that is both constitutionally committed to the General Assembly and lacking in manageable legal standards. Thus, plainly stated and as applied to this case, the uncontroverted standard of review asks whether plaintiffs have shown that the challenged statutes, presumed constitutional, violate an express provision of the constitution beyond a reasonable doubt.

II. Justiciability

¶ 237 The Supreme Court of the United States has explained that "as essentially a function of the separation of powers," courts must refuse to review issues that are better suited for the political branches; these issues are nonjusticiable.

> It is apparent that several formulations which vary slightly according to the settings in which the questions arise may describe a political question, although each has one or more elements which identify it as essentially a function of the separation of powers. Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Baker v. Carr, 369 U.S. 186, 217, 82 S. Ct. 691, 710 (1962); *see also Bacon v. Lee*, 353 N.C. 696, 716–17, 549 S.E.2d 840, 854 (2001). Thus, respect for separation of powers requires a court to refrain from entertaining a claim if any of the following are shown: (1) a textually demonstrable commitment of the matter to another political department; (2) a lack

of judicially discoverable and manageable standards; (3) the impossibility of deciding a case without making a policy determination of a kind clearly suited for nonjudicial discretion; or (4) the impossibility of a court's undertaking independent resolution of a matter without expressing lack of the respect due to a coordinate branch of government. Often the second, third, and fourth factors are collectively referred to as lacking a manageable standard.

A. Manageable Standards

¶ 238 In addressing the manageable standards analysis, the Supreme Court recently held that partisan gerrymandering claims present nonjusticiable political questions, and it warned of the pitfalls inherent in such claims. *See Rucho v. Common Cause*, 139 S. Ct. 2484, 2506–07 (2019).[3] In *Rucho* "[v]oters and other plaintiffs in North Carolina and Maryland challenged their States' congressional districting maps as unconstitutional partisan gerrymanders." *Id.* at 2491. "The plaintiffs alleged that the gerrymandering violated the First Amendment, the Equal Protection Clause of the Fourteenth Amendment, the Elections Clause, and Article I, § 2, of the Constitution." *Id.* As such, the Supreme Court was tasked with deciding "whether claims of excessive partisanship in districting are 'justiciable'—that is, properly suited for resolution by the federal courts." *Id.*

¶ 239 In seeking to answer this question, the Court provided the following historical background:

> Partisan gerrymandering is nothing new. Nor is frustration with it. The practice was known in the Colonies prior to Independence, and the Framers were familiar with it at the time of the drafting and ratification of the Constitution. . . .
>
> . . . .
>
> . . . The Framers were aware of electoral districting problems and considered what to do about them. They settled on a characteristic approach, assigning the issue to the state legislatures, expressly checked

3. It should be noted that several of the attorneys in *Rucho* are also litigating this case. Similar claims are presented here and similar remedies requested, only this time based on our state constitution, not the Federal Constitution. Neither the Federal Constitution nor the state constitution have explicit provisions addressing partisan gerrymandering. Likewise, some of the plaintiffs' experts in *Rucho* are the same experts as used here.

> and balanced by the Federal Congress. As Alexander Hamilton explained, "it will . . . not be denied that a discretionary power over elections ought to exist somewhere. It will, I presume, be as readily conceded that there were only three ways in which this power could have been reasonably modified and disposed: that it must either have been lodged wholly in the national legislature, or wholly in the State legislatures, or primarily in the latter, and ultimately in the former." The Federalist No. 59, p. 362 (C. Rossiter ed. 1961). At no point was there a suggestion that the federal courts had a role to play. Nor was there any indication that the Framers had ever heard of courts doing such a thing.

Id. at 2494–96 (alteration in original). The Court then noted that "[i]n two areas—[equal voting power defined as] one-person, one-vote and racial gerrymandering—our cases have held that there is a role for the courts with respect to at least some issues that could arise from a State's drawing of congressional districts." *Id.* at 2495–96. It specified, however, that

> [p]artisan gerrymandering claims have proved far more difficult to adjudicate. The basic reason is that, while it is illegal for a jurisdiction to depart from the one-person, one-vote rule, or to engage in racial discrimination in districting, "a jurisdiction may engage in constitutional political gerrymandering." *Hunt v. Cromartie*, 526 U.S. 541, 551, 119 S.Ct. 1545, 143 L.Ed.2d 731 (1999) (citing *Bush v. Vera*, 517 U.S. 952, 968, 116 S.Ct. 1941, 135 L.Ed.2d 248 (1996); *Shaw v. Hunt*, 517 U.S. 899, 905, 116 S.Ct. 1894, 135 L.Ed.2d 207 (1996) (*Shaw II*); *Miller v. Johnson*, 515 U.S. 900, 916, 115 S.Ct. 2475, 132 L.Ed.2d 762 (1995); *Shaw* [*v. Reno*], 509 U.S. [630,] 646, 113 S.Ct. 2816[, 125 L.Ed. 2d 511 (1993)]). *See also Gaffney v. Cummings*, 412 U.S. 735, 753, 93 S.Ct. 2321, 37 L.Ed.2d 298 (1973) (recognizing that "[p]olitics and political considerations are inseparable from districting and apportionment").

Id. at 2497 (last alteration in original). Thus, the Court reasoned that

> [t]o hold that legislators cannot take partisan interests into account when drawing district lines would essentially countermand the Framers' decision

> to entrust districting to political entities. The "central problem" is not determining whether a jurisdiction has engaged in partisan gerrymandering. It is "determining when political gerrymandering has gone too far." *Vieth* [*v. Jubelirer*], 541 U.S. [267,] 296, 124 S.Ct. 1769 [(2004)] (plurality opinion). *See League of United Latin American Citizens v. Perry*, 548 U.S. 399, 420, 126 S.Ct. 2594, 165 L.Ed.2d 609 (2006) (*LULAC*) (opinion of Kennedy, J.) (difficulty is "providing a standard for deciding how much partisan dominance is too much").

Id. The Court then highlighted its "mindful[ness] of Justice Kennedy's counsel in *Vieth*: Any standard for resolving such claims must be grounded in a 'limited and precise rationale' and be 'clear, manageable, and politically neutral.' 541 U.S. at 306–308, 124 S.Ct. 1769 (opinion concurring in judgment)." *Id.* at 2498. The Court further clarified that

> [a]n important reason for those careful constraints is that, as a Justice with extensive experience in state and local politics put it, "[t]he opportunity to control the drawing of electoral boundaries through the legislative process of apportionment is a critical and traditional part of politics in the United States." [*Davis v.*] *Bandemer*, 478 U.S. [109,] 145, 106 S.Ct. 2797 [(1986)] (opinion of O'Connor, J.). *See Gaffney*, 412 U.S. at 749, 93 S.Ct. 2321 (observing that districting implicates "fundamental 'choices about the nature of representation' " (quoting *Burns v. Richardson*, 384 U.S. 73, 92, 86 S.Ct. 1286, 16 L.Ed.2d 376 (1966))). An expansive standard requiring "the correction of all election district lines drawn for partisan reasons would commit federal and state courts to unprecedented intervention in the American political process," *Vieth*, 541 U.S. at 306, 124 S.Ct. 1769 (opinion of Kennedy, J.).

Id. (first alteration in original). As such, the Supreme Court concluded that "[i]f federal courts are to 'inject [themselves] into the most heated partisan issues' by adjudicating partisan gerrymandering claims, *Bandemer*, 478 U.S. at 145, 106 S.Ct. at 2797 (opinion of O'Connor, J.), they must be armed with a standard that can reliably differentiate unconstitutional from 'constitutional political gerrymandering.' " *Id.* at

2499 (second alteration in original) (quoting *Cromartie*, 526 U.S. at 551, 119 S. Ct. at 1545).

¶ 240 The Court also explained that partisan gerrymandering claims are effectively requests for courts to allocate political power based upon a principle of proportionality:

> Partisan gerrymandering claims invariably sound in a desire for proportional representation. As Justice O'Connor put it, such claims are based on "a conviction that the greater the departure from proportionality, the more suspect an apportionment plan becomes." [*Bandemer*, 478 U.S. at 159, 106 S.Ct. 2797.] "Our cases, however, clearly foreclose any claim that the Constitution requires proportional representation or that legislatures in reapportioning must draw district lines to come as near as possible to allocating seats to the contending parties in proportion to what their anticipated statewide vote will be." *Id.*, at 130, 106 S.Ct. 2797 (plurality opinion). See *Mobile v. Bolden*, 446 U.S. 55, 75–76, 100 S.Ct. 1490, 1504, 64 L.Ed.2d 47 (1980) (plurality opinion) ("The Equal Protection Clause of the Fourteenth Amendment does not require proportional representation as an imperative of political organization.").
>
> The Founders certainly did not think proportional representation was required. For more than 50 years after ratification of the Constitution, many States elected their congressional representatives through at-large or "general ticket" elections. Such States typically sent single-party delegations to Congress. See E. Engstrom, Partisan Gerrymandering and the Construction of American Democracy 43–51 (2013). That meant that a party could garner nearly half of the vote statewide and wind up without any seats in the congressional delegation. The Whigs in Alabama suffered that fate in 1840: "their party garnered 43 percent of the statewide vote, yet did not receive a single seat." *Id.*, at 48. When Congress required single-member districts in the Apportionment Act of 1842, it was not out of a general sense of fairness, but instead a (mis)calculation by the Whigs that such a change would improve their electoral prospects. *Id.*, at 43–44.

> Unable to claim that the Constitution requires proportional representation outright, plaintiffs inevitably ask the courts to make their own political judgment about how much representation particular political parties *deserve*—based on the votes of their supporters—and to rearrange the challenged districts to achieve that end.

Id. at 2499. The Court thus determined that "federal courts are not equipped to apportion political power as a matter of fairness, nor is there any basis for concluding that they were authorized to do so." *Id.* (quoting *Vieth*, 541 U.S. at 291, 124 S.Ct. 1769 (plurality opinion) (stating that: " 'Fairness' does not seem to us a judicially manageable standard. . . . Some criterion more solid and more demonstrably met than that seems to us necessary to enable the state legislatures to discern the limits of their districting discretion, to meaningfully constrain the discretion of the courts, and to win public acceptance for the courts' intrusion into a process that is the very foundation of democratic decisionmaking.")).

¶ 241 The Court also explained that the Federal Constitution is devoid of any metric for measuring political fairness:

> Appellees contend that if we can adjudicate one-person, one-vote claims, we can also assess partisan gerrymandering claims. But the one-person, one-vote rule is relatively easy to administer as a matter of math. The same cannot be said of partisan gerrymandering claims, because the Constitution supplies no objective measure for assessing whether a districting map treats a political party fairly. It hardly follows from the principle that each person must have an equal say in the election of representatives that a person is entitled to have his political party achieve representation in some way commensurate to its share of statewide support.

Id. at 2501. The Court then turned to the shortcomings of the political science-based tests that the plaintiffs proposed for determining the permissibility of partisan gerrymandering:

> The appellees assure us that "the persistence of a party's advantage may be shown through sensitivity testing: probing how a plan would perform under other plausible electoral conditions." Experience proves that accurately predicting electoral outcomes

> is not so simple, either because the plans are based on flawed assumptions about voter preferences and behavior or because demographics and priorities change over time. In our two leading partisan gerrymandering cases themselves, the predictions of durability proved to be dramatically wrong. In 1981, Republicans controlled both houses of the Indiana Legislature as well as the governorship. Democrats challenged the state legislature districting map enacted by the Republicans. This Court in *Bandemer* rejected that challenge, and just months later the Democrats increased their share of House seats in the 1986 elections. Two years later the House was split 50–50 between Democrats and Republicans, and the Democrats took control of the chamber in 1990. Democrats also challenged the Pennsylvania congressional districting plan at issue in *Vieth*. Two years after that challenge failed, they gained four seats in the delegation, going from a 12–7 minority to an 11–8 majority. At the next election, they flipped another Republican seat.
>
> Even the most sophisticated districting maps cannot reliably account for some of the reasons voters prefer one candidate over another, or why their preferences may change. Voters elect individual candidates in individual districts, and their selections depend on the issues that matter to them, the quality of the candidates, the tone of the candidates' campaigns, the performance of an incumbent, national events or local issues that drive voter turnout, and other considerations. Many voters split their tickets. Others never register with a political party, and vote for candidates from both major parties at different points during their lifetimes. For all of those reasons, asking judges to predict how a particular districting map will perform in future elections risks basing constitutional holdings on unstable ground outside judicial expertise.

Id. at 2503–04 (citations omitted).

¶ 242 The Supreme Court concluded "that partisan gerrymandering claims present political questions beyond the reach of the federal courts.

Federal judges have no license to reallocate political power between the two major political parties, with no plausible grant of authority in the Constitution, and no legal standards to limit and direct their decisions." *Id.* at 2506–07. The Court's discussion in *Rucho* of its previous decision in *Bandemer*, especially its reference to Justice O'Connor's concurring opinion, serves as a cautionary tale for the dangers that loom when a court thrusts itself into the political thicket guided by nothing more than a "nebulous standard." *Bandemer*, 478 U.S. at 145, 106 S. Ct. at 2817 (O'Connor, J., concurring). The Supreme Court did state that some state constitutions might provide the explicit guidance necessary to adjudicate partisan gerrymandering claims.

¶ 243 For specific guidance, the Court mentioned a case in which "the Supreme Court of Florida struck down that State's congressional districting plan as a violation of the Fair Districts Amendment to the Florida Constitution." *Rucho*, 139 S. Ct. at 2507 (citing *League of Women Voters of Florida v. Detzner*, 172 So. 3d 363, 416 (Fla. 2015)). Notably, in *Detzner* the state court was directed by the following express constitutional provision:

> In establishing congressional district boundaries:
>
> (a) No apportionment plan or individual district shall be drawn with the intent to favor or disfavor a political party or an incumbent; and districts shall not be drawn with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process or to diminish their ability to elect representatives of their choice; and districts shall consist of contiguous territory.
>
> (b) Unless compliance with the standards in this subsection conflicts with the standards in subsection (a) or with federal law, districts shall be as nearly equal in population as is practicable; districts shall be compact; and districts shall, where feasible, utilize existing political and geographical boundaries.
>
> (c) The order in which the standards within subsections (a) and (b) of this section are set forth shall not be read to establish any priority of one standard over the other within that subsection.

Fla. Const. art. III, § 20 (footnotes omitted). When the Supreme Court referenced the use of state constitutions to address claims of partisan

gerrymandering, it was referring to explicit prohibitions found in state constitutions, not to those created by judges as this Court does today. When asked by the dissent why the majority did not follow the Florida court's lead, the majority said, "The answer is that there is no 'Fair Districts Amendment' to the Federal Constitution." *Rucho*, 139 S. Ct. at 2507.

¶ 244 Here the majority opinion confirms the truth of all the warnings given by the Supreme Court that there is no manageable standard for adjudicating claims of partisan gerrymandering. The will of the people of Florida is fully and clearly expressed in their constitution. Like the Federal Constitution, there is no provision in our state constitution remotely comparable to this express provision in the Florida Constitution. As the Supreme Court said, with an express provision, states are better "armed with a standard that can reliably differentiate" between constitutional and unconstitutional political gerrymandering. *See Rucho*, 139 S. Ct. at 2499. Instead, the majority inexplicably takes the Court's statement that the "[p]rovisions in state statutes and state constitutions can provide standards and guidance for state courts to apply," *id.* at 2507, as an unrestricted license to judicially amend our constitution. In doing so, the majority wholly ignores the fact that the Court in *Rucho* identified several state constitutional provisions and statutes that are clear, manageable, and express as examples of workable standards for assessing political gerrymandering. *See id.* at 2507–08.

¶ 245 The North Carolina Constitution could have a provision like the Florida Constitution. But, to do so properly requires the amendment process authorized in the constitution itself, allowing the people to determine the wisdom of this new policy. Instead of following the constitutionally required process for properly amending the constitution, the majority now does so by judicial fiat, effectively placing in the constitution that any redistricting plan cannot "on the basis of partisan affiliation . . . deprive[ ] a voter of his or her fundamental right to substantially equal voting power" as determined by certain political science tests. Would the people have adopted this constitutional amendment? We do not know, and the majority does not care.

¶ 246 The plaintiffs in *Rucho* presented arguments and evidence similar to what was presented here—that the use of certain political science theories could provide a manageable standard. The Supreme Court disagreed. *See id.* at 2503–04. Here the majority's new constitutional standard requires litigants and courts to utilize those rejected approaches to predict the electoral outcomes that various proposed plans would produce. In doing so, the majority adopts various policies. First, the majority

makes the initial policy determination that the constitution mandates a statewide proportionality standard. Next, it determines that the constitution requires the use of political science tests to adhere to this standard and designates which political science tests should be used. But, the majority refuses to identity how the standard can be met: "We do not believe it prudent or necessary to, at this time, identify an exhaustive set of metrics or precise mathematical thresholds which conclusively demonstrate or disprove the existence of an unconstitutional partisan gerrymander." "[B]asing [its] constitutional holdings on unstable ground outside judicial expertise," *Rucho*, 139 S. Ct. at 2504, the majority's decision effectively results in the creation of a redistricting commission comprised of selected political scientists and judges.

¶ 247 The majority simply fails to recognize that its political science-based approach involves policy decisions and that these are the same policy determinations about which the Supreme Court warned in *Rucho*. *See id*. at 2503–04; *id*. at 2504 ("For all of those reasons, asking judges to predict how a particular districting map will perform in future elections risks basing constitutional holdings on unstable ground outside judicial expertise."). Why did the majority choose this approach and these specific tests instead of others? The expert witnesses in this case looked to selected past statewide elections results for data, and the majority approves such a practice. Left unanswered is which past elections' results are germane to predicting future ones. Moreover, what if the experts approved by the majority tend to favor one political party over the other as shown by their trial testimony in various cases? Could such experts be considered politically neutral?

¶ 248 As found by the trial court, "[t]he experts' analysis does not inform the Court of how far the Enacted Maps are from what is permissible partisan advantage. Accordingly, these analyses do not inform the Court of how much of an outlier the Enacted Maps are from what is actually permissible." The trial court also found that the "statewide races [used by plaintiffs' experts] have one thing in common, that is, the elected positions have very little in common with the legislative and congressional races except that they all occur in North Carolina."

¶ 249 The majority inserts a requirement of "partisan fairness" into our constitution. Under the majority's newly created policy, any redistricting that diminishes or dilutes an individual's vote on the basis of partisanship is unconstitutional. This outcome results, as predicted by the Court in *Rucho*, in a statewide proportionality standard. According to the majority, when groups of voters of "equal size" exist within a state, elections should result in an equal amount of representatives. Again,

this vague notion of fairness does not answer how to measure whether groups of voters are of equal size or how to predict the results an election would produce.

¶ 250 The majority also bases its reasoning on several false assumptions. First, plaintiffs' experts and now the majority appear to assume that voters will vote along party lines in future elections. This assumption is especially troubling considering that in 2020 over eight percent of North Carolinians voted for both a Republican candidate for president and a Democratic candidate for governor on the same ballot. Though individuals self-select their party affiliation, the views can often differ from one individual to another within that affiliation. Second, in equating partisan affiliation to an immutable characteristic and then elevating its protection to strict scrutiny, the majority also fails to consider that party affiliation can change at any point or be absent altogether. How can the General Assembly forecast the appropriate protections for the unaffiliated voter, a group growing by rapid number in the state? What is the standard for that group's fair representation? The majority certainly provides no answer for these important questions.

¶ 251 Third, the majority's policy decision erroneously assumes that a voter's interests can never be adequately represented by someone from a different party. Representative government is grounded in the concept of geographic representation. Though partisanship may influence the representative's attention to certain political issues, the representative is likely to attend to numerous other issues important to the shared community interests that affect his or her constituents. The constitution cannot guarantee that a representative will have the same political objectives as a given constituent because it is an impossible requirement. Representatives are *individuals* with their own beliefs and who pursue their own motivations, often in opposition to other members of their own party. As the trial court correctly found, plaintiffs' experts, and now the majority, treat candidates and representatives "as inanimate objects in that they do not consider the personality or qualifications of each candidate, any political baggage each candidate may carry, as well as a host of other considerations that voters use to select a candidate." Not only does the majority assume that voters will vote along party lines, but it also likewise transforms the individual representatives into partisan robots. Such reasoning is divorced from reality but nonetheless is the expected result when a court involves itself in a "policy determination of a kind clearly for nonjudicial discretion." *Baker*, 369 U.S. at 217, 82 S. Ct. at 710. As in this case, the plaintiffs in *Rucho* argued that addressing concerns of partisan gerrymandering was comparable to the process used in the one-person, one-vote legal analysis. Again,

the Supreme Court of the United States disagreed. *See Rucho*, 139 S. Ct. at 2501. The one-person, one-vote rule is just "a matter of math." *Id.* But the Constitution does not provide an "objective measure" of how to determine if a political party is treated "fairly." *Id.* Again, rejecting the Supreme Court's guidance, the majority holds that one-person, one-vote and partisan gerrymandering use comparable assessments and even asserts that violations related to partisan gerrymandering are more egregious than violations of one-person, one-vote. In sum, there is no judicially discernible manageable standard. As thoroughly discussed in *Rucho*, the majority's approach is replete with policy determinations. Thus, the case is nonjusticiable.

B. Textual Commitment

¶ 252 In addition to the fact that partisan gerrymandering claims are lacking in manageable standards, the issue is textually committed to the General Assembly. Under our state constitution, the General Assembly possesses plenary power as well as responsibilities explicitly recognized in the text. *McIntyre*, 254 N.C. at 515, 119 S.E.2d at 891–92. Both the Federal Constitution and the North Carolina Constitution textually assign redistricting authority to the legislature. The Federal Constitution commits the drawing of congressional districts to the state legislatures subject to oversight by the Congress of the United States. "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." U.S. Const. art. I, § 4, cl. 1. Our constitution also plainly commits redistricting responsibility to the General Assembly. *See* N.C. Const. art. II, § 3 ("The General Assembly . . . *shall* revise the senate districts and the apportionment of Senators among those districts . . . ." (emphasis added)); *id.* § 5 ("The General Assembly . . . *shall* revise the representative districts and the apportionment of Representatives among those districts . . . ." (emphasis added)). The governor has no role in the redistricting process because the constitution explicitly exempts redistricting legislation from the governor's veto power. *Id.* § 22(5)(b)–(d).

¶ 253 The role of the judiciary through judicial review is to decide challenges regarding whether a redistricting plan violates the objective limitations in Article II, Sections 3 and 5 of our constitution or a provision of federal law. Under our historic standard of review, the Court should not venture beyond the express language of the constitution. This Court is simply not constitutionally empowered nor equipped to formulate policy or develop standards for matters of a political, rather than legal, nature.

¶ 254 Our constitution places only the following four enumerated objective limitations on the General Assembly's redistricting authority:

> (1) Each Senator shall represent, as nearly as may be, an equal number of inhabitants, the number of inhabitants that each Senator represents being determined for this purpose by dividing the population of the district that he represents by the number of Senators apportioned to that district;
>
> (2) Each senate district shall at all times consist of contiguous territory;
>
> (3) No county shall be divided in the formation of a senate district;
>
> (4) When established, the senate districts and the apportionment of Senators shall remain unaltered until the return of another decennial census of population taken by order of Congress.

Id. § 3; *see id.* § 5 (setting the same limitations for the state House of Representatives). These express limitations neither restrict nor prohibit the General Assembly's presumptively constitutional discretion to engage in partisan gerrymandering. *See Preston*, 325 N.C. at 448–49, 385 S.E.2d at 478. The majority seriously errs by suggesting the General Assembly needs an express grant of authority to redistrict for partisan advantage. Under our state constitution, the opposite is true; absent an express prohibition, the General Assembly can proceed.

¶ 255 In a landmark case this Court considered the explicit limitations in Article II, Sections 3 and 5 and concluded that these objective restraints remain valid and can be applied consistently with federal law. In *Stephenson* the plaintiffs challenged the 2001 state legislative redistricting plans as unconstitutional in violation of the Whole County Provisions (WCP) of Article II, Sections 3 and 5. *Stephenson v. Bartlett*, 355 N.C. 354, 358, 562 S.E.2d 377, 381 (2002). The defendants argued that "the constitutional provisions mandating that counties not be divided are wholly unenforceable because of the requirements of the Voting Rights Act [(VRA)]." *Id.* at 361, 562 S.E.2d at 383–84. Thus, before addressing whether the 2001 redistricting plans violated the Whole County Provisions, this Court first had to address "whether the WCP is now entirely unenforceable, as [the] defendants contend, or, alternatively, whether the WCP remains enforceable throughout the State to the extent not preempted or otherwise superseded by federal law." *Id.* at 369, 562 S.E.2d at 388. In doing so, we explained that

> an inflexible application of the WCP is no longer attainable because of the operation of the provisions of the VRA and the federal "one-person, one-vote" standard, as incorporated within the State Constitution. This does not mean, however, that the WCP is rendered a legal nullity if its beneficial purposes can be preserved consistent with federal law and reconciled with other state constitutional guarantees.
>
> . . . . The General Assembly may consider partisan advantage and incumbency protection in the application of its discretionary redistricting decisions, *see Gaffney v. Cummings*, 412 U.S. 735, [93 S. Ct. 2321,] 37 L. Ed. 2d 298 (1973), but it must do so in conformity with the State Constitution. To hold otherwise would abrogate the constitutional limitations or "objective constraints" that the people of North Carolina have imposed on legislative redistricting and reapportionment in the State Constitution.

Id. at 371–72, 562 S.E.2d at 389–90. Thus, we referred to the Whole County Provisions and the other explicit limitations of Article II, Sections 3 and 5 as the "objective constraints" that the people have imposed upon the General Assembly's redistricting authority. We then concluded that "the WCP remains valid and binding upon the General Assembly during the redistricting and reapportionment process . . . except to the extent superseded by federal law." *Id.* at 372, 562 S.E.2d at 390. Having decided that the Whole County Provisions remained enforceable to the extent not preempted or otherwise superseded by federal law, we held that the 2001 redistricting plans violated the Whole County Provisions because "the 2001 Senate redistricting plan divide[d] 51 of 100 counties into different Senate Districts," and "[t]he 2001 House redistricting plan divide[d] 70 out of 100 counties into different House districts." *Id.* at 371, 562 S.E.2d at 390.

¶ 256 Having found that the maps violated the still valid Whole County Provisions, out of respect for the legislative branch, we then sought to give the General Assembly detailed criteria for fashioning remedial maps. The plaintiffs "contend[ed] that remedial compliance with the WCP requires the formation of multi-member legislative districts in which all legislators would be elected 'at-large.' " *Id.* at 376, 562 S.E.2d at 392. As such, we "turn[ed] to address the constitutional propriety of such districts, in the public interest, in order to effect a comprehensive remedy to the constitutional violation which occurred in the instant

case." *Id.* at 377, 562 S.E.2d at 393. In doing so, we noted that "[t]he classification of voters into both single-member and multi-member districts . . . necessarily implicates the fundamental right to vote on equal terms." *Id.* at 378, 562 S.E.2d at 393. We explained that

> voters in single-member legislative districts, surrounded by multi-member districts, suffer electoral disadvantage because, at a minimum, *they are not permitted to vote for the same number of legislators* and may not enjoy the same representational influence or "clout" as voters represented by a slate of legislators within a multi-member district.

Id. at 377, 562 S.E.2d at 393 (emphasis added). Thus, we concluded that the use of both single-member and multi-member districts within the same redistricting plan infringes upon "the fundamental right of each North Carolinian to substantially equal voting power." *Id.* at 379, 562 S.E.2d at 394. In other words, "substantially equal voting power" meant that each legislator should represent a similar number of constituents. This is an application of the one-person, one-vote concept. Here the majority changes the concept of "substantially equal voting power" of one-person, one-vote to apply now to "party affiliation."

¶ 257 We did not discuss the political party of the constituents in *Stephenson* but provided the following remedial directive:

> [T]o ensure full compliance with federal law, legislative districts required by the VRA shall be formed prior to creation of non-VRA districts. The USDOJ precleared the 2001 legislative redistricting plans, and the VRA districts contained therein, on 11 February 2002.[4] This administrative determination signified that, in the opinion of the USDOJ, the 2001 legislative redistricting plans had no retrogressive effect upon minority voters. In the formation of VRA districts within the revised redistricting plans on remand, we likewise direct the trial court to ensure that VRA districts are formed consistent with federal law and in

4. North Carolina is no longer subject to this requirement of Section 5 of the Voting Rights Act. *N.C. State Conf. of NAACP v. McCrory*, 831 F.3d 204, 215–16 (4th Cir. 2016) ("[I]n late June 2013, the Supreme Court issued its opinion in *Shelby County*. In it, the Court invalidated the preclearance coverage formula, finding it based on outdated data. *Shelby* [*Cnty. v. Holder*], [570 U.S. 529, 556–57,] 133 S. Ct. [2612,] 2631 [(2013)]. Consequently, as of that date, North Carolina no longer needed to preclear changes in its election laws.").

a manner having no retrogressive effect upon minority voters. To the maximum extent practicable, such VRA districts shall also comply with the legal requirements of the WCP, as herein established for all redistricting plans and districts throughout the State.

In forming new legislative districts, any deviation from the ideal population for a legislative district shall be at or within plus or minus five percent for purposes of compliance with federal "one-person, one-vote" requirements.

In counties having a 2000 census population sufficient to support the formation of one non-VRA legislative district falling at or within plus or minus five percent deviation from the ideal population consistent with "one-person, one-vote" requirements, the WCP requires that the physical boundaries of any such non-VRA legislative district not cross or traverse the exterior geographic line of any such county.

When two or more non-VRA legislative districts may be created within a single county, which districts fall at or within plus or minus five percent deviation from the ideal population consistent with "one-person, one-vote" requirements, single-member non-VRA districts shall be formed within said county. Such non-VRA districts shall be compact and shall not traverse the exterior geographic boundary of any such county.

In counties having a non-VRA population pool which cannot support at least one legislative district at or within plus or minus five percent of the ideal population for a legislative district or, alternatively, counties having a non-VRA population pool which, if divided into districts, would not comply with the at or within plus or minus five percent "one-person, one-vote" standard, the requirements of the WCP are met by combining or grouping the minimum number of whole, contiguous counties necessary to comply with the at or within plus or minus five percent "one-person, one-vote" standard. Within any such contiguous multi-county grouping, compact districts shall

> be formed, consistent with the at or within plus or minus five percent standard, whose boundary lines do not cross or traverse the "exterior" line of the multi-county grouping; provided, however, that the resulting interior county lines created by any such groupings may be crossed or traversed in the creation of districts within said multi-county grouping but only to the extent necessary to comply with the at or within plus or minus five percent "one-person, one-vote" standard. The intent underlying the WCP must be enforced to the maximum extent possible; thus, only the smallest number of counties necessary to comply with the at or within plus or minus five percent "one-person, one-vote" standard shall be combined, and communities of interest should be considered in the formation of compact and contiguous electoral districts.
>
> Because multi-member legislative districts, at least when used in conjunction with single-member legislative districts in the same redistricting plan, are subject to strict scrutiny under the Equal Protection Clause of the State Constitution, multi-member districts shall not be used in the formation of legislative districts unless it is established that such districts are necessary to advance a compelling governmental interest.
>
> Finally, we direct that any new redistricting plans, including any proposed on remand in this case, shall depart from strict compliance with the legal requirements set forth herein only to the extent necessary to comply with federal law.

Id. at 383–84, 562 S.E.2d at 396–97.

¶ 258 The majority attempts to analogize the classification of voters in *Stephenson* that were placed into both single and multi-member districts to the classification of voters based upon partisan affiliation. It does so by concluding, without any citation or other reference to legal support or any explanation, that the right to vote on equal terms "necessarily encompasses the opportunity to aggregate one's vote with like-minded citizens to elect a governing majority of elected officials who reflect those citizens' views." The majority thus reasons that "[l]ike the

distinctions at issue in *Stephenson*, drawing distinctions between voters on the basis of partisanship when allocating voting power diminishes the 'representational influence' of voters" because "those voters have far fewer legislators who are 'responsive' to their concerns and who can together 'press their interests.' "

¶ 259 The majority, however, fails to recognize that at least some partisan considerations are permitted under *Stephenson*. *Id.* at 371, 562 S.E.2d at 390 ("The General Assembly may consider partisan advantage and incumbency protection in the application of its discretionary redistricting decisions, but it must do so in conformity with the State Constitution." (internal citation omitted)); *Rucho*, 139 S. Ct. at 2497 (recognizing that legislators must be permitted to take some "partisan interests into account when drawing district lines"). Furthermore, our *Stephenson* decision thus directs that the Whole County Provisions of Article II, Sections 3 and 5 are still enforceable to the extent that they are compatible with the VRA and one-person, one-vote principles. When understanding *Stephenson* in context, it becomes clear that the Court's statement—that the General Assembly's practice of partisan gerrymandering must still conform with the constitution—refers to the express objective limitations present in Article II, Sections 3 and 5. The Court in *Stephenson* did not identify any other restrictions on the General Assembly's redistricting authority arising from the state constitution; the Court only recognized the express limitations, which deal exclusively with geographic and population-based measures.

¶ 260 The majority's misunderstanding of *Stephenson* is further expressed through its requirement from the 4 February 2022 order that "[t]he General Assembly must first assess whether, using current election and population data, racially polarized voting is legally sufficient in any area of the state such that Section 2 of the Voting Rights Act requires the drawing of a district to avoid diluting the voting strength of African-American voters."[5] Contrarily, *Stephenson* in no way requires the General Assembly to conduct an independent analysis under Section

5. Interestingly, the language in the majority's opinion now attempts to contextualize this requirement, noting that "the General Assembly's responsibility to conduct a racially polarized voting analysis arises from our state constitution and decisions of this Court, including primarily *Stephenson*, and not from the VRA itself, or for that matter from any federal law." But this attempted contextualization is senseless considering the directive from the majority's order specifically instructed the General Assembly to apply the federal VRA.

2 of the VRA before enacting a redistricting plan. Similarly, federal precedent does not have this requirement.[6]

¶ 261 In *Stephenson* we explained that "Section 2 of the VRA generally provides that states or their political subdivisions may not impose any voting qualification or prerequisite that impairs or dilutes, on account of race or color, a citizen's opportunity to participate in the political process and to elect representatives of his or her choice." *Stephenson*, 355 N.C. at 363, 562 S.E.2d at 385 (first citing 42 U.S.C. §§ 1973a, 1973b (1994); and then citing *Thornburg v. Gingles*, 478 U.S. 30, 43, 106 S. Ct. 2752, 2762 (1986)). We then stated that "[o]n remand, to ensure full compliance with federal law, legislative districts required by the VRA shall be formed prior to creation of non-VRA districts." *Id.* at 383, 562 S.E.2d at 396–97. We provided this approach to alleviate the tension between the Whole County Provisions and the VRA because the legislative defendants in *Stephenson* argued that "the constitutional provisions mandating that counties not be divided are wholly unenforceable because of the requirements of the Voting Rights Act." *Id.* at 361, 562 S.E.2d at 383–84. Thus, the Court in *Stephenson* was not forcing the legislative defendants to conduct a VRA analysis. Rather, the Court was merely stating that if Section 2 requires VRA districts, those districts must be drawn first so that the remaining non-VRA districts can be drawn in compliance with the Whole County Provisions.

¶ 262 Legislative defendants here made the decision not to draw any VRA districts. As the trial court correctly noted, "[i]f the [l]egislative [d]efendants are incorrect that no VRA Districts are required, [p]laintiff Common Cause has an adequate remedy at law and that is to bring a claim under Section 2 of the VRA." There is no requirement under the North Carolina Constitution or federal law that the General Assembly must conduct a racially polarized voting analysis before enacting a redistricting plan. Here the trial court found that there was no showing

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6. "The Equal Protection Clause of the Fourteenth Amendment limits racial gerrymanders in legislative districting plans." *Cooper v. Harris*, 137 S. Ct. 1455, 1463 (2017). Thus, absent a "sufficient justification," a state is prevented from "separat[ing] its citizens into different voting districts on the basis of race." *Bethune-Hill v. Virginia State Bd. of Elections*, 137 S. Ct. 788, 797 (2017) (alteration in original) (quoting *Miller v. Johnson*, 515 U.S. 900, 911, 115 S. Ct. 2475, 2486 (1995)). A plaintiff must first "prove that 'race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district.' That entails demonstrating that the legislature 'subordinated' other factors—compactness, respect for political subdivisions, partisan advantage, what have you—to 'racial considerations.' " *Cooper*, 137 S. Ct. at 1463–64 (citation omitted) (quoting *Miller*, 515 U.S. at 916, 115 S. Ct. at 2488).

that race was the predominant factor in drawing the districts. Similarly, the trial court concluded that the state legislative district plans did not violate the Whole County Provisions because the plans contained the minimum number of county traversals necessary to comply with one-person, one-vote principles and because the traversals were done predominantly in pursuit of traditional redistricting principles. Since the trial court formed these conclusions based upon findings of fact supported by competent evidence, its conclusions should be upheld.

¶ 263 Similar to our holding in *Stephenson* is *People ex rel. Van Bokkelen v. Canaday*, 73 N.C. 198 (1875). There the General Assembly divided the City of Wilmington into three wards, with three aldermen elected in each ward. While the first and second wards each had about 400 voters, the third ward had 2800. *Id.* at 225. While the first and second wards each consisted of one precinct for registration and voting, the third ward had four precincts divided by a "meets and bounds" description which omitted a portion of the city. *Id.* at 223. To be eligible to vote, voters needed to register to vote in their assigned precincts. Lastly, the act required a ninety-day residency in the ward, whereas the constitution provided for thirty days. *Id.* at 216, 221. The Court held that these obstacles to voting amounted to "the disfranchisement of the voters." *Id.* at 223. Furthermore, it observed that the great disparity of voters in the third ward as compared to the others meant that a third ward voter's vote was not equal. *Id.* at 225. The vote in the two wards "counts as much as seven votes in the third ward." *Id.* This malapportionment was "a plain violation of fundamental principles." *Id.* The "fundamental principle" is that representation shall be apportioned to the popular vote as near as may be. In other words, the Court recognized a basic one-person, one-vote principle. This case has no application to partisan gerrymandering. Notably, for the more than one hundred years since this case was decided, it has never been cited for the proposition for which the majority seeks to use it here.

¶ 264 Since 1776 this Court has exercised restraint absent an express limitation on the authority of the General Assembly. Moreover, this Court has long recognized that responsibilities reserved for the legislature are not reviewable by this Court because they raise political questions. In *Howell v. Howell*, 151 N.C. 575, 66 S.E. 571 (1909), the board of education in Haywood County created a school district and then held a vote to enable those in the district to determine whether a special tax should be imposed. *Id.* at 575–76, 66 S.E. at 572. A majority of the qualified voters in the newly drawn district voted in favor of the tax. *Id.* at 576, 66 S.E. at 572. The plaintiffs, who were taxpayers within that district, brought an

action to annul creation of the special-tax school district and to enjoin collection of the tax. *Id.* at 575, 66 S.E. at 572. The plaintiffs argued that the district was neither compact nor convenient, indicating to them that the district had been gerrymandered based on political views to ensure that a majority would vote in favor of the tax. *Id.* at 575–76, 66 S.E. at 572.

¶ 265 This Court, however, recognized that the creation of a special-tax school district was a legislative task, which at that time the legislature had delegated to local boards of education by a special act. *Id.* at 581, 66 S.E. at 572; *see also* Atwell C. McIntosh, *Special Tax School Districts in North Carolina*, 1 N.C. L. Rev. 88, 88–89 (1922). As such, the Court noted that the board's creation of the district was "no more subject to review than the act of the Legislature itself." *Howell*, 151 N.C. at 581, 66 S.E. at 574. Because "questions of compactness and convenience must be addressed to somebody's judgment and discretion," and because the duty to create districts at that time was "unequivocally delegate[d] . . . to the county board of education," the plaintiffs' challenge to the district's creation and composition raised a political question. *Id.* at 578, 66 S.E. at 573. The Court also noted that "[f]or the courts to undertake to pass upon such matters would be manifestly unwise." *Id.* at 578, 66 S.E. at 573. Moreover, the Court stated: "There is no principle better established than that *the courts will not interfere* to control the exercise of discretion on the part of any officer to whom has been legally delegated the right and duty to exercise that discretion." *Id.* at 578, 66 S.E. at 573 (emphasis added).

¶ 266 The Court expressed its concern about the politically motivated gerrymandering of special-tax districts to produce a favorable result and commented that perhaps "the overzealous overstep[ped] the limitations of prudence." *Id.* at 582, 66 S.E. at 574. Nonetheless, the Court recognized that a question about the creation of districts, even when a court disagrees with the district's creation, raises a political question "to be fought out on the hustings"—or, through the political process—not through the judiciary. *Id.* at 581, 66 S.E. at 574. In recognition of the constitutionally assigned authority to the General Assembly, the Court held it was prohibited from interfering.

¶ 267 In sum, a matter is nonjusticiable if the constitution expressly assigns responsibility to one branch of government or there is not a manageable standard by which to decide it, including whether the matter involves a policy determination. Both elements are present here. In addition to the legislature's plenary power, the constitution expressly assigns the General Assembly redistricting authority subject only to express limitations. The decision to implement a political fairness requirement

in the constitution without explicit direction from the text inherently requires policy choices and value determinations and does not result in a neutral, manageable standard. Here this Court's intrusion is a violation of separation of powers. By striking down the enacted plans as unconstitutional partisan gerrymanders, the majority today wholeheartedly ushers this Court into a new chapter of judicial activism, severing ties with over two hundred years of judicial restraint in this area. The majority seizes this opportunity to advance its agenda by grafting a prohibition of partisan gerrymandering onto several provisions of the Declaration of Rights. A review of these provisions, however, demonstrates that none specifically address redistricting. They are designed to protect only "individual and personal rights" rather than a group's right to have a party's preferred candidate placed in office. The majority seems to concede that there is no express provision of the constitution which addresses partisan gerrymandering. Undeterred, it untethers itself from history and case law in this case to apply an evolving understanding to these rights.

III. Declaration of Rights

¶ 268 To properly understand what the drafters meant when they included various rights in the Declaration of Rights, and particularly the application, if any, they may have in structuring voting districts, the historical context of our apportionment and elections process is significant. As recognized by the trial court, North Carolina has had some form of elected, representative body since 1665.[7] Leading up to the enactment of the 1776 constitution, in 1774 the delegates of the First Provincial Congress

7. As early as 1663, the Lords Proprietors could enact laws in consultation with the freeman settled in their province. Charter Granted by Charles II, King of England to the Lords Proprietors of Carolina (Mar. 24, 1663), *in* 1 *Colonial and State Records of North Carolina* 23 (William L. Sanders ed., 1886). In 1665 certain "concessions" by the Lords Proprietors allowed for the formation of the predecessor to the General Assembly and the election of freeman representatives. Concessions and Agreement Between the Lords Proprietors of Carolina and William Yeamans, et al. (Jan. 7, 1665), *in* 1 *Colonial and State Records of North Carolina* 81 (William L. Sanders ed., 1886). The 1669 Fundamental Constitutions of Carolina divided those representatives into counties, divided again into precincts. The Fundamental Constitutions of Carolina (Mar. 1, 1669), *in* 1 *Colonial and State Records of North Carolina* 188 (William L. Sanders ed., 1886). The assembly met every two years and stood for election every two years. *Id.* at 199–200. Thus, long before the 1776 constitution, the people in Carolina were electing their representatives in districts.

Later under the Royal Governor, the bicameral assembly consisted of an upper house to advise the Royal Governor and a lower house that represented the people and their interests. *See* Charles Lee Raper, *North Carolina, A Study in English Colonial Government* 71–100 (1904) [hereinafter *English Colonial Government*]. The lower house consisted of freeman elected by county and certain towns. *Id.* at 89–91.

were elected by geographic location, by county or town. *See* Henry G. Connor & Joseph B. Cheshire, Jr., *The Constitution of North Carolina Annotated* xii–xiv (1911). The text of the 1776 constitution established the General Assembly as the Senate and the House of Commons. N.C. Const. of 1776, § I. Senators were elected annually by county without regard to the population size of that county, *id.* § II, and representatives were also elected annually but with two representatives per county or specified town, *id.* § III. Only certain towns were included in the representation, *id.* but other towns were later added.[8] This apportionment was done at the same time certain Declaration of Rights provisions, namely the popular sovereignty provision, N.C. Const. of 1776, Declaration of Rights, § I, the free elections clause, *id.* at § VI, and the right to assembly and petition, *id.* at § XVIII, were enacted. Given the apportionment provisions, clearly these clauses did not mean "equal voting power," even based on population. Furthermore, partisan gerrymandering was well known to the framers, yet none of these provisions were crafted to address it. *See Rucho*, 139 S. Ct. at 2496.

¶ 269 Through the years, the population of the state shifted radically from the east to the piedmont and west. John V. Orth, *North Carolina Constitutional History*, 70 N.C. L. Rev. 1759, 1770–71 (1992). Nonetheless, the eastern region received additional representation. *Id.* at 1770. The General Assembly created smaller counties in the east and larger ones in the piedmont and west, tipping the numbers of representatives in favor of the east despite population growth trends in other areas. *Id.* at 1770–71. This county-town approach, combined with the power of the General Assembly to divide existing counties to create new ones, resulted in superior political power in the east despite the shift in population. *See id.* This malapportionment led to civil unrest and a crisis which culminated with the 1835 constitutional convention. John V. Orth & Paul Martin Newby, *The North Carolina State Constitution* 3, 13 (2d ed. 2013) [hereinafter *State Constitution*]. No one argued that the provisions of the Declaration of Rights made the legislative apportionment acts unconstitutional.

¶ 270 In 1835 a constitutional convention met to, among other things, adjust the representative system to better address differences in population. *See id.* That convention resulted in amendments that required

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8. The towns represented initially were Edenton, New Bern, Wilmington, Salisbury, Hillsborough, and Halifax, while others were added over the years. John V. Orth, *North Carolina Constitutional History*, 70 N.C. L. Rev. 1759, 1769 (1992) (discussing Article III of the 1776 constitution and including that Fayetteville, for example, was added to that list in 1789).

senatorial districts to be drawn by the General Assembly based on the taxes paid by each county, N.C. Const. of 1776, amends. of 1835, art. I, § 1, and included the predecessor of the Whole County Provisions, *see* N.C. Const. art. II, § 3(3), that prohibited a county from being divided to create the senatorial districts, N.C. Const. of 1776, amends. of 1835, art. I, § 1. House seats were allotted based on population, allowing the more populated counties to have additional representatives. *Id.* art. I, § 2. Like today, the General Assembly was instructed to reconsider the apportionment of the counties based on population according to the census taken by order of Congress. *Id.* art. I, § 3. Each county was required to have at least one House representative. *Id.* art. I, § 2. Likewise, the convention implemented other changes to representation such as lengthening legislative terms from one year to two years, *id.* art. I, §§ 1–2, and allowing the voters to elect the governor, *id.* art. II, § 1.

¶ 271 The constitutional convention of 1868 placed the Declaration of Rights in Article I, the forefront of the constitution. *See* N.C. Const. of 1868, art. I. The convention added Article I, Section 1, incorporating the provision from the Declaration of Independence that acknowledged our God-given, equal rights. *See id.* art. I, § 1. Significant here, the Senate became apportioned by population. *Id.* art. II, § 5. Along with the express limitation imposed by the Whole County Provisions, the 1868 amendments required senatorial districts to be contiguous and only be redrawn in connection with the decennial census. *Id.* The convention lengthened the term of the governor to four years, *id.* art. III, § 1, and constitutionally created a separate judicial branch, *see id.* art. IV, with judges being elected by the voters for eight-year terms, *id.* art. IV, § 26.

¶ 272 For almost one hundred years, apportionment remained unchanged until the 1960s. During that time, the Speaker of the House received the authority to apportion the House districts. N.C. Const. of 1868, amends. of 1961, art. II, § 5. Also, to comply with a federal lawsuit and the decision in *Baker v. Carr*, the constitution was amended in 1968 to reflect the one-person, one-vote requirement. *State Constitution* 31. This change affected the structure of the House of Representatives in particular. *Id.* Significantly, the number of House members remained at 120, but the representatives were no longer apportioned by county; instead, the 120 representatives were allotted among districts now drawn based on equal population. N.C. Const. of 1868, amends. of 1961, art. II, § 5. By the end of the 1960s, the same criteria for proper districts—equal population, contiguous territory, the Whole County Provisions, and reapportionment in conjunction with the decennial census—applied to both Senate and House districts. *See* N.C. Const. of 1868, amends. of 1967, art. II, §§ 4, 6.

¶ 273 The current version of our constitution, ratified by the people at the ballot box in 1971 along with five new amendments, came about as a "good government measure," *State Constitution* 32–33, or, in other words, an attempt to consolidate the 1868 constitution and its subsequent amendments along with editorial and organizational revisions and amendment proposals. *See, e.g.*, N.C. State Constitution Study Comm'n, *Report of the North Carolina State Constitution Study Commission* 8–12 (1968).

¶ 274 Based upon our history and the constitutional structure, when the people had concerns about ineffective political representation, they addressed those concerns by amending the constitution itself, rather than relying on judicial amendment through litigation. Each of the provisions relevant to the claims here have existed since 1971, with some dating back to the 1776 constitution. They are all housed in Article I of our constitution, the Declaration of Rights. None of those clauses have been interpreted as a restriction on partisan considerations in redistricting—even after hundreds of years of apportionments and decades of redistricting litigation—until today.

¶ 275 The Declaration of Rights is an expressive yet nonexhaustive list of protections afforded to *individual* citizens against government intrusion, along with "the ideological premises that underlie the structure of government." *State Constitution* 46. The Declaration of Rights sets out "[b]asic principles, such as popular sovereignty and separation of powers," which are "given specific application in later articles." *Id.* As such, each provision within the Declaration of Rights must be considered with the related, more specific provisions of the constitution that outline the practical workings for governance. That understanding comports with the general principles for interpreting all legal documents, treating statutes and constitutional text alike.[9]

¶ 276 The frequent elections provision provides a classic example of when a general principle set forth in the Declaration of Rights is practically developed by other constitutional text. Article I, Section 9 states: "For redress of grievances and for amending and strengthening the laws,

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9. *Compare Piedmont Publ'g Co. v. City of Winston-Salem*, 334 N.C. 595, 598, 434 S.E.2d 176, 177–78 (1993) ("One canon of construction is that when one statute deals with a particular subject matter in detail, and another statute deals with the same subject matter in general and comprehensive terms, the more specific statute will be construed as controlling."), *with Preston*, 325 N.C. at 449, 385 S.E.2d at 478 ("Issues concerning the proper construction of the Constitution of North Carolina 'are in the main governed by the same general principles which control in ascertaining the meaning of all written instruments.' " (quoting *Perry v. Stancil*, 237 N.C. 442, 444, 75 S.E.2d 512, 514 (1953))).

elections shall be often held." N.C. Const. art. I, § 9. This provision appeared in the original Declaration of Rights, *see* N.C. Const. of 1776, Declaration of Rights, § XX, and in 1776 "often" meant annual elections, *see*, *e.g.*, N.C. Const. of 1776, §§ V, VI, XV. The frequency of elections changed in 1835 through amendments providing for biannual legislative elections. N.C. Const. of 1776, amends. of 1835, art. I, §§ 1, 2. Even though it changed the frequency of elections from one to two years, this constitutional amendment did not violate the stated goal to have frequent elections as a timely means of holding accountable an unresponsive elected legislature. The concept of frequent elections remained embodied in the biannual election cycle.

¶ 277 Similarly, the 1868 constitution for the first time set the three branches on different election cycles. For example, in recognition of its policymaking authority, the General Assembly stayed on a biannual election cycle, *see* N.C. Const. of 1868, art. II, §§ 3, 6; however, the executive officers received four-year terms, *id.* art. III, § 1, and the Justices of the Supreme Court received eight-year terms, *id.* art. IV, § 26. Did this change violate the frequent elections provision? The answer is no—the principle of "often" elections in the Declaration of Rights is defined by other provisions of the constitution.

¶ 278 This Court recently read a provision of the Declaration of Rights in Article I, Section 15 together with a more specific and applicable provision in Article IX, Section 2. *Deminski ex rel. C.E.D. v. State Bd. of Educ.*, 377 N.C. 406, 2021-NCSC-58, ¶ 14. Article I, Section 15 acknowledges the "right to the privilege of education" and the State's duty "to guard and maintain that right." N.C. Const. art. I, § 15. Placed in the working articles of the constitution, Article IX, entitled "Education," *see id.* art. IX, actually "implements the right to education as provided in Article I," *Deminski*, ¶ 14. This Court explained that "these two provisions work in tandem," *id.* in that

> "Article I, Section 15 and Article IX, Section 2 of the North Carolina Constitution combine to guarantee every child of this state an opportunity to receive a sound basic education in our public schools." *Leandro* [*v. State*], 346 N.C. [336], 347, 488 S.E.2d [249,] 255 [(1997).] . . . .
>
> Further, Article I, Section 15 places an affirmative duty on the government "to guard and maintain that right." N.C. Const. art. I, § 15. Taken together, Article I, Section 15 and Article IX, Section 2 require

> the government to provide an opportunity to learn that is free from continual intimidation and harassment which prevent a student from learning. In other words, the government must provide a safe environment where learning can take place.

Id. ¶¶ 14–15. Thus, to arrive at a proper and harmonious interpretation of the constitutional text, the Court read the principles regarding the privilege of education enshrined in our Declaration of Rights in conjunction with the specific application given to education in a later article. As done in *Deminiski*, this Court should construe the general provisions of the Declaration of Rights in harmony with the more specific provisions addressing redistricting.

¶ 279 Moreover, "[t]he civil rights guaranteed by the Declaration of Rights in Article I of our Constitution *are individual and personal rights* entitled to protection against state action." *Corum v. Univ. of N.C.*, 330 N.C. 761, 782, 413 S.E.2d 276, 289 (1992) (emphasis added); *id.* at 783, 413 S.E.2d at 290 ("Having no other remedy, our common law guarantees *plaintiff* a direct action under the State Constitution for alleged violations of *his* constitutional freedom of speech rights." (emphases added)).

¶ 280 Finding no explicit constitutional provision prohibiting partisan gerrymandering, the majority creatively attempts to mine the Declaration of Rights to find or create some protection for a political group's right to their preferred form of representation and a "fair" share of the "voting power." The majority seems to say that this entitlement is based on the political party registrants associated with that group. Under a *Corum* analysis, however, an *individual* plaintiff has a direct cause of action against state officials who, acting in their official capacity, violate his constitutional rights as protected by the Declaration of Rights. *Id.* at 783–84, 413 S.E.2d at 290; *see Deminski*, ¶¶ 16–18 (outlining the *Corum* framework as the legal mechanism for bringing a proper claim under the Declaration of Rights).[10] Even when considering a self-identified class of individuals, such as self-selection of political affiliation, the Court has concluded that the Declaration of Rights protects the individual's rights, not the political group's rights. *Libertarian Party of N.C. v. State*, 365 N.C. 41, 49, 707 S.E.2d 199, 204–05 (2011) (explaining that casting votes in alignment with political beliefs implicates "*individual* associational

10. The holdings in *Corum* and *Deminiski* did not expand the role of the Court in remedying violations of constitutional rights as protected by the Declaration of Rights. Rather, like in *Bayard*, those cases involved the Court's interpretation of express provisions within the text of the constitution.

rights" (emphasis added)). This principle rings true even when alleging a violation of an associational right such as those implicated in the free speech and assembly clauses. *Id.* at 49, 707 S.E.2d at 204–05 ("In North Carolina, statutes governing ballot access by political parties implicate *individual* associational rights rooted in the free speech and assembly clauses of the state constitution." (emphasis added) (citing N.C. Const. art. I, §§ 12, 14)). Nonetheless, in the majority's view, "political equality" based on a group's party affiliation is a fundamental, albeit unwritten, principle of the Declaration of Rights akin to an immutable characteristic that deserves the highest form of protection under the state constitution.

¶ 281 Contrary to the majority's assertion, even a cursory review of the applicable history and case law supports the basic understanding that the Declaration of Rights protects individual rights such as the freedom of an individual to vote his conscience in an election which is free from fraud. The individual right to participate in a "free election" does not include the right to have one's preferred candidate elected or a political group's right to proportional representation. Moreover, because "a constitution cannot violate itself," *Leandro*, 346 N.C. at 352, 488 S.E.2d at 258, this Court must construe Article II, Sections 3 and 5 and the provisions that the majority relies upon—Article I, Sections 10, 12, 14, and 19—harmoniously. We address each provision in turn.

A. Free Elections Clause

¶ 282 Article I, Section 10 states that "[a]ll elections shall be free." N.C. Const. art. I, § 10. The clause first appears in the 1776 constitution, providing that "[t]he election of members, to serve as representatives, ought to be free." N.C. Const. of 1776, Declaration of Rights, § VI.[11] The 1868 constitution restated the free elections clause as "[a]ll elections ought to be free." N.C. Const. of 1868, art. I, § 10. Even though the word "ought" in both the 1776 and 1868 constitutions was changed to "shall" in the 1971 constitution, this change is not a substantive revision to the free elections clause. *See Report of the North Carolina State Constitution Study Commission* 73–75; *see also Smith v. Campbell*, 10 N.C. (3 Hawks) 590,

11. Under the 1776 constitution, the members of the General Assembly were the only elected officials. The General Assembly thus had the exclusive power to: (1) elect the Governor, N.C. Const. of 1776, § XV; (2) appoint the Attorney-General, *id.* § XIII; (3) appoint Judges of the Supreme Courts of Law and Equity and Judges of Admiralty, *id.*; (4) appoint the general and field officers of the militia, *id.* § XIV; (5) elect the council of State, *id.* § XVI; (6) appoint a treasurer or treasurers of the State, *id.* § XXII; (7) appoint the Secretary of State, *id.* § XXIV; and (8) recommend the appointment of Justices of the Peace to the Governor who shall commission them accordingly, *id.* § XXXIII.

598 (1825) (declaring that "ought" is synonymous with "shall," noting that "the word *ought*, in this and other sections of the [1776 constitution], should be understood imperatively"). "Free" means having political and legal rights of a personal nature or enjoying personal freedom, a "free citizen," or having "free will" or choice, as opposed to compulsion, force, constraint, or restraint. *See Free*, *Black's Law Dictionary* (11th ed. 2019). As a verb, "free" means to liberate or remove a constraint or burden. *Id.* Therefore, giving the provision its plain meaning, "free" means "free from interference or intimidation." *State Constitution* 56.[12]

¶ 283 While the provision protects the voter, it also protects candidates; however, there are limits. The terms "elections" and "free," N.C. Const. art. I, § 10, must be read, for example, in the context of Article VI, entitled "Suffrage and Eligibility to Office," *see id.* art. VI. Even though "elections shall be free," they are nonetheless restricted in certain ways in Article VI. *See, e.g.*, N.C. Const. art. VI, § 1 (requiring a North Carolina voter to be a citizen of the United States and at least 18 years old); *id.* § 2(1)–(2) (placing residency requirements on voters); *id.* § 2(3) (placing restrictions on felons' voting rights); *id.* § 3 (allowing for conditions on voter registration as prescribed by statute); *id.* § 5 (requiring that votes by the people be by ballot); *id.* § 7 (requiring public officials to take an oath before assuming office); *id.* § 8 (outlining certain disqualifications from holding public office); *id.* § 9 (prohibiting dual office holding); *id.* § 10 (allowing an incumbent to continue in office until a successor is chosen and qualified).

¶ 284 Based on our constitution's plain language and history, the framers had a specific meaning of the free elections clause. With respect to the history of the clause, the trial court found that inclusion of the clause was intended to protect against abuses of executive power, not to protect the people from their representatives who frequently face election

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12. The full text of the Virginia Declaration of Rights, from which the North Carolina free elections clause was taken, provides a clearer idea of the intention behind the text.

> That elections of members to serve as representatives of the people, in Assembly ought to be free; and that all men, having sufficient evidence of permanent common interest with, and attachment to, the community, have the right of suffrage and cannot be taxed or deprived of their property for public uses without their own consent or that of their representatives so elected, nor bound by any law to which they have not, in like manner, assented for the public good.

Va. Const. of 1776, Declaration of Rights, § 6.

by the people.[13] For the same reason, the 1776 constitution allowed the General Assembly to elect the Governor. N.C. Const. of 1776, § XV. The trial court found in part:

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13. The trial court found in part:

> . . . [T]he words as originally used in the English Bill of Rights ([1689]) were crafted in response to abuses and interference by the Crown in elections for members of parliament which included changing the electorate in different areas to achieve electoral advantage. J.R. Jones, *The Revolution of 1688 in England*, 148 (1972). . . . Examining the North Carolina Free Elections Clause in a greater context gives a complete understanding to its meaning.
>
> . . . At the time of the Glorious Revolution, King James II embarked on a campaign to pack Parliament with members sympathetic to him in an attempt to have laws that penalized Catholics and criminalized the practice of Catholicism repealed. After failing in his attempt to pack parliament, King James II was ultimately overthrown and fled England, paving the way for King William and Queen Mary to rule together. As a condition of King William and Queen Mary's assumption of the throne, they were required to sign the English Declaration of Rights which resulted in limiting the powers of the Crown and an increase in power to Parliament, most notably in the House of Commons.
>
> . . . The Glorious Revolution and the resulting English Bill of Rights were the beginning of a constitutional monarchy. While the English Bill of Rights, in part, sought to address the Crown's interference with the affairs of Parliament, there is no indication that the English Free Election Clause was directed at anyone but the Crown, much less a restriction on the power of Parliament. In fact, the opposite seems true. The English Bill of Rights reflected a shift in power from the Crown, who generally acted to protect its own interest, to the House of Commons in Parliament, whose members were elected by the people. Because the English Bill of Rights did not abolish the monarchy, provisions were necessary to provide protection to the elected members of parliament from interference by the Crown.
>
> . . . By the time the Virginia Declaration of Rights and the North Carolina Declaration of Rights and Constitution were passed, the Glorious Revolution had been over for almost a century. It is safe to say that none of the drafters of the 1776 Constitution were alive during the Glorious Revolution or the establishment of the English Bill of Rights and their experiences and concerns did not arise from direct interactions with the Crown, but instead from

Upon the adoption of the 1776 Constitution, the Royal Governor, who represented and protected the interest of the Crown, was replaced by a Governor chosen by the General Assembly. N.C. Const. of 1776, § XV. . . .

. . . The circumstances under which the English Free Election Clause was written were far different

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> direct interactions with the Royal Governors and their Council who represented the interests of the Crown. Moreover, the Royal Governors were representatives of a constitutional monarch, unlike the monarchs who claimed the throne through divine right before and up to the signing of the English Bill of Rights.
>
> . . . Under colonial rule, the North Carolina Royal Governor had veto power, as no law could be passed without his consent. While his instructions did not allow him to determine the manner of electing members to the House of Burgesses or set the number of members, they did allow him to dissolve the House of Burgesses. [*English Colonial Government*], at 35. The instructions to the Royal Governor also allowed him to issue charters of incorporation for towns and counties from which representatives would be elected.
>
> . . . No doubt there were tensions between the House of Burgesses and the Governor from 1729 to 1776. In 1746, in an effort to give equal representation to each county, as the newer counties were given fewer representatives in the House of Burgesses, the Royal Governor moved the legislature to Wilmington where representatives of the larger counties would not travel, giving the smaller counties effective control of the lower house. As a result, the legislature passed legislation giving each county two representatives in the assembly. This remained in effect until 1754 when the legislation was repealed by the Crown. [*English Colonial Government*, at] 90–91.
>
> . . . .
>
> . . . At times, the House of Burgesses refused to seat new members from counties created by the Governor. The dispute was not necessarily that the Governor did not have the authority, but the House believed they had a role in the process in the creation of counties. [*English Colonial Government*,] at 89–90.

As the trial court found, aside from disputes over representation, the lower house fought the Royal Governor over a myriad of issues, including the right to establish a quorum for the legislature and, most seriously, over fiscal matters and the appointment of judges.

> than those which caused the same language to be used in the 1776 Constitution.
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> . . . .
>
> . . . Any argument that the Free Elections Clause placed limits on the authority of the General Assembly to apportion seats flies in the face of the overwhelming authority given to the General Assembly in the 1776 Constitution. . . .
>
> . . . Much like the English Bill of Rights, the 1776 Constitution shifted power to the elected representatives of the people.

As noted by the trial court, under the 1776 constitution, voters did not vote for any executive branch members, including the governor, nor did voters elect judges. The General Assembly selected the members of the executive and judicial branches. *See* N.C. Const. of 1776, §§ XIII, XV, XXII, XXIV. Despite the existence of the free elections clause, under this constitutional structure, the voter did not have the right to vote for these offices at all and certainly was not entitled to see his *preferred* candidate in office.

¶ 285 Because of its plain meaning, this Court has issued few opinions interpreting the free elections clause though it has been part of our constitution since 1776. The first instance was in *State ex rel. Swaringen v. Poplin*, 211 N.C. 700, 191 S.E. 746 (1937), in which the plaintiff, a candidate who ostensibly lost an election for the office of county commissioner of Wilkes County, brought a quo warranto action, alleging that the Wilkes County Board of Elections fraudulently deprived him of the office by altering the vote count. *Id.* at 700–01, 191 S.E. at 746. In response, the defendant argued the plaintiff's complaint failed to state facts sufficient to constitute a cause of action. *Id.* at 701, 191 S.E. at 746. After the trial court rejected the defendant's argument, the defendant appealed, arguing that it was the sole duty of the County Board of Elections, rather than the judiciary, "to judicially determine the result of the election from the report and tabulation made by the precinct officials." *Id.* at 701, 191 S.E.2d at 747. In affirming the trial court's decision, we provided the following rationale:

> One of the chief purposes of *quo warranto* or an information in the nature of *quo warranto* is to try the title to an office. This is the method prescribed for settling a controversy between rival claimants

> when one is in possession of the office under a claim of right and in the exercise of official functions or the performance of official duties; and the jurisdiction of the Superior Court in this behalf has never been abdicated in favor of the board of county canvassers or other officers of an election.
>
> In the present case fraud is alleged. The courts are open to decide this issue in the present action. In Art. I, sec. 10, of the Constitution of North Carolina, we find it written: "All elections ought to be free." Our government is founded on the consent of the governed. A free ballot and a fair count must be held inviolable to preserve our democracy. In some countries the bullet settles disputes, in our country the ballot.

Id. at 702, 191 S.E. at 747 (internal citations omitted) (quoting N.C. Const. of 1868, art. I, § 10). Therefore, we interpreted "free" to mean the right to an honest vote count, free from fraud.

¶ 286 The next time we addressed the merits of a free election claim was in *Clark v. Meyland*, 261 N.C. 140, 134 S.E.2d 168 (1964). The plaintiff in *Clark* challenged a statute that required voters wishing to change their party affiliation to first take an oath with the following language: "I will support the nominees of the party to which I am now changing my affiliation in the next election and the said party nominees thereafter until I shall, in good faith, change my party affiliation in the manner provided by law." *Id.* at 140, 134 S.E.2d at 169. We held that the provision in the statute requiring certain provisions of the oath was invalid, explaining that:

> Any elector who offers sufficient proof of his intent, in good faith, to change his party affiliation cannot be required to bind himself by an oath, the violation of which, if not sufficient to brand him as a felon, would certainly be sufficient to operate as a *deterrent to his exercising a free choice among available candidates at the election*—even by casting a write-in ballot. His membership in his party and his right to participate in its primary may not be denied because he refuses to take an oath to vote in a manner which violates the constitutional provision that elections shall be free. Article I, Sec. 10, Constitution of North Carolina.

> When a member of either party desires to change his party affiliation, the good faith of the change is a proper subject of inquiry and challenge. Without the objectionable part of the oath, ample provision is made by which the officials may strike from the registration books the names of those who are not in good faith members of the party. The oath to support future candidates violates the principle of *freedom of conscience*. It denies a free ballot—*one that is cast according to the dictates of the voter's judgment*. We must hold that the Legislature is without power to shackle a voter's conscience by requiring the objectionable part of the oath as a price to pay for his right to participate in his party's primary.

Id. at 142–43, 134 S.E.2d at 170 (emphases added) (citing N.C. Const. of 1868, art. I, § 10). Thus, we interpreted "free" to mean freedom to vote one's conscience. Nonetheless, an inquiry into the sincerity of one's desire to change parties did not violate the clause.

¶ 287 The majority judicially amends the free elections clause to read "elections shall be free from depriving a voter of substantially equal voting power on the basis of party affiliation" with the voting power to be measured by modern political science analysis. To believe that the framers of this provision in 1776 or the people who ultimately adopted it in subsequent constitutions had even a vague notion that the clause had this unbounded meaning is absurd. The mandated political science methods did not even exist. Our hundreds of years of constitutional history confirms that this creative idea has no support in our history or case law.

¶ 288 Based upon this Court's precedent with respect to the free elections clause, a voter is deprived of a "free" election if (1) the election is subject to a fraudulent vote count, *see Poplin*, 211 N.C. at 702, 191 S.E. at 747, or (2) a law prevents a voter from voting according to one's judgment, *see Clark*, 261 N.C. at 142, 134 S.E.2d at 170. Therefore, the free elections clause must be read in harmony with other constitutional provisions such as Article VI, that limits who can vote and run for office. Free elections must be absent of fraud in the vote tabulation. The free elections clause was not meant to restrict the General Assembly's presumptively constitutional ability to engage in partisan gerrymandering.

B. Equal Protection Clause

¶ 289 Next, the majority claims its decision is supported by the equal protection clause. Article I, Section 19 provides, in relevant part, that

"[n]o person shall be denied the equal protection of the laws; nor shall any person be subjected to discrimination by the State because of race, color, religion, or national origin." N.C. Const. art. I, § 19. With respect to the history of this clause, the trial court found as follows:

> The Equal Protection Clause came into existence as part of the ratification of the 1971 Constitution . . . . The addition of the Equal Protection Clause, while a substantive change, was not meant to "bring about a fundamental change" to the power of the General Assembly. Report of Study Comm'n at 10.

This Court reviews claims brought under the equal protection clause as follows:

> Traditionally, courts employ a two-tiered scheme of analysis when an equal protection claim is made.
>
> When a governmental act classifies persons in terms of their ability to exercise a fundamental right, or when a governmental classification distinguishes between persons in terms of any right, upon some "suspect" basis, the upper tier of equal protection analysis is employed. Calling for "strict scrutiny", this standard requires the government to demonstrate that the classification is necessary to promote a compelling governmental interest.
>
> When an equal protection claim does not involve a "suspect class" or a fundamental right, the lower tier of equal protection analysis is employed. This mode of analysis merely requires that distinctions which are drawn by a challenged statute or action bear some rational relationship to a conceivable legitimate governmental interest.
>
> For strict scrutiny to be properly applied in evaluating an equal protection claim, it is necessary that there be a preliminary finding that there is a suspect classification or an infringement of a fundamental right. It has been held that a class is deemed "suspect" when it is saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command particular consideration from

> the judiciary. The underlying rationale of the theory of suspect classification is that where legislation or governmental action affects discrete and insular minorities, the presumption of constitutionality fades because the traditional political processes may have broken down.

Texfi Indus., Inc. v. City of Fayetteville, 301 N.C. 1, 10–11, 269 S.E.2d 142, 149 (1980) (internal citations omitted).

¶ 290 Classification based upon affiliation with one of the two major political parties in the United States—especially the Democratic Party in North Carolina[14]—does not trigger heightened scrutiny because neither party has historically been relegated to a position of political powerlessness. Allegations of partisan gerrymandering likewise do not trigger heightened scrutiny because the practice of partisan gerrymandering alone does not constitute "an infringement of a fundamental right." *Id.* at 11, 269 S.E.2d at 149.

¶ 291 This Court has explained that "[t]he right to vote *on equal terms* is a fundamental right." *Northampton Cnty. Drainage Dist. No. One v. Bailey*, 326 N.C. 742, 747, 392 S.E.2d 352, 356 (1990) (emphasis added). The fundamental right to vote on equal terms simply means that each vote should have the same weight. This is a simple mathematical calculation. *Rucho*, 139 S. Ct. at 2501. The historic understanding of equal voting power is stated in Article II, Sections 3(1) and 5(1), requiring that legislators "represent, as nearly as may be, an equal number of inhabitants." Party affiliation is not mentioned. This understanding of equal voting power meaning one-person, one-vote is supported by our cases such as *Stephenson* and *Canaday*. To reach its approved application of the equal protection clause, the majority begins by radically changing the meaning of the fundamental right to vote. It takes this individual right and transforms it into a right to "substantially equal voting power on the basis of party affiliation" and then declares a right to statewide proportional representation. In its unparalleled distortion of the right to vote, it singles out equal representation based on political affiliation, i.e., the two major political parties. What about the unaffiliated voters or voters in "non-partisan," issue-focused groups organized for

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14. The trial court found that "[b]etween 1870 and 2010, the Democratic Party at all times controlled one or both houses of the General Assembly." This finding, which is binding on appeal, demonstrates that throughout North Carolina's history, members of the Democratic Party certainly have not been relegated to a position of political powerlessness.

political influence? Of course, nothing about this approach is supported by the constitutional text or case law.

¶ 292 Only when a redistricting enactment infringes upon the "right to vote on equal terms for representatives" does heightened scrutiny apply. *See Stephenson*, 355 N.C. at 378, 562 S.E.2d at 393 ("The classification of voters into both single-member and multi-member districts within [the same redistricting plan] necessarily implicates the fundamental right to vote on equal terms, and thus strict scrutiny is the applicable standard."); *Blankenship v. Bartlett*, 363 N.C. 518, 518, 523–24, 681 S.E.2d 759, 763–64, 766 (2009) (applying heightened scrutiny where the plaintiffs showed a "gross disparity in voting power" because some judicial districts had five times the population of others). The "right to vote on equal terms" has been carefully defined in our case law.

¶ 293 In *Stephenson* this Court explained that "[t]he classification of voters into both single-member and multi-member districts [in the same redistricting plan] necessarily implicates the fundamental right to vote on equal terms." 355 N.C. at 378, 562 S.E.2d at 393. We reasoned that

> voters in single-member legislative districts, surrounded by multi-member districts, suffer electoral disadvantage because, at a minimum, *they are not permitted to vote for the same number of legislators* and may not enjoy the same representational influence or "clout" as voters represented by a slate of legislators within a multi-member district.

Id. at 377, 562 S.E.2d at 393 (emphasis added).

¶ 294 Likewise, in *Blankenship* the plaintiffs demonstrated a "gross disparity in voting power between similarly situated residents of Wake County" by making the following showing:

> In Superior Court District 10A, the voters elect one judge for every 32,199 residents, while the voters of the other districts in Wake County, 10B, 10C, and 10D, elect one judge per every 140,747 residents, 158,812 residents, and 123,143 residents, respectively. Thus, residents of District 10A have a voting power roughly five times greater than residents of District 10C, four and a half times greater than residents of District 10B, and four times greater than residents of District 10D.

363 N.C. at 527, 681 S.E.2d at 766. We explained that the above showing implicated the fundamental "right to vote on equal terms in

representative elections—a one-person, one-vote standard," and we thus employed a heightened scrutiny analysis. *Id.* at 522, 681 S.E.2d at 762–63.

¶ 295 Unlike the classifications in *Stephenson* and *Blankenship*, partisan gerrymandering has no significant impact upon the right to vote on equal terms under the one-person, one-vote standard. In other words, an effort to gerrymander districts to favor a political party does not alter *voting power* so long as voters are permitted to (1) vote for the same number of representatives as voters in other districts and (2) vote as part of a constituency that is similar in size to that of the other districts. Therefore, because partisan gerrymandering does not infringe upon a fundamental right, rational basis review applies. As such, read in harmony with Article II, Sections 3 and 5, Article I, Section 19 only prohibits redistricting plans that fail to "bear some rational relationship to a conceivable legitimate governmental interest." *Texfi*, 301 N.C. at 11, 269 S.E.2d at 149.[15] Our understanding of the equal protection clause has been informed by federal case law interpreting the Federal Equal Protection Clause. *See Rucho*, 139 S. Ct. at 2506–07 (finding no manageable standards for assessing partisan considerations in redistricting despite claims that the federal Equal Protection Clause had been violated). The plan here does not violate the equal protection clause.

C. Freedom of Assembly and Freedom of Speech Clauses

¶ 296 The majority also engrafts new meaning into Article I, Sections 12 and 14. These sections provide as follows:

> **Sec. 12. Right of assembly and petition.**
>
> The people have a right to assemble together to consult for their common good, to instruct their representatives, and to apply to the General Assembly for redress of grievances; but secret political societies are dangerous to the liberties of a free people and shall not be tolerated.
>
> . . . .
>
> **Sec. 14. Freedom of speech and press.**
>
> Freedom of speech and of the press are two of the great bulwarks of liberty and therefore shall

15. Here the enacted plans pass rational basis review because they are rationally related to the General Assembly's legitimate purpose of redrawing the legislative districts after each decennial census.

> never be restrained, but every person shall be held responsible for their abuse.

N.C. Const. art. I, §§ 12, 14. The trial court made the following findings with respect to the history of these clauses:

> Like the Equal Protection Clause, the Free Speech Clause was added to the Freedom of the Press Clause as part of the 1971 Constitution . . . . The addition of the Free Speech Clause, while a substantive change, was not meant to "bring about a fundamental change" to the power of the General Assembly. Report of Study Comm'n at 10.
>
> . . . .
>
> . . . The Freedom of Assembly Clause first appeared in the Declaration of Rights set forth in the 1776 Constitution and provided that "the people have a right to assemble together, to consult for their common good, to instruct their Representatives, and to apply to the Legislature, for redress of grievances." 1776 Const. Decl. of Rights XVII. The Freedom of Assembly Clause was modified by the 1868 Constitution by deleting the first word of the clause "that." 1868 Const. art. I, § 26. Amendments were again made to the Freedom of Assembly Clause with the ratification of the 1971 Constitution . . . . The change to the Freedom of Assembly Clause was not meant as a substantive change, nor was it meant to "bring about a fundamental change" to the power of the General Assembly. Rept. of Study Comm'n at 10.

¶ 297 The right to free speech is violated when "restrictions are placed on the espousal of a particular viewpoint," *State v. Petersilie*, 334 N.C. 169, 183, 432 S.E.2d 832, 840 (1993), or where retaliation motivated by the contents of an individual's speech would deter a person of reasonable firmness from engaging in speech or association, *Toomer v. Garrett*, 155 N.C. App. 462, 477–78, 574 S.E.2d 76, 89 (2002) (explaining that the test for a retaliation claim requires a showing "that the plaintiff . . . suffer[ed] an injury that would likely chill a person of ordinary firmness from continuing to engage" in a "constitutionally protected activity," including First Amendment activities), *appeal dismissed and disc. rev. denied*, 357 N.C. 66, 579 S.E.2d 576 (2003); *see Evans v. Cowan*, 132 N.C. App. 1, 11, 510 S.E.2d 170, 177 (1999) (determining "there was no forecast of evidence" to support a retaliation claim).

¶ 298 Partisan gerrymandering plainly does not place any restriction upon the espousal of a particular viewpoint. Rather, redistricting enactments in North Carolina are subject to the typical policymaking customs of open debate and compromise. *See Berger*, 368 N.C. at 653, 781 S.E.2d at 261 (noting that the structure of the legislature "ensures healthy review and significant debate of each proposed statute, the enactment of which frequently reaches final form through compromise"). As such, opponents of a redistricting plan are free to voice their opposition.

¶ 299 Moreover, partisan gerrymandering—and public disdain for the practice—has been ubiquitous throughout our state's history. *See Rucho*, 139 S. Ct. at 2494 ("Partisan gerrymandering is nothing new. Nor is frustration with it. The practice was known in the Colonies prior to Independence, and the Framers were familiar with it at the time of the drafting and ratification of the Constitution.") As such, it is apparent that a person of ordinary firmness would not refrain from expressing a political view out of fear that the General Assembly will place his residence in a district that will likely elect a member of the opposing party. *See Toomer*, 155 N.C. App. at 477–78, 574 S.E.2d at 89. It is plausible that an individual may be less inclined to voice his political opinions if he is unable to find someone who will listen. Article I, Sections 12 and 14, however, guarantee the rights to speak and assemble without government intervention, rather than the right to be provided a receptive audience. *See Minn. State Bd. for Cmty. Colls. v. Knight*, 465 U.S. 271, 286, 104 S. Ct. 1058, 1066 (1984) (stating that individuals "have no constitutional right as members of the public to a government audience for their policy views"); *Johnson v. Wisc. Elections Comm'n*, 967 N.W.2d 469, 487 (Wis. 2021) ("Associational rights guarantee the freedom to *participate in* the political process; they do not guarantee a favorable outcome." (emphasis added)).

¶ 300 This Court and the Court of Appeals have interpreted speech and assembly rights in alignment with federal case law under the First Amendment. *See Petersilie*, 334 N.C. at 184, 432 S.E.2d at 841; *Feltman v. City of Wilson*, 238 N.C. App. 246, 252–53, 767 S.E.2d 615, 620 (2014); *State v. Shackelford*, 264 N.C. App. 542, 552, 825 S.E.2d 689, 696 (2019). As discussed at length in *Rucho*, the Supreme Court of the United States found no manageable standards for assessing partisan considerations in redistricting despite having the similar express protections of speech and assembly rights. *Rucho*, 139 S. Ct. at 2505–07. Therefore, when interpreted in harmony with Article II, Sections 3 and 5, it is clear that Article I, Sections 12 and 14 do not limit the General Assembly's presumptively constitutional authority to engage in partisan gerrymandering. As with

the prior Declaration of Rights clauses, there is nothing in the history of the clauses nor the applicable case law that supports the majority's expanded use of them.

D. Summary

¶ 301 In summary, none of the constitutional provisions cited by plaintiffs prohibit the practice of partisan gerrymandering. Each must be read in harmony with the more specific provisions that outline the practical workings for governance. Notably, Article II, Sections 3 and 5 outline the practical workings of the General Assembly's redistricting authority. These provisions contain only four express limitations on the General Assembly's otherwise plenary power, none of which address partisan gerrymandering. Therefore, because the constitution expressly assigns to the General Assembly the authority to redistrict, and this Court is without any satisfactory or manageable standards to assess redistricting decisions by the legislative branch, we should not and cannot adjudicate partisan gerrymandering claims. The claims here present a nonjusticiable political question, and this Court's intrusion violates separation of powers.

¶ 302 Recognizing that there is no explicit constitutional provision supporting its position, the majority resorts to an evolving understanding to support its expansive approach. The majority cites Article I, Sections 1 and 2 as supporting its statewide proportionality argument. *See* N.C. Const. art. I, § 1 ("We hold it to be self-evident that all persons are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, the enjoyment of the fruits of their own labor, and the pursuit of happiness."); *id.* § 2 ("All political power is vested in and derived from the people; all government of right originates from the people, is founded upon their will only, and is instituted solely for the good of the whole."). Undoubtedly, Article I, Sections 1 and 2, are bedrock constitutional principles, recognizing that all are created equal and endowed with God-given rights and acknowledging that all political power originates and is derived from the people. Neither provision speaks expressly to limitations on the General Assembly's authority to redistrict. Undeterred, however, the majority reads into our constitution a proportionality requirement which appears to be more akin to the European parliamentary system, rather than the American system. Furthermore, the "will of the people" is expressed in the words of our constitution. The best way to honor the "will of the people" is to interpret the constitution as written and as the drafters intended. At no point in 1776, 1835, 1868, or 1971 did the drafters or refiners intend for the selected provisions of the Declaration of Rights to

limit the legislature's authority to redistrict. The limitations the people placed upon the General Assembly regarding redistricting are expressly stated in Article II, Sections 3 and 5.

¶ 303 The people expressed their will in the 2020 election, which utilized constitutionally compliant maps. Knowing that the 2021 General Assembly would be tasked with redistricting, the people elected them. Nonetheless, the majority says it is simply "recur[ing] to fundamental principles." Its analysis and remedies, however, are new, not fundamental. Judicially modified constitutional provisions and judicial intrusion into areas specifically reserved for the legislative branch are not a "recurrence to fundamental principles." Rather, the decisions of the majority are a significant departure threatening "the blessings of liberty."

IV. Remedy

¶ 304 The majority's remedy mandates its approved political scientists and their approaches. Apparently, the majority's policy decisions guide these selections. The majority's required timeline is arbitrary and seems designed only to ensure this Court's continued direct involvement in this proceeding. Instead of following our customary process of allowing the trial court to manage the details of a case on remand, the majority mandates a May 2022 primary. No reason is given, nor does one exist for not allowing the trial court to manage the remand schedule, including, if necessary, further delaying the primary.

¶ 305 The majority defines "partisan advantage" as "achieving a political party's advantage across a map incommensurate with its level of statewide voter support." The majority also defines "political fairness" as "the effort to apportion to each political party a share of seats commensurate with its level of statewide support." These definitions demonstrate the majority's desire to judicially amend our constitution to include a requirement of statewide proportional representation. *See Proportional representation*, *Black's Law Dictionary* (11th ed. 2014) ("An electoral system that allocates legislative seats to each political group in proportion to its actual voting strength in the electorate.") Just as there is no proportionality requirement in our constitution, there is none in the Federal Constitution: "Our cases, however, clearly foreclose any claim that the Constitution requires proportional representation or that legislatures in reapportioning must draw district lines to come as near as possible to allocating seats to the contending parties in proportion to what their anticipated statewide vote will be." *Rucho*, 139 S. Ct. at 2499 (quoting *Bandemer*, 478 U.S. at 130, 106 S. Ct. at 2809).

¶ 306 The majority asserts that

> [i]f constitutional provisions forbid only what they were understood to forbid at the time they were enacted, then the free elections clause has nothing to say about slavery and the complete disenfranchisement of women and minorities. In short, the dissent's view compels the conclusion that there is no constitutional bar to denying the right to vote to women and black people.

This claim is wholly unfounded. Slavery was officially abolished by the Thirteenth Amendment to the United States Constitution ratified in 1865. Article I, Section 17, of the 1868 state constitution explicitly prohibits slavery. N.C. Const. of 1868, art. I, § 17. Similarly, the Nineteenth Amendment to the United States Constitution gave women the right to vote. The state constitution was modified accordingly. *See* N.C. Const. art. VI, § 1. As discussed elsewhere, the free election and assembly clauses were enacted in 1776 and were never applied to voter qualifications. Free speech and equal protection clauses were added to the state constitution in 1971, after equal voting qualifications were established. In sum, the issues raised by the majority are specifically addressed in the Federal Constitution and the state constitution.

V. Conclusion

¶ 307 Historically, to prove an act of the General Assembly is unconstitutional we have required a showing that, beyond a reasonable doubt, an express provision of the constitution is violated. No express provision of our constitution has been violated here. Nonetheless, in the majority's view, it is the members of this Court, rather than the people, who hold the power to alter our constitution. Thus, the majority by judicial fiat amends the plain text of Article I, Sections 10, 12, 14, and 19, to empower courts to supervise the legislative power of redistricting when met with complaints of partisan gerrymandering. Such action constitutes a clear usurpation of the people's authority to amend their constitution. As explicitly stated in our constitution, the people alone have the authority to alter this foundational document. N.C. Const. art. I, § 3 ("The people of this State have the inherent, sole, and exclusive right of . . . altering . . . their Constitution . . . ."); *see also id.* art. XIII, § 2. Under our constitution's expressed process, the people have the final say. *Id.* art. XIII, §§ 3–4.

¶ 308 The majority asserts that its holding somehow adheres to "the principle of democratic and political equality that reflects the spirits and

intent of our Declaration of Rights." It cannot point to any text or case law to support its deciphering of the "spirits and intent" of the document because there is nothing in the text of the constitution, its history, or our case law that supports the majority's position. The majority simply rules that the North Carolina Constitution now has a statewide proportionality requirement for redistricting. In doing so, the conclusion magically transforms the protection of individual rights into the creation of a protected class consisting of members of a political party, thereby subjecting a redistricting plan to strict scrutiny review. The majority presents various general views about what constitutes unconstitutional partisan gerrymandering and provides a variety of observations about what the constitution requires. Absent from the opinion is what is meant by "substantially equal voting power on the basis of partisan affiliation." Any discretionary decisions constitutionally committed to the General Assembly in the redistricting process seem to have been transferred to the Court.

¶ 309 The vagaries within the opinion and the order only reinforce the holding of the Supreme Court in *Rucho* that there is no neutral, manageable standard. The four members of this Court alone will approve a redistricting plan which meets their test of constitutionality. This case substantiates the observations of the Supreme Court of the United States as to the many reasons why partisan gerrymandering claims are nonjusticiable. The Court observed that redistricting invariably involves numerous policy decisions. It noted that "[p]artisan gerrymandering claims invariably sound in a desire for proportional representation," *Rucho*, 139 S. Ct. at 2499, and that "plaintiffs inevitably ask the courts to make their own political judgment about how much representation particular political parties *deserve*—based on the votes of their supporters—and to rearrange the challenged districts to achieve that end," *id.* In other words, plaintiffs ask the courts "to reallocate political power between the two major political parties." *Id.* at 2507. Despite these well-reasoned warnings, the majority of this Court proceeds, and in the process, proves the Supreme Court's point.

¶ 310 The Supreme Court also warned of the need for courts to provide a clear standard so legislatures could "reliably differentiate unconstitutional from 'constitutional political gerrymandering.' " *Id.* at 2499 (quoting *Cromartie*, 526 U.S. at 551, 119 S. Ct. at 1551). It observed that:

> "Fairness" does not seem to us a judicially manageable standard. . . . Some criterion more solid and more demonstrably met than that seems to us necessary to enable the state legislatures to discern the limits of

> their districting discretion, to meaningfully constrain the discretion of the courts, and to win public acceptance for the courts' intrusion into a process that is the very foundation of democratic decisionmaking.

Id. at 2499–500 (alteration in original) (quoting *Vieth*, 541 U.S. at 291, 124 S. Ct. at 1784 (opinion of Scalia, J.)). The majority ignores all these warnings, fails to articulate a manageable standard, and seems content to have the discretion to determine when a redistricting plan is constitutional. This approach is radically inconsistent with our historic standard of review, which employs a presumption that acts of the General Assembly are constitutional, requiring identification of an express constitutional provision and a showing of a violation of that provision beyond a reasonable doubt.

¶ 311 The Supreme Court cautioned that embroiling courts in cases involving partisan gerrymandering claims by applying an "expansive standard" would amount to an "unprecedented intervention in the American political process." *Id.* at 2498 (quoting *Vieth*, 541 U.S. at 306, 124 S. Ct. at 1793 (opinion of Kennedy, J.)). Sadly, the majority does just that. I respectfully dissent.

Justices BERGER and BARRINGER join in this dissenting opinion.

BISHOP v. BISHOP

[380 N.C. 458, 2022-NCSC-18]

JOHN EDWARD BISHOP, III
v.
SARA ELIZABETH BISHOP

No. 65A21

Filed 11 March 2022

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 275 N.C. App. 457, 853 S.E.2d 815 (2020), affirming an order entered on 30 April 2018 and an order entered on 27 November 2018 by Judge Anna Worley in District Court, Wake County. Heard in the Supreme Court on 14 February 2022.

Jonathan McGirt for plaintiff-appellant.

Manning, Fulton & Skinner, P.A., by Michael S. Harrell, for defendant-appellee.

PER CURIAM.

AFFIRMED.

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

BUTTON v. LEVEL FOUR ORTHOTICS & PROSTHETICS, INC.

[380 N.C. 459, 2022-NCSC-19]

JAMES C. BUTTON
v.
LEVEL FOUR ORTHOTICS & PROSTHETICS, INC., LEVEL FOUR SBIC HOLDINGS, LLC, PENTA MEZZANINE SBIC FUND I, L.P., REBECCA R. IRISH, AND SETH D. ELLIS

No. 376A20

Filed 11 March 2022

1. Appeal and Error—interlocutory order—claims dismissed without prejudice—no substantial right

In an action for declaratory judgment and tortious interference with contract, which was designated a complex business case, plaintiff's cross-appeal from an interlocutory order partially granting defendants' motion to dismiss was dismissed as premature. The order did not affect a substantial right to avoid the risk of inconsistent verdicts in two possible trials where plaintiff's claims were dismissed without prejudice and, therefore, not all relief had been denied.

2. Declaratory Judgments—jurisdiction—actual controversy—former CEO's contractual rights upon termination of employment

In a complex business case, where a corporation's former CEO sought a declaratory judgment setting forth his rights under his employment agreement with the corporation and under various related contracts with the corporation's majority shareholder—and where the determinative issue was whether the corporation terminated his employment with or without cause—the trial court lacked subject matter jurisdiction over the CEO's declaratory judgment claim against the majority shareholder. The complaint failed to show an actual controversy between the parties that was practically certain to result in litigation, where the decision to terminate the CEO lay with the corporation, the complaint did not allege that the CEO or the majority shareholder had attempted to exercise their rights under the various contracts, and it was impossible to speculate on appeal whether any future acts by the shareholder would constitute a breach.

3. Contracts—tortious interference with contract—specific pleading requirements—no rebuttal to qualified privilege

In a complex business case, where a corporation's former CEO (plaintiff) accused two shareholders and the minority shareholder's managing partner (defendants) of inducing the corporation to

violate plaintiff's employment agreement, the trial court properly dismissed plaintiff's claim for tortious interference with contract for failure to state a claim. Plaintiff did not comply with the specific pleading requirements for tortious interference claims where his complaint made conclusory, general allegations that defendants had acted with malice. Further, the complaint failed to rebut the presumption that the shareholders—as corporate "non-outsiders"—acted in the corporation's best interest, and also failed to rebut the qualified privilege afforded to stockholders to interfere with a corporation's contracts with third parties.

4. Jurisdiction—personal—long-arm statute—due process—CEO's contractual rights after termination—extent of control by shareholders

In a complex business case, where the parties disputed a former CEO's rights under his employment agreement with a North Carolina corporation and under various related contracts with the corporation's majority shareholder (a Florida company), and where the CEO accused the Florida company and the minority shareholder's managing partner of inducing the corporation to terminate the CEO for cause, the trial court properly exercised personal jurisdiction over the Florida company and the managing partner. To varying degrees, the Florida company—through one of its managers, who also acted as the North Carolina corporation's sole director—and the managing partner exercised control over the North Carolina corporation and were actively involved in negotiating terms of the contracts at issue and in firing the CEO, thereby satisfying the "substantial activity" requirement under North Carolina's long-arm statute and the "minimum contacts" requirement for due process.

Justice EARLS concurring in part and dissenting in part.

Justices HUDSON and ERVIN join in this opinion concurring in part and dissenting in part.

Appeal by defendants pursuant to N.C.G.S. § 1-277(b) and cross-appeal by plaintiff pursuant to N.C.G.S. § 7A-27(a)(3)(a) from an order entered 13 March 2020 in the North Carolina Business Court, Forsyth County by Judge Michael L Robinson. Heard in the Supreme Court 6 October 2021.

Mullins Duncan Harrell & Russell PLLC, by Alan W. Duncan, Stephen M. Russell, Jr., and Tyler D. Nullmeyer, for plaintiff.

Robinson, Bradshaw & Hinson, P.A., by Brian L. Church and David C. Wright, III, for defendants.

BERGER, Justice.

¶ 1 On March 13, 2020, the trial court entered an order dismissing without prejudice plaintiff James Button's claims for declaratory judgment against Level Four SBIC Holdings (Level Four Holdings). In addition, the trial court dismissed plaintiff's claim for tortious interference with contract against Penta Mezzanine SBIC Fund I, L.P. (Penta Fund), Level Four Holdings, and Seth Ellis. The trial court also denied motions to dismiss for lack of personal jurisdiction by Level Four Holdings and Ellis. Level Four Holdings and Ellis filed a notice of appeal as to the trial court's denial of their motions to dismiss for lack of personal jurisdiction. Plaintiff filed a notice of cross-appeal from the trial court's order partially granting defendants' motions to dismiss. Plaintiff acknowledged that the order from which he was attempting to appeal was interlocutory, but he argues that the appeal affects a substantial right. Alternatively, plaintiff filed a petition for writ of certiorari, arguing that this Court should allow review of the trial court's dismissal without prejudice of his claims for declaratory judgment and for tortious interference with contract.

I. Factual and Procedural Background

¶ 2 Penta Fund is a limited partnership formed in Delaware with its principal place of business in Winter Park, Florida. Penta Fund is a manager and majority owner of Level Four Holdings and minority shareholder of Level Four Orthotics & Prosthetics, Inc. (Level Four Inc.). Level Four Holdings, a Florida corporation with its principal place of business in Winter Park, Florida, is the majority shareholder of Level Four Inc., a North Carolina corporation with its principal place of business in Winston-Salem, North Carolina.

¶ 3 In July 2017, plaintiff, a citizen of New Jersey, entered into an employment agreement (the Employment Agreement) with Level Four Inc. to serve as its Chief Executive Officer. Plaintiff negotiated the terms of his employment with Rebecca Irish (Irish) and Ellis, both of whom are residents of Florida. During these negotiations, Irish "simultaneously represented Level Four Inc., Level Four Holdings, and Penta Fund." At all times relevant to the current dispute, Irish concurrently acted as "the

sole director of Level Four Inc., a manager of Level Four Holdings, and a managing partner and investment committee member of Penta Fund." Ellis was the managing partner of Penta Fund and a member on its investment committee.

¶ 4 In addition to the Employment Agreement, plaintiff entered into a Warrant Agreement with Level Four Inc. Further, with Level Four Holdings, plaintiff entered into an Option Agreement, Stock Repurchase Agreement, Go Shop Provision with Future Sale Agreement (Go Shop Agreement), and Shareholder Voting Agreement (collectively, the Level Four Holdings Agreements).

A. The Employment Agreement and Warrant Agreement with Level Four Inc.

¶ 5 The Employment Agreement allowed Level Four Inc. to terminate plaintiff's employment with or without cause. Termination without cause entitled plaintiff to a thirty-day written notice along with several severance benefits. If terminated for cause, plaintiff would not be entitled to notice or severance benefits. Pursuant to the Employment Agreement, termination for cause was permissible for "any willful misconduct or gross negligence which could reasonably be expected to have a material adverse affect [sic] on the business and affairs of [Level Four Inc.]." "Willful misconduct" under the agreement was defined as conduct that a court determines "to be knowingly fraudulent or deliberately dishonest." Additionally, during employment negotiations, plaintiff learned of and became concerned with the amount of debt Level Four Inc. owed to Penta Fund. As a result, plaintiff negotiated for a clause to be included in the Employment Agreement whereby the interest rates on promissory notes payable to Penta Fund by Level Four Inc. would "be reduced to no greater than the two- and one-half percent (2.5%) at all times subsequent to July 1, 201[7]."

¶ 6 Under the Warrant Agreement, plaintiff had the right to purchase 30% of Level Four Inc.'s common stock, subject to certain vesting requirements. Notably, plaintiff's rights under the Warrant Agreement would fully vest without regard to the duration of his employment if his employment was terminated without cause. However, if plaintiff's employment was terminated for cause, no further rights under the Warrant Agreement would vest.

B. The Level Four Holdings Agreements

¶ 7 Pursuant to the Option Agreement, plaintiff had the right to purchase 21% of Level Four Inc.'s common stock, along with over $3 million worth

of notes plus accrued interest owed to Penta Fund by Level Four Inc. Plaintiff's voluntary resignation or termination for cause would eliminate his right to exercise the option contained in the Option Agreement. Otherwise, a termination without cause would allow plaintiff's rights under the Option Agreement to continue until they naturally expired.

¶ 8 The Stock Repurchase Agreement concerned what rights Level Four Holdings had regarding stock obtained by plaintiff pursuant to the Warrant Agreement and Option Agreement. If plaintiff's employment was terminated without cause, Level Four Holdings would not have the ability to purchase stock acquired by plaintiff under the Option Agreement but would be allowed to purchase stock acquired by plaintiff under the Warrant Agreement. Alternatively, if plaintiff's employment was terminated for cause, Level Four Holdings would have the option to purchase stock acquired by plaintiff under both the Option Agreement and Warrant Agreement.

¶ 9 Finally, under the Go Shop Agreement, plaintiff was given the right to submit a competing offer to purchase Level Four Inc. within a thirty-day period should Level Four Holdings agree to an offer to sell Level Four Inc. to a third party. Plaintiff's termination for cause or voluntary resignation would immediately terminate these rights. If plaintiff's employment was terminated without cause, however, his rights under the Go Shop Agreement would continue for six months from the date of his "without cause" termination.

C. Plaintiff's employment and subsequent termination

¶ 10 Upon plaintiff's employment as CEO, Level Four Inc. owed Penta Fund close to $10 million in long-term debt bearing various interest rates of up to 18%. Pursuant to the Employment Agreement, however, the interest rate on the debt owed by Level Four Inc. was reduced to 2.5%. In November 2018, plaintiff sought an additional loan from Penta Fund. On December 12, 2018, Irish conditioned the additional funding with an 8% interest rate applicable to both new and existing amounts owed to Penta Fund. Plaintiff refused to agree to any modification regarding the interest rate provision in the Employment Agreement and believed implementation of an 8% interest would violate the Employment Agreement.

¶ 11 Despite plaintiff's objection to increasing the interest, Penta Fund wired funds to Level Four Inc. on December 12, 2018. On that day, as well as on February 21, 2019, Irish and Ellis presented to plaintiff promissory notes with an interest rate of 8%, and plaintiff refused to sign the notes. On a February 21, 2019, conference call, Ellis informed plaintiff that the promissory note needed to be signed.

¶ 12 Plaintiff traveled to North Carolina on March 20, 2019, to meet with employees and attend various meetings. One of the meetings included a conference call with Penta Fund's Investment Committee. During this call, plaintiff was given an opportunity to resign. When he refused, plaintiff was informed by Irish that his employment with Level Four Inc. was being terminated for cause. Plaintiff contends he has not been provided with a reason for his termination, specifically regarding the classification as for cause. Upon termination of plaintiff's employment, Irish was appointed CEO of Level Four Inc.

¶ 13 On May 30, 2019, plaintiff filed a complaint in this matter, and the case was designated as a complex business case. Plaintiff sought, among other things, a declaratory judgment setting forth his specific rights under the Employment Agreement and Level Four Holdings Agreements. Plaintiff also alleged claims for tortious interference with contract against Penta Fund, Ellis, Level Four Holdings, and Irish. Defendants moved to dismiss all claims against Level Four Holdings and Ellis for lack of personal jurisdiction.

¶ 14 On March 13, 2020, the trial court determined that it did not have subject matter jurisdiction over plaintiff's declaratory judgment claim because no actual controversy existed and dismissed that claim against Level Four Holdings without prejudice under Rule 12(b)(1). The trial court also dismissed without prejudice plaintiff's claims for tortious interference with contract against Penta Fund, Level Four Holdings, and Ellis pursuant to Rule 12(b)(6). The trial court determined that plaintiff's allegations of malice were insufficiently pled in the complaint. Further, the trial court denied defendant's motion to dismiss for lack of personal jurisdiction over Level Four Holdings and Ellis. Plaintiff and defendants cross-appeal, both arguing the trial court erred in making the above rulings.

¶ 15 **[1]** The initial question we must address is whether plaintiff's appeal is properly before this Court. An order is either "interlocutory or the final determination of the rights of the parties." N.C.G.S. § 1A-1, Rule 54(a) (2021). Interlocutory orders are generally not immediately appealable. N.C.G.S. § 7A-27 (2021). However, interlocutory orders from the Business Court may be appealed to this Court if the order affects a substantial right. N.C.G.S. § 7A-27(a)(3)(a). "Ordinarily, an appeal from an interlocutory order will be dismissed as fragmentary and premature unless the order affects some substantial right and will work injury to appellant if not corrected before appeal from final judgment." *Goldston v. Am. Motors Corp.*, 326 N.C. 723, 726, 392 S.E.2d 735, 736 (1990) (quoting *Stanback v. Stanback*, 287 N.C. 448, 453, 215 S.E.2d 30, 34 (1975)).

¶ 16 Plaintiff argues that dismissal of his declaratory judgment action and claim for tortious interference with contract affect a substantial right because of the possibility of inconsistent verdicts. *See Cook v. Bankers Life & Cas. Co.*, 329 N.C. 488, 491, 406 S.E.2d 848, 850 (1991). Plaintiff contends that similar factual issues must be resolved with regard to the classification of his termination and determination of whether defendants acted with malice. Failure to resolve these issues now, plaintiff argues, would potentially require these similar factual issues to be determined at separate trials.

¶ 17 Plaintiff's argument, however, fails to appreciate that the dismissal of his claims was without prejudice. As not all relief has been denied, it follows that no substantial right has been affected and plaintiff's appeal is premature. *See Day v. Coffey*, 68 N.C. App. 509, 510, 315 S.E.2d 96, 97 (1984) ("When the court allows amendment, relief in the trial court has not been entirely denied and appeal is premature. . . . Plaintiffs have an opportunity to correct the deficiency in the trial court without affecting their cause of action. Prosecuting an appeal, when simple and economical corrective measures might be taken without prejudice in the trial court, is exactly the sort of wasteful procedure which our appellate courts have consistently disapproved."). Because no substantial right has been affected, plaintiff's interlocutory cross-appeal is improper and defendant's motion to dismiss plaintiff's cross-appeal is allowed.

¶ 18 Plaintiff alternatively petitions this Court pursuant to Rule 21 of the Rules of Appellate Procedure for a writ of certiorari to review the trial court's dismissal of his declaratory judgment action and claim for tortious interference with contract. A

> writ of certiorari may be issued in appropriate circumstances by either appellate court to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action, or when no right of appeal from an interlocutory order exists, or for review pursuant to N.C.G.S. § 15A-1422(c)(3) of an order of the trial court ruling on a motion for appropriate relief.

N.C. R. App. P. 21.

¶ 19 A writ of certiorari is intended "as an extraordinary remedial writ to correct errors of law." *State v. Simmington*, 235 N.C. 612, 613, 70 S.E.2d 842, 843–44 (1952). A petitioner "must show 'merit or that error was probably committed below[.]' " *State v. Ricks*, 2021-NCSC-116, ¶ 6, 378 N.C. 737, 741 (quoting *State v. Grundler*, 251 N.C. 177, 189, 111

S.E.2d 1, 9 (1959)); *See also In re Snelgrove*, 208 N.C. 670, 182 S.E. 335, 336 (1935) ("Certiorari is a discretionary writ, to be issued only for good or sufficient cause shown, and the party seeking it is required . . . to show merit or that he has reasonable grounds for asking that the case be brought up and reviewed on appeal.").

¶ 20 For the reasons stated below, plaintiff has failed to show that his petition has merit or that error was probably committed by the Business Court, and we deny his petition for writ of certiorari.

II. Analysis

A. Plaintiff's declaratory judgment claim against Level Four Holdings

¶ 21 **[2]** A court shall dismiss an action when it appears that the court lacks subject matter jurisdiction. N.C.G.S. § 1A-1, Rule 12(h)(3) (2019). As a jurisdictional prerequisite, the Declaratory Judgment Act requires "the pleadings and evidence [to] disclose the existence of an actual controversy between the parties having adverse interests in the matter in dispute." *Gaston Bd. of Realtors v. Harrison*, 311 N.C. 230, 234, 316 S.E.2d 59, 61 (1984). This controversy between the parties must exist "at the time the pleading requesting declaratory relief [was] filed." *Sharpe v. Park Newspapers of Lumberton, Inc.*, 317 N.C. 579, 583, 347 S.E.2d 25, 29 (1986). Absolute certainty of litigation is not required, but the plaintiff must demonstrate "to a practical certainty" that litigation will arise. *Ferrell v. Dep't of Transp.*, 334 N.C. 650, 656, 435 S.E.2d 309, 314 (1993).

¶ 22 Plaintiff in the present case seeks a decision concerning his rights under the Employment Agreement and the collective Level Four Holdings Agreements. Essentially, plaintiff requests a determination as to whether his termination from Level Four Inc. was with or without cause. Plaintiff's rights under the various agreements differ significantly based on this classification.

¶ 23 Pursuant to the Employment Agreement, determination of whether to terminate plaintiff's employment was a decision to be made by Level Four Inc., not Level Four Holdings. Thus, any actual controversy and subsequent litigation regarding the classification would be directed toward Level Four Inc. Plaintiff's complaint does not establish the existence of an actual controversy between himself and Level Four Holdings that is practically certain to result in litigation.

¶ 24 Regarding the Level Four Holdings Agreements, plaintiff's complaint does not establish his intent or ability to exercise his rights under the Option Agreement, an attempt by Level Four Holdings to exercise

its rights under the Stock Repurchase Agreement, or that a contemplated sale will trigger any rights under the Go Shop Agreement. Although one can imagine scenarios from which litigation could arise under such agreements, litigation cannot be a practical certainty in the absence of a party attempting to exercise rights under the various agreements.

¶ 25 Plaintiff's argument is couched in the notion that Level Four Holdings may breach the various agreements at some future date. However, whether any future act would constitute a breach is dependent on whether plaintiff's employment was terminated for cause. With that issue still pending before the trial court, this Court is unable to speculate as to what rights either party has and what future acts would constitute a breach. Plaintiff's argument is insufficient to establish an actual controversy between himself and Level Four Holdings to satisfy the jurisdictional requirement of the Declaratory Judgment Act. *See Gaston Bd. of Realtors*, 311 N.C. at 234, 316 S.E.2d at 61.

¶ 26 As such, plaintiff has failed to demonstrate that his petition has merit or that the trial court committed error in dismissing his claim for declaratory judgment as to Level Four Holdings.

B. Tortious interference with contract

¶ 27 **[3]** "A complaint should not be dismissed under Rule 12(b)(6) unless it affirmatively appears that the plaintiff is entitled to no relief under any state of facts which could be presented in support of the claim." *Embree Const. Grp., Inc. v. Rafcor, Inc.*, 330 N.C. 487, 491, 411 S.E.2d 916, 920 (1992) (cleaned up). Practically, "the system of notice pleading affords a sufficiently liberal construction of complaints so that few fail to survive a motion to dismiss." *Id.* (cleaned up).

¶ 28 To establish a claim for tortious interference, the complaint must allege: (1) a valid contract existed between the plaintiff and a third person conferring contractual rights to plaintiff against a third person; (2) defendant knew of the contract; (3) the defendant intentionally induced the third person not to perform the contract; (4) in not performing the contract the third person acted without justification; and (5) plaintiff suffered actual damages. *United Labs., Inc. v. Kuykendall*, 322 N.C. 643, 661, 370 S.E.2d 375, 387 (1988). The issue before us concerns the fourth element.

¶ 29 Corporate "non-outsiders" have a qualified privilege leading to a presumption that he or she acted in the corporation's best interest. *See Embree*, 330 N.C. at 498, 411 S.E.2d at 924 (discussing the privilege available to corporate insiders). "A non-outsider is one who, though not

a party to the terminated contract, had a legitimate business interest of his own in the subject matter." *Smith v. Ford Motor Co.*, 289 N.C. 71, 87, 221 S.E.2d 282, 292 (1976). Non-outsiders include officers, directors, shareholders, and other corporate fiduciaries. *Embree*, 330 N.C. at 498, 411 S.E.2d at 924.

¶ 30 A non-outsider's actions, then, are presumed justified, and the presumption can only be overcome by a showing that the non-outsider acted with malice. *Ford Motor Co.*, 289 N.C. at 87—88, 91, 221 S.E.2d at 292, 294. Essentially, the claimant "must allege facts demonstrating that [the] defendant's actions were not prompted by legitimate business purposes." *Embree*, 330 N.C. at 500, 411 S.E.2d at 926 (cleaned up). "General allegations which characterize defendant's conduct as malicious are insufficient as a matter of pleading." *Spartan Equip. Co. v. Air Placement Equip. Co.*, 263 N.C. 549, 559, 140 S.E.2d 3, 11 (1965). Further, "[i]n order to survive dismissal, a complaint alleging tortious interference must admit of no motive for interference other than malice." *Wells Fargo Ins. Servs. USA, Inc. v. Link*, 372 N.C. 260, 285, 827 S.E.2d 458, 477 (2019) (cleaned up).

¶ 31 Penta Fund and Level Four Holdings are shareholders of Level Four Inc. Thus, Penta Fund and Level Four Holdings are considered non-outsiders and are entitled to a presumption that their actions were "prompted by legitimate business purposes" and in the best interest of Level Four Inc. *Embree*, 330 N.C. at 500, 411 S.E.2d at 926. To rebut this presumption, plaintiff must allege that Penta Fund and Level Four Holdings acted in their own personal interest. Further, his complaint "must admit of no motive for interference other than malice." *Link*, 371 N.C. at 285, 827 S.E.2d at 477.

¶ 32 Plaintiff's complaint states that Penta Fund and Level Four Holdings "intentionally induced Level Four Inc. not to comply with the Employment Agreement by classifying [plaintiff's] termination as 'for cause' in violation of the Employment Agreement and without justification." Such "willful interference," plaintiff alleges "was carried out to benefit themselves regardless of the negative repercussions on Level Four Inc." However, in the section of plaintiff's complaint alleging tortious interference, plaintiff fails to distinguish between the defendants and allege with specificity how each acted in their own personal interest. We are not permitted to infer a personal interest upon which Penta Fund and Level Four Holdings acted from the allegations in the complaint.

¶ 33 Further, this Court has concluded that a stockholder's financial interest in a corporation allows for "a qualified privilege to interfere with contractual relations between the corporation and a third party."

Wilson v. McClenny, 262 N.C. 121, 133, 136 S.E.2d 569, 578 (1964). Plaintiff's conclusory allegation does little to comply with the specific pleading requirements of a tortious interference claim that prohibit general allegations of malice, *Spartan*, 263 N.C. at 559, 140 S.E.2d at 11, and fails to rebut the qualified privilege afforded to Penta Fund and Level Four Holdings as non-outsiders, *Embree*, 330 N.C. at 500, 411 S.E.2d at 926, and stockholders. *Wilson*, 262 N.C. at 133, 136 S.E.2d at 578.

¶ 34 Regarding Ellis, whether he constituted a non-outsider is not dispositive. Plaintiff, again, makes only general allegations of malice which "are insufficient as a matter of pleading." *Spartan*, 263 N.C. at 559, 140 S.E.2d at 11. Plaintiff's complaint again fails to adhere to the strict pleading requirements when alleging tortious interference against Penta Fund, Level Four Holdings, and Ellis. As such, plaintiff's petition lacks merit and has failed to show error in the trial court's dismissal of his claims for tortious interference against Penta Fund, Level Four Holdings, and Ellis.

C. Personal jurisdiction over Level Four Holdings and Ellis

¶ 35 **[4]** "The standard of review of an order determining [personal] jurisdiction is whether the findings of fact by the trial court are supported by competent evidence in the record; if so, this Court must affirm the order of the trial court." *Tejal Vyas, LLC v. Carriage Park, L.P.*, 166 N.C. App. 34, 37, 600 S.E. 2d 881, 884 (2004), *per curiam affirmed*, 359 N.C. 315, 608 S.E.2d 751 (2005). "Where no findings are made, proper findings are presumed, and our role on appeal is to review the record for competent evidence to support these presumed findings." *Bruggeman v. Meditrust Acquisition Co.*, 138 N.C. App. 612, 615, 532 S.E.2d 215, 217–18, *appeal dismissed and disc. review denied*, 353 N.C. 261, 546 S.E.2d 90 (2000). "If presumed findings of fact are supported by competent evidence, they are conclusive on appeal despite evidence to the contrary." *Tejal*, 166 N.C. App. at 37, 600 S.E.2d at 884.

¶ 36 Appellate courts consider the same evidence as the trial court when determining whether competent evidence exists to support the exercise of personal jurisdiction which includes: (1) any allegations in the complaint that are not controverted by the defendants' affidavits; (2) all facts in the affidavits; and (3) any other evidence properly tendered. *Banc of Am. Sec. LLC v. Evergreen Int'l Aviation, Inc.*, 169 N.C. App. 690, 694, 611 S.E.2d 179, 183 (2005); *Parker v. Town of Erwin*, 243 N.C. App. 84, 98, 776 S.E.2d 710, 722 (2015).

¶ 37 This Court engages in a two-step analysis when examining whether our courts can exercise personal jurisdiction over a non-resident defendant. *Beem USA Ltd.-Liab. Ltd. P'ship v. Grax Consulting LLC*, 373

N.C. 297, 302, 838 S.E.2d 158, 161 (2020). First, personal jurisdiction must be permitted by North Carolina's long-arm statute which allows a court to exercise jurisdiction over a defendant who "[i]s engaged in substantial activity within this State, whether such activity is wholly interstate, intrastate, or otherwise." N.C.G.S. § 1-75.4(1)(d) (2019). "This Court has held that this statute is 'intended to make available to the North Carolina courts the full jurisdictional powers permissible under federal due process.' " *Beem*, 373 N.C. at 302, 838 S.E.2d at 161 (quoting *Dillon v. Numismatic Funding Corp.*, 291 N.C. 674, 676, 231 S.E.2d 629, 630 (1977)). Second, "the Due Process Clause permits state courts to exercise personal jurisdiction over an out-of-state defendant so long as the defendant has certain minimum contacts with [the forum state] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Id.* at 302, 231 S.E.2d at 162 (cleaned up).

¶ 38 Personal jurisdiction, then, cannot result from random, attenuated contacts, but instead must follow "some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Skinner v. Preferred Credit*, 361 N.C. 114, 123, 638 S.E.2d 203, 210–11 (2006) (quoting *Hanson v. Denckla*, 357 U.S. 235, 253, 78 S.Ct. 1228, 1239-40 (1958)). Thus, a defendant's contacts with the forum state must be sufficient such that a defendant would "reasonably anticipate being haled into court there." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980). There are two types of personal jurisdiction: general and specific, with the latter being at issue in this case.

¶ 39 Specific jurisdiction "encompasses cases in which the suit arises out of or relates to the defendant's contacts with the forum." *Beem*, 373 N.C. at 303, 231 S.E.2d at 162 (cleaned up). Specific jurisdiction, "is, at its core, focused on the relationship among the defendant, the forum, and the litigation." *Id.* (cleaned up). A defendant's physical presence in the forum state is not a prerequisite to jurisdiction. *Walden v. Fiore*, 571 U.S. 277, 283 (2014). While a contractual relationship between an out-of-state defendant and a North Carolina resident is not dispositive of whether minimum contacts exist, "a single contract may be a sufficient basis for the exercise of [specific personal] jurisdiction if it has a substantial connection with this State." *Tom Togs, Inc. v. Ben Elias Indus. Corp.*, 318 N.C. 361, 367, 348 S.E.2d 782, 786 (1986). Finally, each defendant's contacts with the forum state must be analyzed individually. *Calder v. Jones*, 465 U.S. 783, 790 (1984).

¶ 40 Beginning with North Carolina's long-arm statute, the record makes clear that both Level Four Holdings and Ellis are "engaged in substantial

activity within [North Carolina]," and it is irrelevant "whether such activity is wholly interstate, intrastate, or otherwise." N.C.G.S. § 1-75.4(1)(d). As further discussed below, a review of the record establishes the control over Level Four Inc., a North Carolina entity, that was exercised by Level Four Holdings and Ellis, and the exercise of personal jurisdiction over Level Four Holdings and Ellis complies with North Carolina's long-arm statute. We now analyze both defendants' contacts individually to ensure that maintenance of the suit "does not offend traditional notions of fair play and substantial justice." *Beem*, 373 N.C. at 302, 838 S.E.2d at 161 (cleaned up).

¶ 41 The trial court's order set forth the "factual allegations that [were] relevant and necessary to the [trial court's] determination" including, that each of the Level Four Holdings Agreements defined "Corporation" as Level Four Inc. and selected North Carolina in the choice of law provisions; Irish acted simultaneously as the sole director of Level Four Inc., a manager of Level Four Holdings, and a managing partner and investment committee member of Penta Fund without ever differentiating the entity she was representing; Irish was actively involved in the management of Level Four Inc. and plaintiff's termination; Level Four Inc.'s "corporate central functions" were in North Carolina; and plaintiff regularly conducted business in North Carolina as CEO of Level Four Inc.

¶ 42 The trial court stated that these factual allegations "tend[ed] to show that Level Four Holdings contemplated continuing obligations with [p]laintiff and Level Four Inc., [p]laintiff regularly performed work pertaining to the Employment Agreement in North Carolina, and the Employment Agreement and Level Four Holdings Agreements have a substantial connection with North Carolina." "These facts," said the trial court, "support a conclusion that the [c]ourt may properly exercise personal jurisdiction over Level Four Holdings."

¶ 43 Aside from the contractual relationship that existed, the trial court noted the actions of Level Four Holdings, through Irish, such as: negotiating the reduced interest rate of debt owed to Penta Fund by Level Four Inc.; terminating plaintiff's employment with Level Four Inc. while physically present in North Carolina; and increasing the interest rate on debt owed by Level Four Inc. to Penta Fund. This additional conduct, the trial court noted, "further supports the conclusion that the [c]ourt may properly exercise personal jurisdiction over Level Four Holdings."

¶ 44 Although not designated as findings of fact in the trial court's order, the factual allegations relied upon by the trial court do support its conclusion that personal jurisdiction is proper over Level Four Holdings.

Additionally, though not discussed in the trial court's order, evidence contained in the record—including the uncontroverted allegations in the complaint, facts contained in the affidavits, and other properly admitted evidence—permits this Court to presume the trial court could have found the following: Level Four Holdings is the majority shareholder of Level Four Inc., a North Carolina entity; included in the Insurance section of the Employment Agreement is a requirement that Level Four Inc. or Penta Fund maintain insurance against liability on behalf of plaintiff so long as Level Four Holdings owned Level Four Inc. stock; and the Employment Agreement stated that Level Four Holdings and plaintiff would discuss relocating other Level Four Inc. executive offices to New Jersey pending a review of Level Four Inc.'s personnel and costs.

¶ 45 The trial court's "factual allegations" that it relied on, coupled with the additional presumed findings discussed above, are supported by competent evidence. As such, they are conclusive on appeal. *Tejal*, 166 N.C. App. at 37, 600 S.E.2d at 884, *per curiam affirmed*, 359 N.C. 315, 608 S.E.2d 751 (2005).

¶ 46 Level Four Holdings' contacts with this state are neither random nor attenuated. Rather, they are evidence of Level Four Holdings purposefully availing itself of the privilege of conducting business in North Carolina. *See Skinner*, 361 N.C. at 123, 638 S.E.2d at 210–11 (quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)). Level Four Holdings could reasonably anticipate being haled into court in North Carolina when it selected North Carolina in the choice of law provision in the Employment Agreement and Level Four Holdings Agreements. *See World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980). Moreover, Level Four Holdings could also anticipate continuing obligations with Level Four Inc. when it required Level Four Inc. to maintain specific insurance so long as Level Four Holdings owned stock in Level Four Inc., a North Carolina corporation with its principal place of business in North Carolina. Further evidence of its continuing obligation is the process by which Level Four Holdings was to discuss relocating Level Four Inc.'s executive offices away from the current location in Winston-Salem, North Carolina after an assessment of Level Four Inc.'s personnel and costs. Such involvement with and control over Level Four Inc., a North Carolina entity, by Level Four Holdings, a majority shareholder, satisfy the minimum contacts required by due process.

¶ 47 Next, regarding Ellis, a court cannot "base personal jurisdiction on the bare fact of a defendant's status as . . . a corporate officer or agent," as such "would violate his due process rights." *Saft Am., Inc. v. Plainview Batteries, Inc.*, 189 N.C. App. 579, 595, 659 S.E.2d 39, 49

(2008) (Arrowood, J., dissenting), *reversed for reasons stated in dissent*, 363 N.C. 5, 673 S.E.2d 864 (2009) (per curiam). However, it is not simply Ellis's status that the trial court relied upon in determining it could properly exercise personal jurisdiction. The trial court recited Ellis's contacts with North Carolina alleged by plaintiff, including: negotiating the terms of plaintiff's employment with Level Four Inc.; negotiating the interest-rate provision in the Employment Agreement; discussing Level Four Inc.'s performance with plaintiff on at least fifteen occasions via telephone or e-mail; informing plaintiff that his termination was a unanimous decision of Penta Fund; and increasing the interest rate on the debt owed to Penta Fund by Level Four Inc. The trial court found that Ellis's contacts with North Carolina "establish [ ] that Mr. Ellis purposefully availed himself of the benefits of the forum," and "go directly to [p]laintiff's management of Level Four Inc. and the termination of his employment, which is the core of the subject matter of this litigation." As a result, the trial court concluded that it could properly exercise personal jurisdiction over Ellis.

¶ 48 Again, the record contains competent evidence to support the factual allegations relied on by the trial court, and they are conclusive on appeal. *Tejal*, 166 N.C. App. at 37, 600 S.E.2d at 884, *per curiam affirmed*, 359 N.C. 315, 608 S.E.2d 751 (2005). It is these acts by Ellis that plaintiff claims violated the Employment Agreement and for which Ellis could "reasonably anticipate being haled into court" in North Carolina. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980). Similar to Level Four Holdings, the record contains competent evidence of Ellis's control of Level Four Inc., a North Carolina entity. It follows that plaintiff's suit arises out of Ellis's contacts with North Carolina through his control over Level Four Inc., a North Carolina entity, and that personal jurisdiction can be properly exercised over Ellis. *See Beem*, 373 N.C. at 303, 838 S.E.2d at 162 (stating that specific jurisdiction encompasses cases in which the suit arises out of or relates to the defendant's contacts with the forum). As such, the trial court was correct in determining personal jurisdiction exists over both Level Four Holdings and Ellis.

III. Conclusion

¶ 49 For the foregoing reasons, this Court concludes plaintiff has failed to demonstrate a substantial right has been affected or that an error likely occurred at the trial court. Further, North Carolina's long arm statute, in conjunction with both Level Four Holdings's and Ellis's sufficient minimum contacts with North Carolina, allow for the trial court to exercise personal jurisdiction. In conclusion, defendants' motion to dismiss

plaintiff's notice of cross-appeal is allowed; plaintiff's petition for writ of certiorari is denied; and the decision of the trial court regarding personal jurisdiction is affirmed.

AFFIRMED.

Justice EARLS concurring in part and dissenting in part.

¶ 50 I concur in the majority's conclusion that Level Four Holdings and Ellis are subject to the trial court's personal jurisdiction. However, I write separately to explain my disagreement with how the majority disposes of Button's interlocutory appeal and petition for a writ of certiorari. In particular, I disagree with the majority's conflation of the standard for determining whether a writ of certiorari should be issued with an analysis of the ultimate merits of Button's claims. In this case, I believe our interest in judicial economy justifies issuing a writ of certiorari. On the merits, I would affirm the trial court's dismissal of Button's declaratory judgment claim against Level Four Holdings but reverse the court's dismissal of his tortious interference claims against Penta Fund, Level Four Holdings, and Seth Ellis.

I. Button's interlocutory appeal and petition for writ of certiorari

¶ 51 Button seeks interlocutory review of the trial court's dismissal of his declaratory judgment claim against Level Four Holdings and his claim for tortious interference with contract against Penta Fund, Level Four Holdings, and Ellis. Button invokes two procedural mechanisms in his effort to bring the trial court's dismissal of his claims before this Court on interlocutory review. First, he invokes N.C.G.S. § 7A-27(a)(3)(a) in arguing that the trial court's actions implicate a substantial right based on the risk of inconsistent verdicts, given that the trial court allowed his claims to proceed as against other defendants. Second, he invokes N.C.G.S. § 7A-32(b) and Rule 21 of the North Carolina Rules of Appellate Procedure in arguing that this Court should issue a writ of certiorari in the interests of judicial economy and to avoid fragmentary and piecemeal appellate review. The majority decides that neither ground provides a basis for allowing interlocutory review, dismissing Button's cross-appeal and denying his petition for writ of certiorari. Yet, curiously, the majority appears to rule on the substantive merits of both claims. In so doing, the majority reaches out to decide two issues that, by its own account, are not properly before this Court. The majority's handling of these two claims risks muddling our standard for determining when interlocutory review is appropriate.

¶ 52 For example, the majority seems to imply that interlocutory review is not warranted pursuant to N.C.G.S. § 7A-27(a)(3)(a) because "the dismissal of [Button's] claims was without prejudice." To begin with, this rationale does not address Button's actual argument; because his declaratory judgement claim and his tortious interference claim survived as against one of the defendants, Irish, the fact that his claims were dismissed without prejudice as against other defendants does not obviate the risk of inconsistent verdicts arising from two separate trials. Regardless, this rationale appears to offer cold comfort given that, just a few paragraphs later, the majority proceeds to (1) conduct a review of Button's declaratory judgment claim and conclude, on the merits, that there is no actual controversy, and (2) examine the merits of Button's tortious interference claim in significant detail.

¶ 53 Ostensibly, the majority analyzes the substance of Button's claims in the course of concluding that his writ of certiorari should be denied. The majority is correct that, in determining whether a petition for writ of certiorari should be granted or denied, an appellate court must assess whether the claim has "merit," as we recently noted in *State v. Ricks*. 378 N.C. 737, 2021-NCSC-116, ¶ 1 ("[A]n appellate court may only consider certiorari when the petition shows merit, meaning that the trial court probably committed error at the hearing."). But a determination as to whether a petition for writ of certiorari should be granted is prior to and distinct from a resolution of the ultimate merits of a claim—a court must issue a writ of certiorari "in order to *reach* the merits" of a claim. *In re A.C.*, 378 N.C. 377, 2021-NCSC-91, ¶ 7 n.3 (emphasis added). Thus, at this stage, the question is whether "there is merit to an appellant's substantive arguments" such that certiorari should be granted and the merits reached, not whether the appellant's substantive arguments will ultimately succeed. *Zaliagiris v. Zaliagiris*, 164 N.C. App. 602, 606 (2004).

¶ 54 It cannot be and has never been the case that a litigant must prevail on the merits in order to demonstrate that a writ of certiorari should be issued. *See id.* at 606, 610 (2004) (exercising discretion under Rule 21 to grant certiorari "to consider the full merits of this appeal" but concluding with respect to one issue that "the trial court did not abuse its discretion"). More importantly, it cannot be and has never been the case that a litigant who has failed to demonstrate that certiorari is warranted necessarily must lose when their substantive claim is resolved in due course. *See, e.g.*, *Peaseley v. Virginia Iron, Coal & Coke Co.*, 282 N.C. 585, 595 (1973) ("[D]enials of [c]ertiorari do not constitute approval of either the reasoning or the merits of the prior decisions of the [lower

tribunal].”). Certiorari is, as the majority notes, “an extraordinary remedial writ.” Not every litigant who fails to demonstrate that his or her case is “extraordinary” must fail when the merits of his or her claim are ultimately resolved.

¶ 55 Because the Court in this case has dismissed Button’s cross-appeal and denied certiorari, its substantive analysis of Button’s declaratory judgment and tortious interference with contract claims must be understood as nothing more than an illustrative examination of their “merit” relevant solely for the purposes of justifying the majority’s decision to deny certiorari and not for any other purpose. The majority does not—and, in accordance with its own ruling that these claims are not before this Court, cannot—conclusively resolve the issues of whether Button has properly stated a claim under the Declaratory Judgment Act or for tortious interference with contract. Any attempt to resolve an issue not presently before the Court “would constitute an advisory opinion on abstract questions, and this court will not give advisory opinions or decide abstract questions.” *Kirkman v. Wilson*, 328 N.C. 309, 312 (1991) (cleaned up). Still, the majority’s imprecision risks conflating two distinct analyses and preempting any effort Button may choose to undertake to amend his complaint regarding claims that have been dismissed without prejudice. A party need not prove their case in order to obtain a writ of certiorari, and an appellate court’s refusal to issue the writ on an interlocutory appeal does not dictate the outcome on the merits in future proceedings.

¶ 56 In addition to my concerns about the majority’s analytical approach, I also depart from the majority’s decision not to grant certiorari and reach the merits of Button’s declaratory judgment and tortious interference claims. Under Appellate Rule 21, this Court may issue the writ of certiorari “in appropriate circumstances . . . to permit review of the judgments and orders of trial tribunals . . . when no right of appeal from an interlocutory order exists.” N.C. R. App. P. 21(a)(1). Our Rules of Appellate Procedure aim to promote the efficient disposition of appeals, and we have previously issued the writ in order to “prevent fragmentary and partial appeals.” *Pelican Watch v. U.S. Fire Ins. Co.*, 323 N.C. 700, 702 (1989). As the Court of Appeals has explained, while reviewing interlocutory orders is ordinarily inefficient, there exist “exceptional cases where judicial economy will be served by” issuing a writ of certiorari and “consider[ing] the order [of a lower tribunal] on its merits.” *Carolina Bank v. Chatham Station, Inc.*, 186 N.C. App. 424, 428 (2007); *see also Valentine v. Solosko*, 270 N.C. App. 812, 814, *review denied*, 376 N.C. 537 (2020) (issuing writ in the interest of “judicial economy”).

¶ 57 Three aspects of Button's case lead me to the conclusion that his appeal presents one of those "exceptional case[s]" where issuing a writ of certiorari and conclusively resolving the merits of the defendants' motions to dismiss serves our interest in judicial economy. First, because this Court did not previously rule on Button's cross-appeal and petition for writ of certiorari, the merits of Button's declaratory judgment and tortious interference claims have been fully briefed and argued at this Court. Second, because the trial court ruled that Button could proceed on his declaratory judgment and tortious interference claims as against other defendants, resolving the legal issues surrounding these claims now would likely serve "the interests of judicial economy." *Robinson, Bradshaw & Hinson, P.A. v. Smith*, 139 N.C. App. 1, 9 (2000). Because issues that may be decisive in determining the ultimate merits of Button's surviving claims are presently before us, denying certiorari in this case "encourage[s] rather than prevent[s] fragmentary and partial appeals." *Pelican Watch*, 323 N.C. at 702. Third, the case is already before us on defendants' appeal as of right on the question of personal jurisdiction. Under these circumstances, I believe Button's claims have sufficient merit to justify us exercising our authority to accept review and offer a conclusive resolution of the legal issues presented.

II. Button's declaratory judgment and tortious interference claims

¶ 58 Turning to the merits, I largely agree with the majority's analysis and would hold that Button has failed to state a cognizable claim arising under the Declaratory Judgment Act. In his complaint, Button does not allege that he has attempted to exercise any of the rights afforded to him under the Option Agreement, nor that he imminently intends to do so or that any of the defendants have exercised or intend to exercise any of their rights based upon their contention that the Employment Agreement was terminated for cause. It is certainly possible that litigation *may* arise should any of these events come to pass but, as the majority correctly notes, Button has failed to demonstrate "to a practical certainty" that litigation is imminent. *Sharpe v. Park Newspapers of Lumberton, Inc.*, 317 N.C. 579, 590 (1986); *see also Chapel H.O.M. Assocs., LLC v. RME Mgmt., LLC*, 256 N.C. App. 625, 629–30 (2017) ("To satisfy the jurisdictional requirement of an actual controversy, it must be shown in the complaint that litigation appears unavoidable. Mere apprehension or the mere threat of an action or suit is not enough."). Accordingly, on the merits, I would affirm the trial court's dismissal of this claim.

¶ 59 However, I disagree with the majority's analysis of Button's tortious interference claim and would conclude that he has stated a claim for

tortious interference against Penta Fund, Level Four Holdings, and Ellis. Although the majority correctly recites the elements of a tortious interference claim involving corporate non-outsiders, the majority suggests an unduly stringent standard inconsistent with notice pleading principles. The majority also ignores numerous relevant factual allegations contained in Button's complaint.

¶ 60 It is a longstanding principle in North Carolina that potentially meritorious claims should generally be resolved on the merits, not dismissed on technical grounds. *See generally*, *e.g.*, *Hansley v. Jamesville & W.R. Co.*, 117 N.C. 565 (1895) (describing "our system of liberal pleading"). "[T]he spirit of the North Carolina Rules of Civil Procedure is to permit parties to proceed on the merits without the strict and technical pleadings rules of the past." *Henry v. Deen*, 310 N.C. 75, 82 (1984). Of course, a complaint must "allege[ ] the substantive elements of a legally recognized claim and . . . give[ ] sufficient notice of the events that produced the claim to enable the adverse party to prepare for trial." *Embree Const. Grp., Inc. v. Rafcor, Inc.*, 330 N.C. 487, 490–91 (1992). But "[a] complaint should not be dismissed under Rule 12(b)(6) . . . unless it affirmatively appears that plaintiff is entitled to no relief under any state of facts which could be presented in support of the claim." *Ladd v. Est. of Kellenberger*, 314 N.C. 477, 481 (1985).

¶ 61 To survive a motion to dismiss, a complaint asserting tortious interference by a corporate non-outsider must allege that the defendant acted without justification. As the majority correctly notes, corporate non-outsiders are "entitled to a presumption that their actions 'were prompted by legitimate business purposes.' " Because corporate non-outsiders are presumed to act in the company's interests, they are afforded a "conditional or qualified" "privilege" to interfere with a contractual obligation assumed by the company. *Smith v. Ford Motor Co.*, 289 N.C. 71, 91 (1976). A complaint asserting tortious interference against corporate non-outsiders must allege "malice" to displace this privilege. *Wells Fargo Ins. Servs. USA, Inc. v. Link*, 372 N.C. 260, 285 (2019). Nonetheless, the majority goes too far in suggesting that "strict pleading requirements" apply in this context; rather, the "rule of liberal construction of complaints" still applies to a complaint alleging tortious interference by a corporate non-outsider. *Embree Const. Grp.*, 330 N.C. at 500.[1] The complaint need not affirmatively disprove the possibility

1. The sole case the majority appears to rely on in support of its assertion that "strict pleading requirements" apply to tortious interference claims is *Spartan Equip. Co. v. Air Placement Equip. Co.*, a case which both predates adoption of the North Carolina Rules of Civil Procedure and states nothing more than that "general allegations" of malice

that the corporate non-outsiders did act in the interests of the company. Rather, the complaint need only "allege facts demonstrating that defendants' actions were not prompted by 'legitimate business purposes.' " *Id.*

¶ 62 In the section of the complaint specifically addressing the tortious interference claim, Button alleged the following:

> 200. Upon information and belief, Penta Fund, Ms. Irish, Mr. Ellis, and Level Four Holdings intentionally induced Level Four Inc. not to comply with the Employment Agreement by classifying Mr. Button's termination as "for cause" in violation of the Employment Agreement and without justification.
>
> 201. Upon information and belief, the willful interference of Penta Fund, Ms. Irish, Mr. Ellis, and Level Four Holdings with Mr. Button's employment contract was carried out to benefit themselves regardless of the negative repercussions on Level Four Inc.
>
> 202. The actions of Penta Fund, Ms. Irish, Mr. Ellis, and Level Four Holdings as alleged herein constitute a reckless, intentional, conscious, and wanton disregard of Mr. Button's rights.
>
> 203. Penta Fund, Ms. Irish, Mr. Ellis, and Level Four Holdings knew or should have known that their actions were reasonably likely to, and actually did, injure Mr. Button.

Standing alone, these allegations are conclusory. However, in considering a motion to dismiss, we review "the whole complaint," not just isolated sections. *Smith v. Summerfield*, 108 N.C. 284, 289 (1891). In context, the factual basis for Button's allegation that the relevant defendants acted with malice is readily apparent.

¶ 63 Button's complaint contains a lengthy background section in which he alleges various facts common to all subsequent legal claims. In this section, he alleges that (1) Penta Fund was a manager and majority stakeholder in Level Four Holdings, which owned a majority interest in Level Four Inc.; (2) Irish and Ellis were both Managing Partners and Investment Committee members who had substantial financial interests

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do not suffice in this context. 263 N.C. 549, 559 (1965). Indeed, the majority's characterization of the pleading requirements as "strict" finds no support in our caselaw and is inconsistent with our modern system of notice pleading.

in Penta Fund; (3) Level Four Inc. "relied substantially on loans from Penta Fund for the funding of its operations"; (4) the loans Level Four Inc. obtained from Penta Fund before Button was hired "bore interest at a range of variable and fixed rates up to 18[percent] per annum"; (5) Button negotiated for and secured a provision in his Employment Agreement limiting the interest rate Penta Fund could charge on loans extended to Level Four Inc. to 2.5 percent; (6) throughout his tenure, Button received exclusively positive feedback regarding his performance as CEO; (7) Irish, Ellis and Penta Fund all pressured Button to waive the interest rate-limiting provision in the Employment Agreement and agree to loans charging Level Four Inc. significantly higher interest rates; (8) Irish and Ellis "commingled the operations of Level Four Inc., Level Four Holdings, and Penta Fund"; (9) after Button was terminated, Irish installed herself as CEO of Level Four Inc. and entered into loan agreements allowing Penta Fund to charge Level Four Inc. an interest rate in excess of the rate limit contained in Button's Employment Agreement; (11) "[n]o Defendant, nor any other person or entity, has informed Mr. Button for the purported basis for his 'for cause' termination from Level Four Inc"; and (12) "[t]hese actions . . . have been taken to benefit Penta Fund and Penta Fund's investors" and "have increased the likelihood that Level Four Inc. . . . will become insolvent and required to seek bankruptcy protection." These factual allegations provide crucial context and support for Button's tortious interference claim.

¶ 64 As corporate non-outsiders to Level Four Inc., Ellis, Penta Fund, and Level Four Holdings enjoy the presumption that they were acting in Level Four Inc.'s interests when they allegedly caused Level Four Inc. to terminate the Employment Agreement with Button. But Button has plainly alleged that these defendants were not acting in *Level Four Inc.'s* interests when they terminated his employment—he contends they were acting to further *their own* financial interests as Level Four Inc.'s creditors by firing him to get around the interest rate cap contained in the Employment Agreement. Common sense dictates that, generally speaking, debtors prefer lower interest rates to higher interest rates. Common sense also dictates that retaining a CEO with a flawless record of performance is preferable to firing one. Here, Button alleges that the defendants (1) sought loans charging Level Four Inc. higher interest rates than the loans Level Four Inc. would have received if the Employment Agreement had been respected, (2) terminated a CEO who had never received any negative performance feedback, and (3) personally benefitted from this result even as Level Four Inc.'s business prospects suffered. These factual allegations were sufficient to displace

the presumption that the defendants were acting in Level Four Inc.'s interests and sufficient to state a claim for tortious interference.

¶ 65 The defendants may have a plausible explanation for why their alleged actions were justified. Or they may demonstrate that the facts are not as Button has alleged. But nothing in Button's complaint allows a court to plausibly infer that their actions served Level Four Inc.'s interests rather than their own personal interests. Button's complaint does not "reveal[ ] that the interference was justified or privileged" and it "admit[s] of no motive for interference other than malice." *Wells Fargo Ins. Servs. USA, Inc.*, 372 N.C. at 285. Accordingly, I would hold that the trial court erred in granting the motion to dismiss Button's tortious interference claims as against Penta Fund, Level Four Holdings, and Ellis.

III. Conclusion

¶ 66 For the foregoing reasons, I concur with respect to the majority's conclusion that the trial court possessed personal jurisdiction over both Level Four Holdings and Ellis, and dissent with respect to the majority's decision not to reach the merits on Button's declaratory judgment and tortious interference claims. Were we to reach the merits, I would affirm the trial court's dismissal of Button's declaratory judgment claims; however, I would hold that Button has stated a cognizable claim for tortious interference as against Penta Fund, Level Four Holdings, and Ellis.

Justices HUDSON and ERVIN join in this opinion concurring in part and dissenting in part.

HOPE v. INTEGON NAT'L INS. CO.

[380 N.C. 482, 2022-NCSC-20]

TAMMY LOU HOPE
v.
INTEGON NATIONAL INSURANCE COMPANY

No. 41A21

Filed 11 March 2022

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, No. COA20-265, 2020 WL 7974003 (N.C. Ct. App. Dec. 31, 2020), affirming in part and reversing in part a summary judgment order entered on 22 November 2019 by Judge Henry L. Stevens IV in Superior Court, Sampson County, and remanding the case. Heard in the Supreme Court on 16 February 2022.

Brent Adams & Associates, by Brenton D. Adams and Diana Devine, for plaintiff-appellant.

Bennett Guthrie PLLC, by Rodney A. Guthrie and Jasmine M. Pitt, for defendant-appellee.

PER CURIAM.

AFFIRMED.[1]

1. The unpublished decision of the Court of Appeals, *Hope v. Integon Nat'l Ins. Co.*, No. COA20-265, 2020 WL 7974003 (N.C. Ct. App. Dec. 31, 2020), is available at https://appellate.nccourts.org/opinions/?c=2&pdf=39635.

IN RE LENNANE

[380 N.C. 483, 2022-NCSC-21]

IN THE MATTER OF FRANK LENNANE, PETITIONER

ADT, LLC, EMPLOYER

AND

NORTH CAROLINA DEPARTMENT OF COMMERCE, DIVISION OF EMPLOYMENT SECURITY, RESPONDENT

No. 3A21

Filed 11 March 2022

Unemployment Compensation—good cause—attributable to employer—employee's burden

Petitioner, a former service technician for a security company, was disqualified from receiving unemployment benefits where, although he had good cause to leave his employment, he failed to carry his burden of showing that his resignation was attributable to his employer. In response to petitioner's ongoing knee pain, the employer had made an out-of-state administrative position available and attempted to give petitioner assignments that were less strenuous on his knees; however, petitioner rejected the out-of-state position, did not take additional Family and Medical Leave, and chose to resign.

Justice EARLS dissenting.

Justices HUDSON and ERVIN join in this dissenting opinion.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 274 N.C. App. 367 (2020), affirming an order entered on 17 February 2020 by Judge W. Robert Bell in Superior Court, Haywood County. Heard in the Supreme Court on 6 January 2022.

Legal Aid of North Carolina, Inc., by Joseph Franklin Chilton, Cindy M. Patton, John R. Keller, and Celia Pistolis, for petitioner-appellant.

North Carolina Department of Commerce, Division of Employment Security, by Elias W. Admassu, R. Glen Peterson, and Sharon A. Johnston, for respondent-appellee.

BARRINGER, Justice.

¶ 1 In this case, we consider whether to uphold the determination that petitioner Frank Lennane is disqualified from receiving unemployment benefits. To guide the interpretation and application of unemployment benefits under Chapter 96 of the General Statutes of North Carolina, the legislature has declared the public policy of this State for nearly ninety years as the following:

> Economic insecurity due to unemployment is a serious menace to the health, morals, and welfare of the people of this State. Involuntary unemployment is therefore a subject of general interest and concern which requires appropriate action by the Legislature to prevent its spread and to lighten its burden which now so often falls with crushing force upon the unemployed worker and his family. The achievement of social security requires protection against this greatest hazard of our economic life. This can be provided by encouraging employers to provide more stable employment and by the systematic accumulation of funds during periods of employment to provide benefits for periods of unemployment, thus maintaining purchasing power and limiting the serious social consequences of poor relief assistance. The Legislature, therefore, declares that in its considered judgment the public good and the general welfare of the citizens of this State require the enactment of this measure, under the police powers of the State, for the compulsory setting aside of unemployment reserves to be used for the benefit of persons unemployed through no fault of their own.

Unemployment Compensation Law, ch. 1, sec. 2, 1936 N.C. Pub. [Sess.] Laws (Extra Sess. 1936) 1, 1 (codified at N.C.G.S. § 96-2 (2021)).

¶ 2 This declaration guides our analysis of the issue before us: whether Lennane's leaving work was attributable to his employer as required by N.C.G.S. § 96-14.5(a) to avoid disqualification for unemployment benefits. *See* N.C.G.S. § 96-2. Having considered the legislature's declared public policy, the plain language of the applicable statute, and the binding findings of fact, we conclude that Lennane failed to show that his leaving work was attributable to his employer as required by N.C.G.S. § 96-14.5(a).

I. Background

¶ 3 Lennane left work on 16 November 2018. Lennane filed an initial claim for unemployment benefits on 11 November 2018. An adjudicator held Lennane disqualified for benefits, and Lennane appealed. Thereafter, an appeals referee conducted a hearing on the matter. The appeals referee affirmed the prior decision and ruled that Lennane was disqualified for unemployment benefits because he failed to show good cause attributable to the employer for leaving as required by N.C.G.S. § 96-14.5(a). Lennane then appealed to the Board of Review for the North Carolina Department of Commerce. The Board of Review adopted the appeals referee's findings of fact as its own and concluded that the appeals referee's decision was in accord with the law and the facts. Accordingly, the Board of Review affirmed the appeals referee's decision. Lennane next appealed to the superior court, which affirmed the Board of Review's decision. Lennane then appealed to the Court of Appeals.

¶ 4 A divided panel of the Court of Appeals affirmed the superior court's order. *In re Lennane*, 274 N.C. App. 367, 372 (2020). When considering whether the superior court erred by affirming the Board of Review's determination, the Court of Appeals compared this case with the Court of Appeals decision in *Ray v. Broyhill Furniture Industries*, 81 N.C. App. 586 (1986). *In re Lennane*, 274 N.C. App. at 370. In *Ray*, the Court of Appeals "held that the claimant proved her reason for leaving was attributable both to the employer's action (the threat to fire her if she went over her supervisor's head) and inaction (her supervisor's failure to put in her transfer request)." *Id.* (cleaned up). Unlike *Ray*, the Court of Appeals explained that, in this case, the employer acted to help Lennane. *Id.*

¶ 5 The Court of Appeals then considered whether competent evidence supported the challenged findings of fact and whether those findings of fact supported the conclusion of law. *Id.* at 370–72. The Court of Appeals concluded that competent evidence supported the challenged findings of fact and that the findings of fact supported the conclusion that Lennane "failed to establish that his good cause for leaving work was attributable to the employer." *Id.* at 372 (cleaned up).

¶ 6 To the contrary, the dissent contended that:

> It is not [Lennane]'s fault that his knee suffers from osteoarthritis, nor is it his fault that his employer's "business needs" precluded accommodations that would not require him to sacrifice his health. He

> was thus rendered "unemployed through no fault of [his] own[,]" N.C. Gen. Stat. § 96-2.

Id. at 373 (Inman, J., dissenting) (second and third alterations in original).

¶ 7 According to the dissent, like in *Ray*, Lennane's employer's inaction "placed [him] in the untenable position of having to choose between leaving [his] job and becoming unemployed or remaining in a job which . . . exacerbated [his medical] conditions." *Id.* (alterations in original) (quoting *Ray*, 81 N.C. App. at 592–93). Thus, the dissent, relying on N.C.G.S. § 96-2 and *Ray*, would have held that Lennane left work for good cause attributable to the employer. *Id.* The dissent disagreed with the majority's conclusion of law but did not identify any findings of fact as being unsupported by competent evidence. *Id.* at 372–73.

¶ 8 Lennane appealed based on the dissenting opinion. Accordingly, we now consider the issue Lennane identified as distinguishing the majority and dissenting opinions: "whether his leaving was attributable to the employer."

II. Standard of Review

¶ 9 "The standard of review in appeals from the [Department of Commerce, Division of Employment Security], both to the superior court and to the appellate division, is established by statute." *Binney v. Banner Therapy Prods., Inc.*, 362 N.C. 310, 315 (2008). In these judicial proceedings, "the findings of fact by the Division, if there is any competent evidence to support them and in the absence of fraud, shall be conclusive, and the jurisdiction of the court shall be confined to questions of law." N.C.G.S. § 96-15(i) (2021); *see also* N.C.G.S. § 96-15(h) (establishing procedure for judicial review of a decision of the Board of Review); *Binney*, 362 N.C. at 315. When no challenge to a finding of fact is made, an appellate court presumes that the finding of fact is supported by the evidence, and the finding of fact is binding on appeal. *See, e.g.*, *Carolina Power & Light Co. v. Emp. Sec. Comm'n of N.C.*, 363 N.C. 562, 564 (2009); *State ex rel. Emp. Sec. Comm'n v. Jarrell*, 231 N.C. 381, 384 (1950). We review de novo whether the Division's findings of fact support the conclusions of law. *Carolina Power*, 363 N.C. at 564.

III. Analysis

¶ 10 Article 2C of Chapter 96 of the North Carolina General Statutes sets forth when benefits are payable for unemployment and when an individual is disqualified from receiving benefits. N.C.G.S. §§ 96-14.1 to -14.16 (2021). As relevant to this appeal, subsection 96-14.5(a) mandates that "[a]n individual does not have a right to benefits and is disqualified

from receiving benefits if the Division determines that the individual left work for a reason other than good cause attributable to the employer." N.C.G.S. § 96-14.5(a). "When an individual leaves work, the burden of showing good cause attributable to the employer rests on the individual and the burden may not be shifted to the employer." N.C.G.S. § 96-14.5(a). Good cause exists when an individual's "reason for [leaving] would be deemed by reasonable men and women valid and not indicative of an unwillingness to work." *In re Watson*, 273 N.C. 629, 635 (1968). "A separation is attributable to the employer if it was produced, caused, created or as a result of actions by the employer." *Carolina Power*, 363 N.C. at 565 (cleaned up).

¶ 11 Since the Division conceded on appeal that Lennane had good cause to leave work, the only question before us is whether the findings of fact support the conclusion of law that Lennane's leaving work was not attributable to his employer. *See* N.C.G.S. § 96-14.5(a). We cannot, as the Court of Appeals' dissent did, substitute our view of the evidence for the findings of fact before us. *See In re Lennane*, 274 N.C. App. at 373 (Inman, J., dissenting) (acknowledging the findings of fact concerning the employer's attempt to make accommodations but dismissing them based on the dissent's interpretation of the manager's testimony and making its own findings concerning the detriment to Lennane's health from performing the equipment installations, Lennane's ability to perform the number of installations required of him by his employer, and Lennane's fault).

¶ 12 All findings of fact by the Division are as follows:

> 1. The claimant filed an initial claim for unemployment insurance benefits on November 11, 2018.
>
> 2. The claimant last worked for ADT LLC on November 16, 2018 as a service technician.
>
> 3. The Adjudicator issued a determination under Issue No. 1669952 holding the claimant disqualified for benefits. The claimant appealed. Pursuant to [N.C.]G.S. [§] 96-15(c), this matter came before Appeals Referee Stephen McCracken on August 7, 2019. Present for the hearing: Frank Lennane, claimant; Joseph Chilton, claimant representative; Randall Goodson, employer witness and installation/service manager; Stephanie Morgan, employer witness and administrative team leader; Michael Curtis, employer representative.

The employer's representative participated in the hearing via teleconference following a written request to participate by telephone due to a travel distance of more than 40 miles to the hearing location. Neither parties were prejudiced by the hybrid hearing.

4. The claimant was employed by the above-captioned employer from February 1, 2012 until November 16, 2018.

5. As a service technician for the employer, the claimant conducted service calls to the employer's residential and commercial customers with security or business alarm systems. Generally, service calls only require a part/component replacement and, generally, do not require a significant amount of physical activity. Although, a service call sometimes required some ladder climbing and crawling.

6. At times, the claimant had to perform residential and commercial security system and alarm system installations. Installations require more physical work, such as more drilling, climbing, and crawling, than a service call.

7. The claimant was aware of his job duties and responsibilities and was trained to perform both service calls and installation jobs.

8. In 2014, the claimant injured his left knee while on the job. Said injury caused the claimant to undergo surgery. Following the claimant's surgery, the claimant began to favor his right knee, which resulted in the claimant experiencing regular pain in his right knee. The claimant had a permanent partial disability in his left knee.

9. The claimant kept the employer informed of his physical health conditions.

10. In 2016, service technicians began to perform installation jobs following a business merger and a merger of the employer's service and installation departments.

11. The claimant had difficulty performing installations due to the poor physical conditions of his knees, of which he notified his manager. The claimant asked his manager if there were other jobs, such as administrative or clerical work, that in which [sic] he could apply for or be placed.

12. The employer only had administrative positions in Spartanburg, South Carolina and Knoxville, Tennessee, and the claimant was unwilling to relocate from North Carolina.

13. In 2017, the claimant took a [five] week leave of absence via the Family and Medical Leave Act (FMLA) to rest his knees and seek additional medical intervention.

14. On or about September 5, 2017, the claimant returned to work from his medical leave. The claimant's doctor requested that the claimant not stand or walk for prolonged periods.

15. The claimant asked his manager, Randall Goodson, if he could only be assigned service calls due to the less strenuous nature of those jobs. The claimant's manager denied the claimant's request because he needed to keep a fair balance of work distribution among all of the service technicians.

16. However, the claimant's manager made attempts thereafter to not dispatch the claimant on the most strenuous or large installations.

17. If the claimant had to be dispatched on a large installation, then manager Goodson would try to ensure that he (claimant) had another service technician available to assist him.

18. In October 2018, the claimant had an appointment with a surgeon to discuss treatment for his knees. At which time, the claimant was told that he could undergo surgery or stem cell therapy. The claimant was unwilling to undergo either options [sic].

19. As of November 2018, the claimant was continuing to fully perform his service technician job duties and responsibilities.

20. On or about November 8, 2018, the claimant notified the employer that he was resigning from employment because he was no longer able to perform his job due to the physical health condition of his knees.

21. Prior to the claimant's resignation, he did not make any formal or written requests for workplace accommodations from either the employer's administrative or human resources staff members. During 2018, the claimant did not request intermittent leave via FMLA.

22. The claimant left this job due to personal health or medical reasons.

23. At the time the claimant left, the employer did have continuing service technician work available for him.

¶ 13 Lennane argues that the findings of fact show that the employer's actions and inactions, not those of Lennane, caused him to leave work to protect his health. According to Lennane, the findings of fact show that his employer acted by changing his job duties by increasing the amount of installation work required for his position and failed to act by not implementing his request to only be assigned service calls. Lennane, like the dissent, advances the proposition that "*Ray* [c]ompels [a] [c]onclusion" that Lennane left work with good cause attributable to the employer. Lennane also contends that his unwillingness to relocate for an administrative position with his employer cannot support the conclusion of law that he left work without good cause attributable to the employer and relies on the Court of Appeals' decision in *Watson v. Employment Security Commission of North Carolina*, 111 N.C. App. 410 (1993).

¶ 14 Admittedly, Lennane's employer modified the allocation of installation jobs to service technicians two years before Lennane left work, and Lennane had difficulty performing installations because of pain in his knees. However, the findings of fact do not support the causal link required by N.C.G.S. § 96-14.5(a) between the employer's action (change in allocation of installation work) or inaction (not ceding to Lennane's request) and Lennane's leaving.

¶ 15 Lennane has not shown that his allocation of installation jobs as modified by his employer in 2016 was more detrimental to his health than his prior duties and responsibilities. Before 2016, Lennane performed service calls as well as installations at times. Lennane's partial disability in his left knee and pain in his right knee predated the 2016 modification. In 2016, only the allocation of service calls and installations assigned to service technicians, like Lennane, changed. Although installations involved "more physical work, such as more drilling, climbing, and crawling, than a service call," Lennane's "doctor requested that [Lennane] not stand or walk for prolonged periods." There is no finding that the installations increased the amount of prolonged standing and walking by Lennane relative to service calls. *See In re Lennane*, 274 N.C. App. at 370 ("[Lennane] provided no medical restrictions or limitations on bending, stooping, or crawling to [the e]mployer. The only medical request [Lennane] gave [the e]mployer was in September 2017 that he not stand or walk for prolonged periods."). Thus, we cannot conclude that the employer's action caused Lennane's leaving.

¶ 16 Despite our sympathy for those with health conditions, we cannot fill in the facts for Lennane. We only have the binding findings of facts properly before us, and the burden is on Lennane pursuant to N.C.G.S. § 96-14.5(a) to show good cause attributable to the employer. We also do not rely on *Barnes v. Singer Co.*, 324 N.C. 213 (1989). In *Barnes*, this Court imposed the burden on the employer and declined to address whether there was good cause attributable to the employer. *Id.* at 216, 217; *see also id.* at 219 (Meyer, J., dissenting) ("The burden should be upon the party who is in the best position to prove the matter in question. Here, it is the claimant who can best prove the crucial fact, not yet established in this case, that transportation to the new plant site is, in a practical sense, unavailable to her.").

¶ 17 Our legislature expressly placed on the individual the burden—that cannot be shifted to an employer—to show good cause attributable to the employer when the individual left work. *See* N.C.G.S. § 96-14.5(a). The goal sought by unemployment insurance is to avoid economic insecurity from involuntary unemployment. *See* N.C.G.S. § 96-2. The legislature for nearly ninety years has recognized that this achievement "can be provided by encouraging employers to provide more stable employment and by the systematic accumulation of funds during periods of employment to provide benefits for periods of unemployment." *Id.* Given the requirement of *attribution* to the employer under N.C.G.S. § 96-14.5(a), we must consider both an individual's and employer's efforts to preserve the employment relationship when assessing whether the individual's

leaving is attributable to the employer. Consideration of these efforts is consistent also with the legislative purposes of "encouraging employers to provide more stable employment" and "prevent[ing] [the] spread [of involuntary unemployment.]" N.C.G.S. § 96-2. If we ignore the efforts of employer in the binding findings of fact, like the dissent, employers are not encouraged to provide stable employment. Likewise, if we ignore the efforts of the employed individual, employers are not encouraged to provide stable employment. Thus, we review the findings of fact concerning both Lennane's and his employer's efforts to preserve the employment relationship.

¶ 18 Here, Lennane made some efforts to preserve his employment. He "kept [his] employer informed of his physical health conditions," "notified his manager" that he "had difficulty performing installations due to the poor physical condition of his knees," and his doctor in 2017 "requested that [Lennane] not stand or walk for prolonged periods." He "asked his manager if there were other jobs, such as administrative or clerical work, that . . . he could apply for or be placed." In 2017, he "took a [five] week leave of absence via the Family and Medical Leave Act . . . to rest his knees and seek additional medical intervention." He also "asked his manager, Randall Goodson, if he could only be assigned service calls due to the less strenuous nature of those jobs."

¶ 19 In response to Lennane's efforts, the employer made efforts to preserve the employment relationship. Lennane's manager "made attempts [after Lennane's request] to not dispatch [Lennane] on the most strenuous or large installations" and "would try to ensure that [Lennane] had another service technician available to assist him." The employer also "had administrative positions in Spartanburg, South Carolina and Knoxville, Tennessee," but not in North Carolina.

¶ 20 Ultimately, Lennane was unwilling to relocate from North Carolina for an administrative position and did not take additional Family and Medical Leave to treat his knees. Lennane subsequently resigned, working his last day on 16 November 2018.

¶ 21 Given the foregoing, his employer acted to preserve the employment relationship. The employer, at Lennane's request, provided Lennane the option to take an administrative position where the employer had administrative positions. The employer further made attempts to adjust the assignment of installations to be more favorable to Lennane given Lennane's request. Lennane also had choices other than leaving his employment—choices he did not take. Lennane could have relocated from North Carolina for an administrative position with his employer, an

option provided by his employer at his request, or he could have taken additional Family and Medical Leave to treat his knees as his employer previously supported. Prior to his leaving, Lennane also had continued to fully perform his duties and responsibilities.

¶ 22 For these reasons, *Ray* is easily distinguishable from this case. In *Ray*, the employer did not act to preserve the employment relationship: the supervisor refused the employee Ray's request to transfer to another department, denied her request for a protective mask, and threatened to terminate her employment if she conveyed her requests to the plant manager. 81 N.C. App. at 588. It is also "axiomatic that this Court is not bound by precedent of our Court of Appeals." *In re L.R.L.B.*, 377 N.C. 311, 2021-NCSC-49, ¶ 31 (cleaned up). Thus, we neither endorse nor dismiss *Ray*.

¶ 23 The Court of Appeals' decision in *Watson v. Employment Security Commission of North Carolina* is also not binding on this Court and is distinguishable. Unlike *Watson*, the employer in this matter did not relocate, and Lennane did not leave work because of unreliable transportation to work. *See* 111 N.C. App. at 415. Also, unlike this matter, the binding findings of fact in *Watson* reflected substantial attempts by the employee, *Watson*, to maintain the employment relationship. She expressed her concern to her employer about reliable transportation to and from work before the relocation; she obtained some transportation from her supervisor; she used her own car until it broke down; and she made a series of other arrangements to get to work. *See id.* at 412. Watson did not leave work until she arrived late to work on account of her co-worker's truck being in disrepair, was sent home as a penalty for arriving late, believed the truck beyond repair, and had no other foreseeable means of transportation to and from work every day of her work week. *Id.* at 412. As a result, the Court of Appeals concluded that "[a]ll of the Commission's findings of fact make clear that petitioner desired, and attempted, to continue to work for respondent employer," such that "[h]er leaving work was solely the result [of the relocation of the plant by her employer]." *Id.* at 415. Given the binding findings of fact before us, we cannot conclude the same in this matter. Thus, we neither endorse nor dismiss *Watson v. Employment Security Commission of North Carolina* but conclude that it is not analogous to this case.[1]

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1. The dissent acknowledges that assessing attribution to the employer is highly fact-specific and relies on other cases that are factual distinct from the matter before us. Thus, further discussion of these cases from our lower courts would offer little (if any) additional clarity to our decision here.

¶ 24 Although Lennane left work for good cause as conceded by the Division, the legislature created unemployment insurance for a more limited subset of individuals: those who left work for "good cause attributable to the employer." N.C.G.S. § 96-14.5(a). Here, the employer made available to Lennane an administrative position as Lennane specifically requested. The employer offered positions in all the locales where the employer had such positions. The employer, thus, acted. Lennane still left, but his employer's inaction did not cause Lennane's leaving. Lennane had made other requests to his employer, but an employer need not cede to every request of an individual employed by the employer to avoid having his inaction deemed the cause of an individual's leaving.

¶ 25 This Court's holding honors the limitation created by our legislature on unemployment benefits, consistent with the plain language of the statute and the legislature's express purpose of "encouraging employers to provide more stable employment" to prevent the spread of involuntary unemployment. N.C.G.S. § 96-2. "[T]he actual words of the legislature are the clearest manifestation of its intent, [so] we give every word of the statute effect, presuming that the legislature carefully chose each word used." *N.C. Dep't of Corr. v. N.C. Med. Bd.*, 363 N.C. 189, 201 (2009). This Court in *In re Watson* explained:

> In [N.C.]G.S. [§] 96-14(1) it is provided that one is disqualified from receiving benefits under the act if he left work voluntarily "without good cause attributable to the employer." The disqualification imposed in [N.C.]G.S. [§] 96-14(3) for failure to accept suitable work "without good cause" does not carry the qualifying phrase "attributable to the employer." It cannot be presumed that the omission of these qualifying words was an oversight on the part of the Legislature. Thus, the "good cause" for rejection of tendered employment need not be a cause attributable to the employer.

273 N.C. at 635.

¶ 26 Decades later, the legislature still does not omit the statutory language "attributable to the employer" for individuals leaving work: "[a]n individual is disqualified for any remaining benefits if the Division determines that the individual has failed, without good cause, to . . . [a]ccept suitable work when offered," N.C.G.S. § 96-14.11(b), but "disqualified from receiving benefits if the Division determines that the individual left work for a reason other than good cause *attributable to the employer*," N.C.G.S.§ 96-14.5(a) (emphasis added). Thus, we decline to create

insurance paid for by employers for unemployment not attributable to an employer's actions or inactions.

IV. Conclusion

¶ 27 Unemployment insurance does not provide benefits to individuals who "left work for a reason other than good cause attributable to the employer." N.C.G.S. § 96-14.5(a). While Lennane, as conceded by the parties, left work for good cause, he has failed to satisfy his burden to show that his leaving work was "attributable to the employer" as a matter of law. *Id.* Accordingly, we affirm the Court of Appeals' decision.

AFFIRMED.

Justice EARLS dissenting.

¶ 28 Both Mr. Lennane and the Employment Security Division agreed that Mr. Lennane's reason for leaving his job, after having worked for ADT as a service technician for over six and a half years, was for "good cause" as defined by law. Indeed, respondent acknowledged to the court below that "[t]he Petitioner's reason for resigning was the personal knee issues, and the Division's Findings of Fact support the conclusion it was for 'good cause.' " Where, as the dissent below noted, "[r]espondent concedes [petitioner] had good cause to resign," *In re Lennane*, 274 N.C. App. 367, 373 (2020) (Inman, J., dissenting), the only issue for this Court is whether Mr. Lennane has met his burden of establishing that the good cause was attributable to his employer. Here the majority observes that the Division conceded good cause, but then illogically concludes that Mr. Lennane failed to establish a "casual link" to explain why he left work. The majority then imposes a newly crafted "efforts to preserve the employment relationship" test and infers from the absence of factual findings that in fact, Mr. Lennane did not have good cause to leave his employment because he refused to leave North Carolina for Spartanburg, South Carolina or Knoxville, Tennessee and did not take additional Family and Medical Leave. These are all, in essence, arguments that he did not have good cause to leave his employment.

¶ 29 The appeals referee's factual findings here do not suggest that ADT offered Mr. Lennane service calls that would comply with his medical restrictions at the time rather than installation work. Based on the findings of fact, "[t]he claimant's manager denied the claimant's request [only to be assigned service rather than installation calls] because he needed to keep a fair balance of work distribution among all of the service technicians." In these circumstances, the decision not to offer Mr. Lennane

work that he could perform safely is what led to the good cause for his need to stop working. Mr. Lennane carried his burden of demonstrating that the good cause for his leaving was attributable to a decision of the employer. He should not be disqualified from receiving unemployment benefits. Therefore, I dissent.

¶ 30 Although our task here is to determine whether the Division's findings of fact support its legal conclusions, the majority begins with an examination of the public policy behind the General Assembly's establishment of unemployment compensation. Ironically, the legislature's declared policy actually supports the conclusion that ADT did not do enough here to keep Mr. Lennane on its payroll with work that he could safely perform given his health condition, rather than the majority's conclusion that Mr. Lennane should have moved out of state to work in an administrative position or take unpaid leave. According to the 1936 statute, economic security in North Carolina is promoted by "encouraging employers to provide more stable employment." N.C.G.S. § 96-2 (2021) (carrying forward the original statutory language). Moreover, "the public good and the general welfare of the citizens of this State require . . . the compulsory setting aside of unemployment reserves to be used for the benefit of persons unemployed through no fault of their own." *Id.* The statute is intended to protect North Carolina workers and to encourage employers to provide stable employment.

¶ 31 Whatever the policy implications, the more specific language of the statute's disqualification provision applies here. *See In re Steelman*, 219 N.C. 306, 310-11, (1941) (the general designation of workers selected for benefits being those who are "unemployed through no fault of their own." is constrained by the more specific provisions of the statute if the provisions would otherwise conflict). This Court has found that "sections of the act imposing disqualifications for its benefits should be strictly construed in favor of the claimant and should not be enlarged by implication or by adding to one such disqualifying provision words found only in another." *In re Watson*, 273 N.C. 629, 639 (1968); *see also Marlow v. N.C. Emp. Sec. Comm'n*, 127 N.C. App. 734, 735 (1997) ("Further, in keeping with the legislative policy to reduce the threat posed by unemployment to the 'health, morals, and welfare of the people of this State,' statutory provisions allowing disqualification from benefits must be strictly construed in favor of granting claims." (quoting N.C.G.S. § 96-2 (1995)), *disc. rev. denied*, 347 N.C. 577 (1998); *Lancaster v. Black Mountain Ctr.*, 72 N.C. App. 136, 141 (1984) (same). It goes without saying that this Court should not be imposing new disqualification rules that have no basis in the statute. *See* N.C.G.S. § 96-14.5.

¶ 32 'Good cause,' which was conceded here, is understood to be "a reason which would be deemed by reasonable men and women valid and not indicative of an unwillingness to work." *Carolina Power & Light Co. v. Emp. Sec. Comm'n of N. C.*, 363 N.C. 562, 565 (2009) (quoting *Intercraft Indus. Corp. v. Morrison*, 305 N.C. 373, 376 (1982)). Given that Mr. Lennane's reason for resigning was for "good cause," it is therefore clear that the facts do not support any conclusion that he resigned because he was unwilling to work. And yet, that is precisely what the majority ultimately concludes, that Mr. Lennane had "other choices" but chose not to keep working. The majority's conclusion is not supported by the factual findings in this case.

¶ 33 If the separation is "produced, caused, created or as a result of actions by the employer," it is attributable to the employer. *Id.* (quoting *Couch v. N.C. Emp. Sec. Comm'n*, 89 N.C. App. 408 at 409-10, *aff'd per curiam*, 323 N.C. 472 (1988)). Inaction by the employer also can provide good cause to leave a job. *See, e.g.*, *Ray v. Broyhill Furniture Indus.*, 81 N.C. App. 586, 592–93 (1986) (attributing a supervisor's failure to put in a transfer request on behalf of an employee to a department with fewer health risks as one of the bases of good cause for the employee's departure). Good cause is attributable to the employer where circumstances caused by the employer "make continued work logistically impractical" or "when the work or work environment itself is intolerable." *Carolina Power*, 363 N.C. at 567–68.

¶ 34 Examples of good cause attributable to employers when they create circumstances that make work logistically impractical for the employee are instructive. In *Barnes v. Singer Co.*, the employee quit after her employer relocated her job and she did not have reliable transportation to her new place of employment. 324 N.C. 213, 214, 216–17 (1989). In *Couch v. North Carolina Employment Security Commission*, a woman who quit her job after her employer unilaterally and substantially reduced her working hours was not disqualified from receiving unemployment benefits. 89 N.C. App. 405, 412, *aff'd per curiam*, 323 N.C. 472 (1988). In *Couch*, the Court of Appeals remanded the case to determine whether the decrease of two hours per day of work was substantial enough to constitute good cause. *Id.* at 408, 412–13. In *Milliken & Co. v. Griffin*, the Court of Appeals found good cause attributable to the employer when Ms. Griffin quit after her employer failed to heed her doctor's advice that she receive work that did not aggravate her muscle spasms or be assigned shorter shift hours. 65 N.C. App. 492, 497 (1982), *disc. rev. denied*, 311 N.C. 402 (1984). The Court of Appeals based its decision on the fact that Ms. Griffin spoke to her manager about her health issues and desire

for alternative work options within the company, ultimately found none and then resigned. *Id.* at 495. None of these precedents are reversed by the Court's decision in this case.

¶ 35 Instead, whether good cause attributable to the employer exists is a highly fact-specific determination, for which Mr. Lennane bears the burden of proof. The fact to be decided here was not whether ADT or Mr. Lennane made the most effort to "preserve the employment relationship," but rather, who was responsible for the circumstances that led to Mr. Lennane resigning for good cause. It is most important to remember that this is not a fault-based inquiry, ADT may have had a very good business reason for not allowing Mr. Lennane to work only service calls. But in this particular workplace, it was ADT's decision to make, not Mr. Lennane's.

¶ 36 As the factual findings explain, ADT had previously divided its home security system service and installation departments. Despite Mr. Lennane's having been trained to do the more physically demanding job of installation work, he was still primarily a service technician. He had worked at this job for over six years by the time he quit, and four of those years were spent dealing with various knee injuries. The injury to his left knee happened while he was on the job, and despite undergoing knee surgery, he sustained a permanent partial disability in that knee. This injury and the subsequent limit on the full use of his left knee caused Mr. Lennane to favor his right knee, which led to him "experiencing regular pain in his right knee."

¶ 37 As his pain increased, Mr. Lennane also experienced a reshuffling of his duties at work when a merger caused ADT to combine its service and installation departments. The loss of that structural divide required service technicians to do installation work as well. There was conflicting testimony at the hearing regarding how much of an increase in installation work this created for Mr. Lennane, and the findings of fact do not resolve that question.[1] But the appeals referee did find that

1. In the absence of detailed findings of fact regarding the effect on Mr. Lennane of the change in work assignments from only service work to a mix of service and installation work, despite testimony on this point, the majority erroneously concludes that therefore Mr. Lennane failed to establish a causal nexus between ADT's actions and his leaving work. Not only does this determination negate the concession that Mr. Lennane left for good cause, it also assumes that in the absence of factual findings, the employer's version of events must be correct. Mr. Lennane did testify about the causal nexus between ADT's inability to accommodate his need for limited walking and standing and his decision to resign. If there is testimony tending to prove a material fact but the absence of a related factual finding, it is not the role of this Court to make assumptions, draw contrary inferences, or make its own factual findings.

Mr. Lennane "kept the employer informed of his physical health conditions" and that he "had difficulty performing installations due to the poor physical conditions of his knees, of which he notified his manager." He asked about two less strenuous work options: a desk job or forgoing installation work. Neither option was a realistic choice for him because the administrative work was only available out of state and the manager "needed to keep a fair balance of work distribution among all of the service technicians."

¶ 38 Mr. Lennane tried to continue with his job by taking a five-week FMLA leave of absence to heal, but that hiatus could not permanently fix the deterioration of his knees. His manager still would assign him installations while attempting to keep these jobs smaller or to assign a second service technician to assist him on large installations. Yet, these attempts were not enough because Mr. Lennane's doctor recommended that he not walk or stand for long periods.

¶ 39 The findings of fact paint a vivid picture of someone who tried to hold on to his job despite chronic pain from a workplace injury, but who ultimately had good cause to leave. And the findings also present a picture of an employer that tried to accommodate his employees' bad knees in some fashion but who, for business reasons, failed to do so adequately. Just as in *Barnes*, in which the court concluded that materially moving an employee's job is good cause attributable to that employer, similarly here it should not be held against Mr. Lennane that ADT's only administrative work option was outside of North Carolina and that his manager's preference was to make an equal distribution of installation work among service technicians. ADT had less strenuous service work still available at Mr. Lennane's North Carolina location but chose not to let him focus only on that work. Given that the majority does not purport to overrule *Barnes*, but inexplicably decides not to rely on it, the principle established by this Court in *Barnes* remains good law, namely that: "[a]n employee does not leave work voluntarily when the termination is caused by events beyond the employee's control or when the acts of the employer caused the termination." *Barnes*, 324 N.C. at 216. There, an employer moving a plant eleven miles away to a location the employee could not commute to from her home, constituted good cause attributable to the employer. *Id.* In this case, requiring that Mr. Lennane move out of state to maintain employment that does not further damage his health similarly is holding him responsible for matters beyond his control. The application of the law here is not about sympathy for an injured worker, it requires an analysis of whether the good cause, conceded by respondent, was due to factors within the employer's control.

¶ 40 Ultimately, Mr. Lennane's manager decided not to meet his medical needs by assigning only service work and, just as the employee in *Ray*, Mr. Lennane chose his health and had to quit. Unlike the situation in *Ray*, however, Mr. Lennane did pursue several avenues to try to keep his job. All of the steps taken by Mr. Lennane – keeping his employer informed of his health problems, requesting a transfer to office work, taking FMLA leave, and asking for lighter field assignments – show an employee trying to keep working. Indeed, Mr. Lennane's pursuit of reasonable remedial measures exceeded the efforts to preserve employment undertaken by employee Ray, who did not take FMLA leave. More importantly, as the unanimous court in *Ray* pointed out, "[s]peculation as to what [claimant] *could have done*" is irrelevant. *Ray*, 81 N.C. App. at 592. (emphasis in original).

¶ 41 Mr. Lennane was in an even more compelling circumstance than the successful claimant in *Ray*. Mr. Lennane acquired his underlying health problems on the job. The findings of fact make clear that his health concerns arose from job requirements that had changed since his hire, even if the magnitude of that change is not specified. Mr. Lennane was a "person who must quit a job for health reasons but who is available for other employment," and therefore, "reason and justice demand that such a claimant receive unemployment benefits." *Griffin*, 65 N.C. App. at 497. Indeed, the logic of the Court of Appeals' decision in *Griffin* is compelling here, because in that case the very policy cited by the majority here was the basis of the Court of Appeals' conclusion that an employee whose health condition leads to unemployment is entitled to receive unemployment benefits:

> Milliken would have us follow those jurisdictions which have denied benefits to individuals who became unemployed because of sickness, accident or old age. . . . We find that the language in the *Mills* decision is in conflict with the policy behind North Carolina's Employment Security Act and application of the Act. The *Mills* court concluded that "involuntary unemployment" under the Act meant unemployment resulting from a failure of industry to provide stable employment; and that unemployment due to changes in personal conditions to the employee, which made it impossible for him to continue his job, was not the type covered by the Act. Our Legislature did not intend such a narrow application of the Act when it declared the following public policy to be

> accomplished by the Act: "[T]he public good and the general welfare of the citizens of this State require the enactment of this measure . . . for the compulsory setting aside of unemployment reserves to be used for the benefit of persons unemployed through no fault of their own." G.S. § 96-2.

Id., at 497-98 (second and third alternations in original) (internal citations omitted). Both *Ray* and *Griffin* remain good law. The majority does not dispute the logic or reasoning of either decision. Instead, the majority finds a significant distinction that in *Ray* the employer "did not act to preserve the employment relationship" because Ray's supervisor denied a transfer request and refused to provide a protective mask. Even if denying a transfer request differs significantly from offering a transfer that requires moving out of state while denying limited work assignments at the current worksite, the ultimate question is who has created the condition under which continued employment is not possible. Based on the factual findings in this case, the relevant business decisions were made by ADT. Mr. Lennane wanted to work, he just could not continue to put too much strain on his knees by installing security systems.

¶ 42 The majority also goes beyond the findings of fact in assuming that Mr. Lennane could have continued to perform installation work for ADT so long as he periodically took FMLA leave to rest his knees. While there was some testimony in the record from Mr. Lennane concerning how frequently he already was resting his knees to no lasting effect, the assumption made by the majority is not in the appeals referee's findings of fact. We do not know from this record whether such leave would have been paid or unpaid, or even if it would have addressed the medical problem. On the record before us, Mr. Lennane left his job for good cause, namely, personal health or medical reasons, in circumstances in which his employer did have work that he could have performed, specifically service calls rather than installation work, but chose not to give him the option of doing that work. Mr. Lennane's good cause for leaving work was attributable to ADT, and he should not be disqualified from receiving unemployment benefits.

Justices HUDSON and ERVIN join in this dissenting opinion.

LAKE v. STATE HEALTH PLAN FOR TCHRS. & STATE EMPS.

[380 N.C. 502, 2022-NCSC-22]

I. BEVERLY LAKE, JOHN B. LEWIS, JR., EVERETTE M. LATTA, PORTER L. McATEER, ELIZABETH S. McATEER, ROBERT C. HANES, BLAIR J. CARPENTER, MARILYN L. FUTRELLE, FRANKLIN E. DAVIS, ESTATE OF JAMES D. WILSON, ESTATE OF BENJAMIN E. FOUNTAIN, JR., FAYE IRIS Y. FISHER, STEVE FRED BLANTON, HERBERT W. COOPER, ROBERT C. HAYES, JR., STEPHEN B. JONES, MARCELLUS BUCHANAN, DAVID B. BARNES, BARBARA J. CURRIE, CONNIE SAVELL, ROBERT B. KAISER, JOAN ATWELL, ALICE P. NOBLES, BRUCE B. JARVIS, ROXANNA J. EVANS, JEAN C. NARRON, AND ALL OTHERS SIMILARLY SITUATED

v.

STATE HEALTH PLAN FOR TEACHERS AND STATE EMPLOYEES, A CORPORATION, FORMERLY KNOWN AS THE NORTH CAROLINA TEACHERS AND STATE EMPLOYEES' COMPREHENSIVE MAJOR MEDICAL PLAN, TEACHERS' AND STATE EMPLOYEES' RETIREMENT SYSTEM OF NORTH CAROLINA, A CORPORATION, BOARD OF TRUSTEES OF THE TEACHERS' AND STATE EMPLOYEES' RETIREMENT SYSTEM OF NORTH CAROLINA, A BODY POLITIC AND CORPORATE, DALE R. FOLWELL, IN HIS OFFICIAL CAPACITY AS TREASURER OF THE STATE OF NORTH CAROLINA, AND THE STATE OF NORTH CAROLINA

No. 436PA13-4

Filed 11 March 2022

Public Officers and Employees—State Health Plan amendments—constitutional contractual impairment claim—existence of contractual obligation

In an action asserting that amendments to the State Health Plan (SHP) removing premium-free options for retired state employees violated both the federal and state constitutions (the Contracts Clause and the Law of the Land Clause, respectively), retirees had a vested right to the noncontributory health plan benefits that existed at the time they were hired and for which they met the eligibility requirements because employees relied on the promise of the State's obligation to provide those benefits when they entered into the employment contract. However, summary judgment was inappropriate where there were genuine issues of material fact regarding whether the amendments constituted a substantial contractual impairment—the determination of which required an analysis of the relative value of different health plans offered at different times—and, if so, whether the impairment was reasonable and necessary to serve an important public purpose. Therefore, the matter was remanded for further factual findings by the trial court.

Justice BARRINGER concurring in part and dissenting in part.

Justice BERGER joins in this opinion concurring in part and dissenting in part.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 264 N.C. App. 174 (2019), reversing and remanding an order of summary judgment entered on 19 May 2017 by Judge Edwin G. Wilson, Jr. in Superior Court, Gaston County. Heard in the Supreme Court on 4 October 2021.

Gray, Layton, Kersh, Solomon, Furr & Smith, P.A. by Michael L. Carpenter, Christopher M. Whelchel, Marcus R. Carpenter, and Marshall P. Walker; Tin, Fulton, Walker & Owen, PLLC, by Sam McGee; and The Law Office of James Scott Farrin, by Gary W. Jackson and J. Bryan Boyd, for plaintiff-appellants.

Joshua H. Stein, Attorney General, by Ryan Y. Park, Solicitor General, and Marc Bernstein, Special Deputy Attorney General, for defendant-appellees.

The McGuinness Law Firm, by J. Michael McGuinness; and North Carolina Association of Educators, by Verlyn Chesson Porte, for amicus curiae North Carolina Association of Educators.

The Sumwalt Group, by Vernon Sumwalt; and AARP Foundation, by Ali Naini, for amicus curiae AARP and AARP Foundation.

EARLS, Justice.

¶ 1 In this case, a class of more than 220,000 former State employees (the Retirees) sued the State of North Carolina and various officials and agencies (the State) after the General Assembly enacted a statute that eliminated their option to remain enrolled in a premium-free preferred provider organization health insurance plan which allocated eighty percent of the costs of health care services to the insurer and twenty percent to the insured (the 80/20 PPO Plan). According to the Retirees, the State had undertaken a contractual—and thus constitutional—obligation to provide them with the option to remain enrolled in the 80/20 PPO Plan or one of equivalent value, on a noncontributory basis, for life. In response, the State argues that it never promised the Retirees the benefit of lifetime enrollment in any particular premium-free health insurance plan and that, even if it had done so, the noncontributory plan the State continues to offer provides the Retirees with a benefit of the same or greater value than the one available to them prior to 2011, when the statute eliminating the noncontributory 80/20 PPO Plan option was enacted (the 2011 Act).

¶ 2 The trial court agreed with the Retirees and entered partial summary judgement in their favor. A unanimous panel of the Court of Appeals reversed and remanded for entry of summary judgment in favor of the State. *See Lake v. State Health Plan for Tchrs. & State Emps.*, 264 N.C. App. 174, 189 (2019). On discretionary review before this Court, we must answer a threshold question that divided the lower tribunals and which the parties vigorously contest: Did the State assume a contractual obligation to provide the Retirees the benefit of lifetime enrollment in the premium-free 80/20 PPO Plan or its substantive equivalent, such that the Retirees possessed a constitutionally protected vested right?

¶ 3 This Court has stated and reaffirmed that "[a] public employee has a right to expect that the retirement rights bargained for in exchange for his loyalty and continued services, and continually promised him over many years, will not be removed or diminished." *Bailey v. State*, 348 N.C. 130, 141 (1998) (quoting *Simpson v. N.C. Local Gov't Emps.' Ret. Sys.*, 88 N.C. App. 218, 224 (1987), *aff'd per curiam*, 323 N.C. 362 (1988)). We have recognized that this right protects state employees' pensions and also encompasses other forms of benefits. *See, e.g.*, *N.C. Ass'n of Educators v. State*, 368 N.C. 777 (2016) (*NCAE*) (holding that teachers possessed a protected right in their status as "career teachers"). It is understandable that the Retirees—who, before 2011, were eligible to remain enrolled in the 80/20 PPO Plan without paying a premium—would perceive being required to pay a premium to remain enrolled in the 80/20 PPO Plan as diminishing their bargained-for rights. For the reasons explained below, we agree with the trial court that the Retirees enjoyed a constitutionally protected vested right in remaining enrolled in the 80/20 PPO Plan or its substantive equivalent on a noncontributory basis.

¶ 4 Nonetheless, the Retirees are entitled to receive only the benefit of the bargain they struck with the State and nothing more. To prevail on their claims arising under Article I, Section 10 of the United States Constitution (the Contracts Clause), the Retirees must also demonstrate that the General Assembly "substantially impaired" their contractual rights when it eliminated the option of enrolling in the premium-free 80/20 PPO Plan. *Bailey*, 348 N.C. at 151. And even if the Retirees meet this burden, the State must be afforded the opportunity to show that the impairment was "reasonable and necessary to serve an important public purpose" and was thus not in violation of the Contracts Clause. *Id.* at 141 (citing *U.S. Tr. Co. of N.Y. v. New Jersey* (*U.S. Trust*), 431 U.S. 1 (1977)).

¶ 5 These latter two questions—whether a contract has been "substantially impaired" and whether any such impairment is "reasonable and necessary"—are particularly fact-intensive. Answering them requires a

careful examination of the plans made available to the Retirees when their respective rights to health insurance coverage vested and a comparison of those plans to the ones the State currently offers. Although the 2011 Act plainly requires the Retirees to pay a premium to remain enrolled in a plan previously offered on a noncontributory basis, many variables besides a premium—such as the size of a plan member's deductibles and co-pays, and the scope of coverage the plan affords—affect the value of a health insurance plan. Furthermore, in a rapidly changing world of dramatic medical advances and evolutions in how health care is financed, including changes to the State's overall health insurance offerings that provide new options for retired state employees, it would be unreasonable to expect that the State would maintain the precise terms of the plans it offered in an entirely different era.

¶ 6 Accordingly, we hold that the trial court correctly determined there were no genuine issues of material fact relating to whether the Retirees possessed a vested right protected under the Contracts Clause. The trial court correctly concluded that the Retirees had obtained such a right. Therefore, the Court of Appeals erred in concluding that the Retirees possessed no vested rights within the meaning of the Contracts Clause. But numerous genuine issues of material fact needed to be resolved in order to answer the latter two questions—whether the 2011 Act worked a substantial impairment of the Retirees' vested rights and whether any such impairment was reasonable and necessary. Thus, the trial court erred in summarily concluding as a matter of law on the record before it that the General Assembly violated the Retirees' state or federal constitutional rights. Accordingly, we affirm the Court of Appeals' decision to reverse the trial court's grant of partial summary judgment in favor of the Retirees, reverse the Court of Appeals' decision to remand this case for entry of summary judgment in favor of the State, and remand this matter to the trial court for further proceedings not inconsistent with this opinion, including our holding that the Retirees possess a vested right.

I. Background

A. Health insurance benefits for retired state employees.

¶ 7 In 1972, the State of North Carolina began offering all state employees and retirees the opportunity to enroll in a health insurance plan. Act of July 20, 1971, ch. 1009, 1971 N.C. Sess. Laws 1588. Initially, the State provided coverage via group insurance contracts it purchased on its employees' behalf. *Id.* § 1 at 1588. In 1982 the General Assembly altered this approach when it established a "Comprehensive Major Medical Plan" offered directly by the State. Act of June 23, 1982, ch. 1398, § 6, 1981

N.C. Sess. Laws (Reg. Sess. 1982) 288, 289-311 (Establishing Act). The Establishing Act codified the Major Medical Plan's terms of coverage and provided that members would be "eligible for coverage under the Plan[ ] on a noncontributory basis." *Id.* at 295. The plan was to be overseen by a Board of Trustees housed within the Office of State Budget and Management, *id.* at 298 (enacting N.C.G.S. § 135-39 (1982)), who were directed to contract with and supervise an outside entity selected by the State Budget Officer to serve as the Plan Administrator, *id.* at 290-91 (enacting N.C.G.S. §§ 135-39.4 to -39.5A (1982)). A few years later, the General Assembly enacted another statute providing that, going forward, retired employees would need to have been employed by the State for at least five years before becoming eligible to receive benefits under the Major Medical Plan. Act of Aug. 14, 1987, ch. 857, § 9, 1987 N.C. Sess. Laws 2098, 2101.

¶ 8 In 2005 the General Assembly enacted a law providing state employees and retirees with the option of enrolling in various PPO plans, while continuing to offer the option of enrolling in the Major Medical Plan. Act of Aug. 13, 2005, ch. 276 § 29.33(a), 2005 N.C. Sess. Laws 1003. The General Assembly also increased the eligibility requirements for new hires to participate in noncontributory retirement health insurance plans from five years of service to twenty years, although the change was only made applicable prospectively. S.L. 2006-174, § 1, 2005 N.C. Sess. Laws (Reg. Sess. 2006) 630, 630. Effective in 2008, the State discontinued the Major Medical Plan it had offered since 1982 and replaced it with a State Health Plan for Teachers and State Employees. Current Operations and Capital Improvements Appropriations Act of 2007, S.L. 2007-323, § 28.22A(a)-(b), 2007 N.C. Sess. Laws 616, 892. By this time, the State was also offering two premium-free PPO plans—the 80/20 PPO Plan[1] and a 70/30 PPO Plan.

¶ 9 In 2011, the General Assembly authorized the State Health Plan[2] to charge employees and retirees a monthly premium to enroll in the 80/20 PPO Plan. S.L. 2011-85, § 1.2(a), 2011 N.C. Sess. Laws 119, 120 (the 2011

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1. The Retirees refer to the Major Medical Plan as the "Regular State Health Plan" and contend that the premium-free 80/20 PPO Plan was its "continuation." Put another way, they argue that the State satisfied its obligation to offer a premium-free health insurance plan of equivalent value to the initial Major Medical Plan (or Regular State Health Plan) until the General Assembly eliminated the option of enrolling in the premium-free 80/20 PPO Plan.

2. The phrase "the State Health Plan" refers both to the package of health benefits offered to State employees and retirees and to the agency that manages those benefits. *See* N.C.G.S. § 135-48.1(14) (2021).

Act). The General Assembly did not eliminate the option for retirees to enroll in a noncontributory health insurance plan—the State continued to offer retirees the option of participating in the premium-free 70/30 PPO Plan. However, retirees who had previously been enrolled in the premium-free 80/20 PPO Plan were required to either pay a premium to remain in their same plan or choose a different premium-free plan containing different terms and, the Retirees assert, offering a less valuable benefit. *See id.*

B. Trial court proceedings.

¶ 10 In response to the 2011 Act, the Retirees filed suit on behalf of themselves and all other similarly situated former state employees against the State Health Plan for Teachers and State Employees, the Teachers' and State Employees' Retirement System and its trustees, the State Treasurer, and the State of North Carolina. They alleged claims for breach of contract, unconstitutional impairment of contracts in violation of the Contracts Clause, and unconstitutional violation of their rights to due process and equal protection under article I, section 19 of the North Carolina Constitution (the Law of the Land Clause). They sought (1) a writ of mandamus requiring the State to "reinstate and continue" the premium-free 80/20 PPO Plan for all class members, or a preliminary and permanent injunction requiring the same; (2) declaratory relief; and (3) the creation of a trust or common fund for the payment of damages. The State initially moved to dismiss the complaint on the basis of sovereign immunity. After the trial court denied that motion, the State appealed. The Court of Appeals affirmed, holding that the Retirees "sufficiently alleged a valid contract between them and the State in their complaint to waive the defense of sovereign immunity." *Lake v. State Health Plan for Tchrs. & State Emps.*, 234 N.C. App. 368, 375 (2014).

¶ 11 On remand, the trial court certified a class composed of:

> (1) All members (or their Estates or personal representatives if they have deceased since July 1, 2009) of the N.C. Teachers' and State Employees' Retirement System ("TSERS") who retired before January 1, 1988; (2) TSERS members (or their Estates or personal representatives if they have deceased since July 1, 2009) who retired on or after January 1, 1988, were hired before October 1, 2006 and have 5 or more years of contributory service with the State and (3) surviving spouses (or their Estates or personal representatives if they have deceased since July 1, 2009) of

> (i) deceased retired employees, provided the death of the former plan member occurred prior to October 1, 1986; and (ii) deceased teachers, State employees, and members of the General Assembly who are receiving a survivor's alternate benefit under any of the State-supported retirement programs, provided the death of the former plan member occurred prior to October 1, 1986

All class members were either former employees who had become eligible to enroll in a premium-free State health insurance plan upon retirement because they satisfied the eligibility requirements in existence when they were hired or those deceased employees' beneficiaries.[3] The parties proceeded to discovery.

¶ 12 On 14 September 2016, the Retirees filed a motion for partial summary judgment. They alleged that "[t]he [State's] own documents and testimony prove that they offered the Retiree Health Benefit as a lifetime contractual benefit 'earned' through a defined period of employment service." In support of their motion, the Retirees relied on depositions of class members as well as former State benefits counselors, the Executive Director and Deputy Director for the State Health Plan, the Director of the Fiscal Research Division of the North Carolina General Assembly and its pension analyst, the Deputy Director of Operations for the State Retirement System, actuaries for the State Health Plan, a representative of the health insurance plan administrator (Blue Cross Blue Shield of North Carolina), and the then-serving elected North Carolina State Treasurer. They also relied on statements in legislation governing the State Health Plan, press releases pertaining to the State Health Plan, training manuals used by customer service personnel to advise State employees and retirees, benefits handbooks provided to State employees and retirees, and presentations regarding the State Health Plan's fiscal outlook.

¶ 13 The undisputed evidence elicited from these sources and presented in support of the Retirees' summary judgment motion included descriptions of retirement health insurance coverage as a part of their "total package of compensation"; explanations that employees would become

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3. Notably, the class only includes retirees who would have satisfied the eligibility requirements for enrolling in the premium-free Major Medical Plan or subsequent 80/20 PPO Plan prior to the 2011 Act taking effect. This case only addresses changes applied retroactively to the health insurance options available to retirees already eligible to enroll in the plan the 2011 Act eliminated. The Retirees do not challenge the State's authority to change its employment benefit offerings prospectively.

eligible for "noncontributory (no cost to you)" health insurance coverage upon retirement and "for life" after working for the State for at least five years; statements that employees would be eligible for retiree health coverage "for life" when they "vested"; descriptions of the State's "liability" arising from its ongoing "obligation" to continue paying the premiums for retirees who had "already earned" the right to enroll in the State Health Plan on a noncontributory basis; and class members' own statements that they relied on the promise of lifetime enrollment in a premium-free health insurance plan when deciding to accept or continue in employment with the State.

¶ 14 In response, the State filed its own motion for summary judgment as to liability in which it argued that the evidence presented by the Retirees demonstrated that "[t]he State never undertook, nor was any state agency authorized, to offer Plaintiffs any such contracts. . . . that would lock-in any terms of the [State Health] Plan for fifty-plus years into the future." The State further contended that even if the Retirees had established the existence of some contractual right to remain enrolled in a health insurance plan of a particular value, the Retirees' assertion that the premium-free 70/30 PPO Plan was substantially less valuable than the premium-free 80/20 PPO Plan "fail[ed] to address the terms of a complete and enforceable contract for healthcare benefits," given that "[c]oinsurance is one of many healthcare terms and it accounts for only a fraction of healthcare costs."

¶ 15 On 19 May 2017, the trial court entered an Order Granting Plaintiffs' Motion for Partial Summary Judgment and Denying Defendants' Motion for Summary Judgment as to Liability. The trial court found as a factual matter that the State had promised its employees the benefit of enrolling in a plan at least as valuable as the premium-free 80/20 PPO Plan as part of their overall compensation package, that these employees relied on this promise, and that the promised benefit formed "a part of the contract between Class Members and the Defendants." Accordingly, the trial court determined that the Retirees' employment contracts with the State gave rise to "an entitlement to a non-contributory (premium-free) health plan equivalent to the 80/20 regular state health plan that had long been offered and provided to Class Members." The trial court further concluded that the 2011 Act eliminating the premium-free 80/20 PPO Plan "substantially impaired the[se] contracts" because the only noncontributory option thereafter available to the Retirees was the 70/30 PPO Plan. Finally, the court concluded that the State's action "was neither reasonable nor necessary to serve an important public purpose." As a result, the trial court concluded that the 2011 Act violated both the

federal Contracts Clause and the state Law of the Land Clause. The State again appealed.

C. The Court of Appeals' decision.

¶ 16 On appeal, the Court of Appeals unanimously reversed and remanded for the entry of summary judgment in favor of the State. *Lake v. State Health Plan for Tchrs. & State Emps.*, 264 N.C. App. 174 (2019).

¶ 17 The Court of Appeals began with the Retirees' claim that the 2011 Act violated the Contracts Clause, which provides in relevant part that "[n]o State shall . . . pass any . . . Law impairing the Obligation of Contracts." U.S. Const. art. I, § 10. According to the Court of Appeals, Contracts Clause claims are governed by a three-part test articulated by the United States Supreme Court in *United States Trust Co. of New York v. New Jersey* (*U.S. Trust*), 431 U.S. 1 (1977), and subsequently adopted by this Court. Under the *U.S. Trust* test, a court must "ascertain: (1) whether a contractual obligation is present, (2) whether the state's actions impaired that contract, and (3) whether the impairment was reasonable and necessary to serve an important public purpose." *Lake*, 264 N.C. App. at 179–80 (quoting *Bailey*, 348 N.C. at 141). The Court of Appeals concluded that the Retirees' claims failed the first prong of the *U.S. Trust* test: they could not demonstrate that the State had undertaken a "specific contractual financial obligation" to continue providing the 80/20 PPO Plan on a noncontributory basis. *Id.* at 189.

¶ 18 To determine if any contractual right existed, the Court of Appeals compared the Retirees' asserted right to health insurance coverage with the pension benefits this Court held protected by the Contracts Clause in *Bailey*. According to the Court of Appeals, pension benefits were granted the status of a constitutionally protected "vested contractual right because they were a form of 'deferred compensation.' " *Id.* at 181 (quoting *Bailey*, 348 N.C. at 141). By contrast, the "benefit" of being eligible to enroll in a particular health insurance plan was categorically different. Whereas pension benefits are funded through "mandatory" deductions "from the employee's paycheck" and are "calculated based upon the employee's salary and length of service," state employees "are not required to" contribute anything to become eligible to enroll in a premium-free health insurance plan. *Id.* at 182. Additionally, "the level of retirement health care benefits is not dependent upon an employee's position, retirement plan, salary, or length of service. All eligible participants, active and retired, have equal access to the same choices in health care plans." *Id.* Thus, health insurance benefits and pension benefits are "[n]ot [a]nalogous." *Id.* at 181.

¶ 19 The Court of Appeals next examined the statutes governing the State Health Plan to determine if the General Assembly had evinced an express intent to undertake a contractual obligation. The Court of Appeals noted that "[t]he statutes governing the State Health Plan do not refer to a 'contract' between the employees and the State," even though "[t]he term 'contract' *is* used in the statute to describe the relationship between the State Health Plan and its service providers." *Id.* at 185. Moreover, the Court of Appeals found it salient that the General Assembly had, on numerous occasions, exercised its statutorily reserved right to "alter" the State Health Plan by changing its terms, which the court concluded "support[s] a holding that the establishment and maintenance of the North Carolina State Health Plan is a legislative policy, which is 'expressly and, inherently subject to revision and repeal' by the General Assembly." *Id.* at 187 (quoting *Nat'l R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe Ry. Co.*, 470 U.S. 451, 466 (1985)). The Court of Appeals concluded that the Retirees had failed to overcome the "presumption" against construing statutes "to create contractual rights in the absence of an expression of unequivocal intent." *Id.* at 180–81.

¶ 20 The Court of Appeals also rejected the Retirees' effort to prove the State's intent to contract by looking to statements in "pamphlets, distributed by the State to its employees to explain the retirement benefits." *Id.* at 185. The Court of Appeals stated that this kind of extrinsic evidence was relevant only in cases involving "mandatory and contributory retirement benefits." *Id.* It reasoned that the General Assembly's "use of contractual language in the statute in reference to service providers indicates the General Assembly specified situations and knew when to use the word 'contract,' and it did not intend to form a contractual relationship between the State and its employees related to health care insurance benefits." *Id.* at 186.

¶ 21 Having concluded that the Retirees had failed to demonstrate the existence of any vested right in a premium-free 80/20 PPO Plan or its substantive equivalent, the Court of Appeals determined that the Retirees' Contracts Clause argument necessarily failed. *Id.* at 188. For the same reason, the Court of Appeals overruled the trial court's conclusion that the 2011 Act "violated Article I, section 19 of the Constitution [by] tak[ing] Plaintiffs' private property without just compensation. . . . Without a valid contract, Plaintiffs' state constitutional claims also fail." *Id.* (citing *Adams v. State*, 248 N.C. App. 463, 469–70 (2016), *disc. rev. denied*, 370 N.C. 80 (2017)). Accordingly, the court "reverse[d] the grant of partial summary judgment and remand[ed] for entry of summary judgment in favor of Defendants and dismissal of Plaintiffs' complaint." *Id.* at 189.

¶ 22 Plaintiffs filed a Petition for Discretionary Review and Writ of Certiorari on 9 April 2019. This Court allowed discretionary review in an order dated 26 February 2020.[4]

II. Standard of Review

¶ 23 "When the party bringing the cause of action moves for summary judgment, he must establish that all of the facts on all of the essential elements of his claim are in his favor. . . ." *Steel Creek Dev. Corp. v. James*, 300 N.C. 631, 637 (1980). The movant "must show that there are no genuine issues of fact; that there are no gaps in his proof; that no inferences inconsistent with his recovery arise from his evidence; and that there is no standard that must be applied to the facts by the jury." *Kidd v. Early*, 289 N.C. 343, 370 (1976). This Court reviews a grant of summary judgment de novo. *Charlotte-Mecklenburg Hosp. Auth. v. Talford*, 366 N.C. 43, 47 (2012). In undertaking de novo review, we consider the affidavits, depositions, exhibits, and other submissions of the parties to determine if the material facts are uncontested and whether there is a genuine issue for trial. *See, e.g.*, *Dobson v. Harris*, 352 N.C. 77, 83 (2000) (citing *Koontz v. City of Winston-Salem*, 280 N.C. 513, 518 (1972)).

¶ 24 In this case both parties moved for summary judgment on the merits. Nevertheless, as we explained in *Dobson*,

> [s]ummary judgment is properly granted when the forecast of evidence reveals no genuine issue as to any material fact, and when the moving party is entitled to a judgment as a matter of law. . . . The movant's papers are carefully scrutinized . . . those of the adverse party are indulgently regarded. All facts asserted by the adverse party are taken as true, and their inferences must be viewed in the light most favorable to that party.

352 N.C. at 83 (cleaned up). Thus, even though both parties in this case asserted that there were no disputes of material fact and that they were

4. By order dated 18 August 2021 this Court, mindful of the quorum requirement of N.C.G.S. § 7A-10(a), invoked the Rule of Necessity to decide this matter in light of the fact that a majority of the members of the Court have one or more persons within the third degree of kinship by blood or marriage not residing in their households who could be plaintiff class members. *See, e.g.*, *Boyce & Isley, PLLC v. Cooper*, 357 N.C. 655, 655–56 (2003) (invoking the Rule of Necessity to permit the making of a decision to grant or deny a petition for discretionary review in an important case by more than a bare quorum of the Court); *Long v. Watts*, 183 N.C. 99, 102–03 (1922) (determining that the Court must hear a case challenging the application of a statewide income tax to judicial salaries despite the potential effect of that case upon the members of the Court).

entitled to judgment as a matter of law, if our review of the evidence submitted at summary judgment reveals a genuine material factual dispute, we must remand to the trial court. *See Forbis v. Neal*, 361 N.C. 519, 530–31 (2007) (remanding after review of cross-motions for summary judgment).

III The Federal Contracts Clause Claim

¶ 25 The Court of Appeals correctly stated the legal framework applicable to claims arising under the Contracts Clause of the United States Constitution. As we have explained, when "determining whether a contractual right has been unconstitutionally impaired, we are guided by the three-part test set forth in *U.S. Trust Co. of N.Y. v. New Jersey*." *Bailey*, 348 N.C. at 140. This test requires us to "ascertain: (1) whether a contractual obligation is present, (2) whether the state's actions impaired that contract, and (3) whether the impairment was reasonable and necessary to serve an important public purpose." *Id.* at 141. An impairment only implicates the Contracts Clause if it is "substantial" as opposed to "[m]inimal." *Id.* at 151 (quoting *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 244–45 (1978)). We apply this familiar "tripartite test" in analyzing the Retirees' claim. *Simpson v. N.C. Local Gov't Emps.' Ret. Sys.*, 88 N.C. App. 216, 224 (1987), *aff'd per curiam*, 323 N.C. 362 (1988).

A. Relevant North Carolina precedents interpreting and applying the *U.S. Trust* test.

¶ 26 This Court has interpreted and applied the *U.S. Trust* test to determine whether state employees or retirees possessed a vested right to an employment benefit on numerous occasions. At its core, this case centers on the proper interpretation of four of those cases: *Simpson v. North Carolina Local Government Employees' Retirement System*, 88 N.C. App. 218 (1987), *aff'd per curiam*, 323 N.C. 362 (1988); *Faulkenbury v. Teachers' & State Employees' Retirement System of North Carolina*, 345 N.C. 683 (1997), *Bailey v. State*, 348 N.C. 130 (1998), and *North Carolina Association of Educators v. State*, 368 N.C. 777 (2016) (*NCAE*). According to the Retirees, these cases establish a universal framework for assessing when state employees obtain a vested right in any kind of employment benefit. According to the State, these cases explain why statutes providing *pension* benefits create vested rights; however, the State asserts that the reasons justifying this Court's treatment of pension benefits do not pertain to the kind of claimed health insurance benefits at issue here.

¶ 27 We agree with the Retirees, to an extent. Collectively, *Simpson*, *Faulkenbury*, *Bailey*, and *NCAE* establish that a state employee can

obtain a vested right in an employment benefit that is not a pension and that treatment of a benefit as a contractual right does not depend on how closely that benefit resembles a pension. These cases further illustrate that the State may assume a contractual obligation to provide a benefit even if the statute creating the benefit "did not itself create any vested contractual rights." *NCAE*, 368 N.C. at 789. Because many of the issues in this case were examined in these four prior cases, we begin with a brief review of these precedents.

1. Simpson v. Local Government Employees' Retirement System.

¶ 28 In *Simpson*, two firefighters who were vested members of the North Carolina Local Governmental Employees' Retirement System challenged a law modifying how disability retirement benefits were calculated. 88 N.C. App. at 219–21. As a result of the General Assembly's actions, the firefighters would "receive, upon disablement after vesting, a smaller retirement allowance under the modified statute than under prior law." *Id.* at 220. The firefighters claimed that the decrease "constitute[d] an impairment of contractual rights" in violation of the Contracts Clause of the United States Constitution. *Id.* at 221. The Court of Appeals agreed, and this Court affirmed per curiam.

¶ 29 According to the Court of Appeals, "the relationship between plaintiffs and the Retirement System is one of contract." *Id.* at 223. In support of this holding, the Court of Appeals identified two related but distinct justifications for characterizing the plaintiffs' disability benefits as vested contractual rights:

> If a pension is but deferred compensation, already in effect earned, merely transubstantiated over time into a retirement allowance, then an employee has contractual rights to it. *The agreement to defer the compensation is the contract. Fundamental fairness also dictates this result.* A public employee has a right to expect that the retirement rights bargained for in exchange for his loyalty and continued services, and continually promised him over many years, will not be removed or diminished.

Id. at 223–24 (emphasis added). The firefighters had vested rights in their pension benefits because (1) they earned the benefits as compensation while they were working and deferred receipt until retirement, and (2) the promise of disability retirement benefits allocated in a particular way was part of the bargain they struck with the State when they

entered into an employment contract. *Id.* Notably, the Court of Appeals pointedly rejected the State's argument that the General Assembly's inclusion of a "right-to-amend" clause in the statute providing benefits to the firefighters defeated the firefighters' claim.[5] *Id.* at 221.

¶ 30 Next, without analysis, the Court of Appeals concluded that the challenged law substantially impaired the firefighters' vested rights "inasmuch as plaintiffs stand to suffer significant reductions in their retirement allowances as a result of the legislative amendment under challenge." *Id.* at 225. But the Court of Appeals concluded that a "genuine issue[ ] [remained] as to a[ ] material fact in this action," namely, whether the State had demonstrated that the legislative changes to the retirement plan were "reasonable *and necessary* to serve an important state interest." *Id.* at 226. Accordingly, the Court of Appeals held that summary judgment for the State had been "improvidently entered" and remanded the case to the trial court for further proceedings. *Id.*

2. Faulkenbury v. Teachers' & State Employees' Retirement System of North Carolina.

¶ 31 In *Faulkenbury* we considered whether a statute "which reduced plaintiffs' disability retirement payments[ ] violates Article I, Section 10 of the Constitution of the United States." 345 N.C. at 690. Noting that the case was "almost on all fours with" *Simpson*, we affirmed "that the relation between the employees and the governmental units was contractual." *Id.* Because "[a]t the time the plaintiffs' rights to pensions became vested, the law provided that they would have disability retirement benefits calculated in a certain way," we concluded that "[t]hese were rights [the plaintiffs] had earned and that may not be taken from them by legislative action." *Id.*

¶ 32 After declining the defendants' invitation to overrule *Simpson*, we considered and rejected various arguments purporting to explain why the plaintiffs lacked a contractual right in disability benefits calculated in the manner provided at the time their benefits vested. We expressly rejected the argument that the plaintiffs' rights were not contractual because "the statutes upon which the plaintiffs rely . . . only state a policy which the General Assembly may change." *Id.* Instead, we concluded that these statutes "provided what the plaintiffs' compensation in the

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5. For reasons explained more fully below, given the fact that *Simpson* established that a statutory provision containing a right-to-amend clause could give rise to contractual benefits, it was not unreasonable for the Retirees to believe that the statutory provisions granting retirement health insurance coverage could give rise to contractual benefits notwithstanding the legislature's inclusion of a right-to-amend clause.

way of retirement benefits would be" at the time the plaintiffs "started working for the state." *Id.* Thus, when the plaintiffs accepted their offers of employment and subsequently vested in the retirement system, the statutes outlining disability benefits became part of their contracts. *Id.*

¶ 33 We reached this conclusion notwithstanding our recognition that "nothing in the statutes" indicated the General Assembly "intended to offer the benefits as a part of a contract." *Id.* at 691. Instead of restricting our analysis to the four corners of the statute, we considered how a reasonable person offered employment with the State would interpret what the benefits provided by the statute represented:

> [W]hen the General Assembly enacted laws which provided for certain benefits to those persons who were to be employed by the state and local governments and who fulfilled certain conditions, this could reasonably be considered by those persons as offers by the state or local government to guarantee the benefits if those persons fulfilled the conditions. When they did so, the contract was formed.

Id. We concluded it was reasonable for a prospective employee to believe the statutes providing retirement disability benefits were part of the compensation package promised, even though these statutes provided that the General Assembly "reserved the right to amend the retirement plans for state and local government employees." *Id.*

¶ 34 Regarding the second prong of the *U.S. Trust* test, we reasoned that even if other changes to the plaintiffs' overall retirement benefits meant they were "receiving more than any reasonable expectation they had for disability benefits," the plaintiffs were "entitled to what they bargained for when they accepted employment with the state and local governments. They should not be required to accept a reduction in benefits for other benefits they have received." *Id.* at 693. Regarding the third prong, we rejected the defendants' argument that the changes were "reasonable and necessary to accomplish [the] important public purpose" of discouraging employees from "tak[ing] early retirement." *Id.* at 693–94. Accordingly, we held that the statute changing how retirement benefits were calculated violated the Contracts Clause. *Id.* at 694.

3. Bailey v. State.

¶ 35 In *Bailey* a class of state and local government employees challenged a state law capping the amount of retirement benefits that were exempted from state taxation at $4,000. 348 N.C. at 139. Prior to the

law, all benefits paid out to retirees under any state or local retirement system were entirely tax-exempt. *Id.* Every member of the class had " 'vested' in the retirement system" before the law took effect, meaning they had met "the requirement that employees work a predetermined amount of time in public service before [becoming] eligible for retirement benefits." *Id.* at 138. Ultimately, we agreed with the plaintiffs that they had "a contractual right to an exemption of their benefits from state taxation that has been impaired by the Act." *Id.* at 139.

¶ 36 Once again, the defendants invited this Court to overrule *Simpson*. Once again, we declined. *Id.* at 142 ("[T]he contractual relationship approach taken by the Court of Appeals in *Simpson* and our subsequent decisions is the proper one."). Instead, we affirmed the underlying principle that North Carolina law has "long demonstrated a respect for the sanctity of private and public obligations from subsequent legislative infringement." *Id.* We explained that "[t]his respect for individual rights has manifested itself through the expansion of situations in which courts have held contractual relationships to exist, and in which they have held these contracts to have been impaired by subsequent state legislation." *Id.* at 143. We noted that this principle has been extended to cases protecting vested rights that were not created by statute. *Id.* at 144 (citing *Pritchard v. Elizabeth City*, 81 N.C. App. 543, *disc. rev. denied*, 318 N.C. 417 (1986)). Indeed, we explained that "[t]he basis of the contractual relationship determinations in these and related cases is the principle that where a party in entering an obligation *relies on the State*, he or she obtains vested rights that cannot be diminished by subsequent state action." *Id.* (emphasis added). The employees' "expectational interests upon which [they] have relied through their actions" in entering into and maintaining employment with the State were the source of the vested right "safeguarded by the Contract Clause protection." *Id.* at 144–45.

¶ 37 With respect to the first prong of the *U.S. Trust* test, we framed the question as "whether the tax exemption was a condition or term included in the retirement contract." *Id.* at 146. We found dispositive the trial court's finding of fact that "[a] reasonable person would have concluded from the totality of the circumstances and communications made to plaintiff class members that the tax exemption was a term of the retirement benefits offered in exchange for public service to state and local governments." *Id.* Moreover, we concluded that this finding was amply supported by the evidence produced at trial, including the

> creation of various statutory tax exemptions by the legislature, the location of those provisions alongside the other statutorily created benefit terms instead of

> within the general income tax code, the frequency of governmental contract making, communication of the exemption by governmental agents in both written and oral form, use of the exemption as inducement for employment, mandatory participation, reduction of periodic wages by contribution amount (evidencing compensation), loss of interest for those not vesting, establishment of a set time period for vesting, and the reliance of employees upon retirement compensation in exchange for their services.

Id. Based on this finding and the supporting evidence, we concluded that "in exchange for the inducement to and retention in employment, the State agreed to exempt from state taxation benefits derived from employees' retirement plans." *Id.* at 150. This was a sufficient basis for us to hold that "the right to benefits exempt from state taxation is a term of [every eligible State employee's] contract" with the State. *Id.*

¶ 38 After rejecting the defendants' arguments that other statutes and constitutional provisions forbade the State from entering into a contract to provide a tax exemption, we held that the plaintiffs had also satisfied the second and third prongs of the *U.S. Trust* test. With respect to the second prong, we concluded that the imposition of a $4,000 annual exemption cap—which would produce "losses to retirees in expected income . . . in excess of $100 million"—was a substantial impairment of the employees' contractual right to tax-exempt retirement benefits. *Id.* at 151. With respect to the third prong, we rejected the State's effort to justify the $4,000 cap as a "reasonable and necessary" means to equalize the tax treatment of state and federal retirement benefits, as was required under a recent United States Supreme Court decision. *Id.* at 152 (citing *Davis v. Mich. Dep't of Treasury*, 489 U.S. 803 (1989)). We held that the $4,000 cap "was not *necessary* to achieve the state interest asserted" because the State could have equalized the tax treatment of state and federal retirement benefits in "numerous ways . . . without impairing the contractual obligations of plaintiffs." *Id.* (emphasis added). We held that the impairment was "not *reasonable* under the circumstances" merely because the impairment would allow the General Assembly to comply with *Davis* by enacting "revenue neutral" legislation. *Id.* (emphasis added). Accordingly, we concluded that the law capping state retirement benefits tax exemptions for the plaintiffs violated the Contracts Clause of the United States Constitution and was an impermissible taking under the Law of the Land Clause of the North Carolina Constitution.

4. North Carolina Association of Educators v. State.

¶ 39 Finally, in *NCAE* a class of North Carolina public school teachers claimed that the General Assembly violated both the Contracts Clause and the Law of the Land Clause when it enacted a statute eliminating North Carolina's career status system, "creat[ing] a new system of employment," and "retroactively revok[ing] the career status of teachers who had already earned that designation." 368 N.C. at 779. Under the career status system, teachers who had been employed for a statutorily fixed number of years became eligible to enter into a "career teacher" contract with the teacher's local school board; having attained career status, the teacher would "no longer [be] subject to an annual appointment process and could only be dismissed for . . . grounds specified [by] statute." *Id.* (internal citation omitted). This Court concluded that the law eliminating career status was unconstitutional "to the extent that the Act retroactively applies to teachers who had attained career status as of" the date the change took effect. *Id.*

¶ 40 Once again, the Court turned to the three-prong *U.S. Trust* test. To determine if the State had undertaken a contractual obligation to maintain the career status system, the Court first considered "whether any contractual obligation arose from the statute making up the now-repealed Career Status Law." *Id.* at 786. Noting the "presumption" against construing state statutes to create private contractual or vested rights, *id.*, the Court concluded that the law itself was not the source of any such rights, *id.* at 788. In reaching this conclusion, the Court found it "critical" that the legislature had chosen not to use the word contract in the Career Status Law. *Id.* at 787.

¶ 41 Nonetheless, the Court explained that there were other ways to prove the existence of a vested right. The first was through a statute providing benefits in the form of deferred compensation. In these circumstances "vested contractual rights were created by the statutes at issue because, at the moment the plaintiffs fulfilled the conditions set out in the two benefits programs, the plaintiffs earned those benefits." *Id.* at 788. This scenario did not describe the statutes creating the career status system because teachers who met the eligibility requirements for becoming a career teacher did not automatically become a career teacher; rather, they needed to "enter a career contract with the school board." *Id.* Accordingly, the Court held that "the Career Status Law did not itself create any vested contractual rights." *Id.* at 789.

¶ 42 Yet the Court's analysis "d[id] not end here." *Id.* Instead, the Court explained that "[l]aws which subsist at the time and place of the making

of a contract . . . enter into and form a part of it, as if they were expressly referred to or incorporated in its terms." *Id.* at 789 (second alteration in original) (quoting *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 429–30 (1934)). When teachers entered into contracts with local school boards to become career teachers, the "statutory system that was in the background of the contract between the teacher and the board set out the mechanism through which the teachers could obtain career status." *Id.* After the teacher "complet[ed] several consecutive years as a probationary teacher and then receiv[ed] approval from the school board," the teacher's contractual right to career status protections "vested." *Id.* "At that point, the General Assembly no longer could take away that vested right retroactively in a way that would substantially impair it." *Id.* Thus, we concluded that "vesting stems not from the Career Status Law, but from the teacher's entry into an individual contract with the local school system." *Id.*

¶ 43 In support of this conclusion, the Court relied on evidence in the record indicating that the opportunity to attain career status was offered to teachers as part of the compensation package used to attract them to public sector employment and that teachers considered the benefit to be an important incentive to remain in their positions. *Id.* (stating that the record "demonstrates the importance of those protections to the parties and the teachers' reliance upon those benefits in deciding to take employment as a public school teacher"). Relying principally on affidavits submitted by the plaintiffs, the Court explained that public school teachers

> were promised career status protections in exchange for meeting the requirements of the law, relied on this promise in exchange for accepting their teacher positions and continuing their employment with their school districts, and consider the benefits and protections of career status to offset the low wages of public school teachers.

Id. at 789–90. Thus, "although the Career Status Law itself created no vested contractual rights, the contracts between the local school boards and teachers with approved career status included the Career Status Law as an implied term upon which teachers relied." *Id.* at 790.

¶ 44 The Court then examined the two remaining prongs of the *U.S. Trust* test. Because the law repealing career status eliminated protections that had previously been afforded to the teachers under the Career Status Law, the Court had no trouble concluding that repeal of the law effected

"a substantial impairment of the bargained-for benefit promised to the teachers who have already achieved career status." *Id.* Addressing the third prong—whether the impairment was "reasonable and necessary"—the Court explained that the burden shifted back to the State to "justify an otherwise unconstitutional impairment of contract" in light of "the interest the State argues is furthered." *Id.* at 791. Although the Court agreed with the State that "maintaining the quality of the public school system is an important purpose . . . [and] that alleviating difficulties in dismissing ineffective teachers might be a legitimate end justifying changes to the Career Status Law, no evidence indicates that such a problem existed." *Id.* Furthermore, the Court could not discern how retroactively repealing career status for all teachers who had already earned it was a "reasonable" way of advancing the State's asserted interest in light of "several alternatives . . . that would allow school boards more flexibility in dismissing low-quality teachers." *Id.* at 792. Accordingly, the Court held that the repeal of the Career Status Law was unconstitutional as applied to teachers who had entered into contracts with school boards which granted them career status protections. *Id.*

B. Whether a contractual obligation is present.

¶ 45 The facts regarding the language chosen by the General Assembly in the statutes creating the State Health Plan, and the language regarding the plan utilized by the State and its agents in communications with employees, retirees, and the public, are not in dispute. The sole question before us in resolving this issue is a legal one: the facts being what they are, do state employees have a vested right in lifetime enrollment in a premium-free health insurance plan offering coverage that is of equivalent or greater value than the plan offered at the time they became eligible to enroll in the State Health Plan on a noncontributory basis? We conclude that they do.

¶ 46 As our precedents illustrate, a state employee can prove the existence of a vested right in numerous ways. An employee can show that the statute conferring a benefit is itself the source of the right. Generally, proving that the statute is itself the source of a right requires an employee to point to language in the statute plainly evincing the General Assembly's intent to undertake a contractual obligation. Based on the uncontested facts, we agree with the State that the Establishing Act is not itself the source of the Retirees' contractual right. The Establishing Act declares that the State "undertakes to *make available* a Comprehensive Major Medical Plan . . . to employees, retired employees, and certain of their dependents," but it stipulates that the State "will pay benefits *in accordance with the terms hereof*." Act of June 23, 1982,

ch. 1398 § 6, 1981 N.C. Sess. Laws (Reg. Sess. 1982) at 292 (emphases added) (enacting N.C.G.S. § 135-40 (1982), repealed by S.L. 2008-168 § 3(b), 2007 N.C. Sess. Laws. (Reg. Sess. 2008) 649, 661)). In addition, the Establishing Act contains a "right-to-amend" clause which expressly reserves to the General Assembly the authority to change the "terms" of coverage. *Id.* Accordingly, the Establishing Act does not expressly indicate an intent to create a contractual obligation to provide health insurance coverage of a certain value.

¶ 47 But state employees can also prove the existence of a vested right by demonstrating that they reasonably relied upon the promise of benefits provided by a statute when entering into an employment contract with the State. *See, e.g.*, *Bailey*, 348 N.C. at 145. If a statute provides benefits in the form of immediate compensation deferred until retirement, then the employee's right to the benefit vests when the contract is formed. *Cf. NCAE*, 368 N.C. at 788 ("Though the benefits would be received at a later time, the plaintiffs' right to receive them accrued immediately, became vested, and a contract was formed between the plaintiffs and the State." (citing *Bailey* and *Faulkenbury*)). By contrast, if a statute provides benefits for which an employee only becomes eligible after certain conditions are met, then the employee's right to the benefit vests when he or she satisfies the relevant eligibility criteria. *Id.* at 788–89.

¶ 48 The Court of Appeals went awry in three important ways when interpreting and applying our Contracts Clause precedents. First, as detailed above, the Court of Appeals ignored our cases recognizing that vested rights can arise even in the absence of a statute demonstrating the General Assembly's express intent to undertake a contractual obligation. As *NCAE* illustrates, vested rights may arise from a source other than an express statutory provision even in circumstances involving benefits that are not pensions. Second, the Court of Appeals overstated the importance of the distinction between pension benefits and other kinds of retirement benefits. Although it is relevant that some of the factors which have led this Court to recognize pension benefits as vested rights are not present with regard to lifetime enrollment in a premium-free health insurance plan, these distinctions do not preclude a finding that public employees obtained a vested right to the latter.[6] Third, the Court

6. For example, it is correct that public employees are required to contribute to and enroll in the pension system but that they can opt out of health insurance coverage. Regardless, even if an employee does not choose to enroll in the State Health Plan, the availability of such a plan to an employee—and the employee's lifetime eligibility to become a plan member—confers a material benefit which could reasonably influence an individual's decision to accept or remain in employment with the State.

of Appeals was wrong to disregard the Retirees' extrinsic evidence regarding the State's communications about the health insurance benefit and what employees reasonably understood that benefit to be. On a different set of facts in which a statute providing benefits unambiguously disclaimed any intent to provide any benefits that could be incorporated into the terms of a contract,[7] the importance of the State's subsequent communications with employees might be diminished. But we are not presented with such a circumstance in this case.

¶ 49 Here, the undisputed evidence establishes that, as the trial court found, "[t]he [State] offered [the Retirees] certain premium-free health insurance benefits in their retirement if they worked for the State . . . for a requisite period of time" and that the "promise" of this benefit was "part of the overall compensation package" state employees reasonably expected to receive in return for their services. The undisputed evidence

> reveals that often the [benefit of lifetime eligibility for premium-free health insurance] was communicated to prospective employees with the intent of inducing individuals to either begin or continue public service employment. Moreover, . . . innumerable communications were made to plaintiff public employees throughout their careers, both orally and in writing (including multiple unequivocal written statements in official publications and employee handbooks) [regarding the availability of the benefit]. . . .

Bailey, 348 N.C. at 138. The undisputed evidence demonstrates that this benefit was an important component of state employees' acceptance of and continuation in employment with the State. *NCAE*, 368 N.C. at 789. These undisputed facts are sufficient to establish the legal proposition

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7. Notably, the General Assembly has enacted statutes containing right-to-amend provisions which explicitly and unmistakably stated that any benefits provided by statute would not be contractual in nature. *See* N.C.G.S. § 135-113 (2021) ("The benefits provided in this Article as applicable to a participant who is not a beneficiary under the provisions of this Article *shall not be considered as a part of an employment contract, either written or implied*, and the General Assembly reserves the right at any time and from time to time to modify, amend in whole or in part or repeal the provisions of this Article."); *see also* N.C.G.S. § 128-38.10(j) (2021) ("The General Assembly reserves the right at any time and, from time to time, to modify or amend, in whole or in part, any or all of the provisions of the QEBA. No member of the Retirement System and no beneficiary of such a member shall be deemed to have acquired any vested right to a supplemental payment under this section."). The fact that the legislature chose *not* to include this kind of explicit clause in the right-to-amend provision at issue here is further support for the conclusion that the Retirees reasonably relied on the State's promise of retirement health insurance coverage.

that a vested right arose from employees' reasonable "expectational interests" and their actions in reliance thereon. *Bailey*, 348 N.C. at 145.

¶ 50 For example, multiple class members testified to the impact the promise of retirement health insurance coverage had on their decision to accept employment with and continue working for the State. As we explained in *NCAE*, such evidence can "demonstrate[ ] the importance of those protections to the parties and the [employees'] reliance upon those benefits in deciding to take [public] employment." 368 N.C. at 789. The State does not meaningfully dispute the fact that class members understood the promise of eligibility to enroll in health care after retirement to be a benefit they earned through their service to the State—indeed, multiple of the defendants or their agents agreed in deposition testimony that they understood themselves to have "*vested* in the retiree health benefit." This undisputed evidence establishes that the promise of health insurance coverage in retirement was "an implied term upon which [the employees] relied." *Id.* at 790.

¶ 51 Of course, one party's reliance does not give rise to a contractual obligation if their reliance is unreasonable. But, in this case, undisputed evidence illustrates that all parties understood the State to have undertaken an obligation to provide continued premium-free health insurance coverage to retirees who had satisfied the statutory eligibility requirements.[8] While this evidence does not prove that the General Assembly acted with an express intent to contract, it demonstrates the reasonableness of the Retirees' belief that lifetime eligibility for enrollment in a premium-free health insurance plan was an inducement to employment and a part of their overall compensation package.

¶ 52 The short title of the final version of the 2006 bill requiring retired employees to have worked for the State for at least twenty years before becoming eligible for noncontributory retirement health insurance benefits was "State Health Plan / 20-Year *Vesting*." S.837 (3d ed.), S.L.

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8. Although the question of whether a party's reliance is reasonable "is ordinarily a question of fact," *Olivetti Corp. v. Ames Bus. Sys., Inc.*, 319 N.C. 534, 544 (1987), the question of whether there exists a "*genuine* issue of material fact" with respect to the reasonableness of a party's reliance is a "question[ ] of law," *Ellis v. Williams*, 319 N.C. 413, 415 (1987) (emphasis added). Thus, we have on numerous prior occasions recognized that the question of whether a party's reliance has been "established as a matter of law" to be reasonable can be resolved on a party's appeal from a summary judgment order when the underlying material facts are undisputed. *Cummings v. Carroll*, 866 S.E.2d 675, 2021-NCSC-147, ¶ 38; *see also Ussery v. Branch Banking & Tr. Co.*, 368 N.C. 325, 336 (2015) (concluding on review of summary judgment order that debtor "cannot . . . claim he reasonably relied on" creditor's representation, and citing Court of Appeals decision for proposition that a party's reliance can be "unreasonable as a matter of law").

2006-174, § 1, 2005 N.C. Sess. Laws (Reg. Sess. 2006) at 630 (emphasis added). An actuarial study commissioned by the General Assembly to analyze the fiscal impact of changing the service requirement stated that "current non-contributory premiums paid on behalf of current retirees . . . *will continue to be a State obligation for some time until these retirees exit the Plan*." Staff of N.C. Gen. Assembly Fiscal Rsch. Div., *Legislative Actuarial Note on S. 837 (2d ed.): State Health Plan / 20-Year Vesting*, 2005 Sess. (Reg. Sess. 2006) (June 30, 2006) at 3 (emphasis added). The fiscal note further explained that the bill increasing the minimum number of years of service "*requires its application to be prospective*" and reiterated that the State would still have an "obligation" to pay the premiums of retirees and current employees who had already vested. *Id.* (emphasis added). This legislative history, including the General Assembly's frequent use of the terms "vested" and "obligation" in reference to its future payment of retirees' health insurance premiums, is further support for the proposition that the Retirees have demonstrated that they and the State shared a common understanding of what this benefit represented.

¶ 53 Indeed, on numerous occasions, State officials and agents involved in administering retirement benefits told State employees they could rely on the promise of health insurance coverage in retirement. In press releases, benefits booklets, and training materials, the State conveyed to its employees that after completing the applicable service eligibility requirements they would be entitled to health insurance coverage "for life." Customer service personnel were instructed that "[i]n order for the retiree to have paid health insurance, he [or she] must have 5 years of contributing membership in the State System, and be in receipt of a monthly retirement benefit with the State. . . . With growing concern about health insurance in our society today, this is an important piece of information that the member should know if he [or she] is vested . . . ." Again, the State does not dispute the existence of these materials or the words they contained. As this evidence makes clear, the State believed it had undertaken an ongoing commitment to provide health insurance benefits to retired employees who had satisfied eligibility requirements and, frequently and in numerous ways, communicated that fact to its employees; it is not unreasonable for these employees to have taken the State at its word.

¶ 54 For years, employees entering into public employment "relie[d] on" the State's promise of future health insurance benefits. *Bailey*, 348 N.C. at 144. Prior cases recognizing that this kind of reliance gives rise to vested rights are, like this case, "rooted in the protection of

expectational interests upon which individuals have relied through their actions." *Id.* at 145. "The statutory system that was in the background of the contract between" the Retirees and the State "set out the mechanism through which the [employees] could obtain" the health insurance benefit. *NCAE*, 368 N.C. at 789. Once state employees met the applicable statutory eligibility requirements and became eligible to enroll in a noncontributory health insurance plan, their right vested to enroll in a plan offering equivalent or greater value to the one offered to them at the time the contract was formed. Accordingly, we overrule the Court of Appeals' determination that the Retirees had failed to prove the existence of a vested right subject to protection by the Contracts Clause.

C. Whether the contract was substantially impaired.

¶ 55 The trial court's sole legal conclusion addressing the second prong of the *U.S. Trust* test was its determination that "[t]he [State] substantially impaired the contracts with the [Retirees]." The Court of Appeals did not reach this prong because it held that the Retirees possessed no vested right to health insurance benefits upon retirement which the State could unconstitutionally impair. Regardless, in reviewing the trial court's order resolving the parties' competing motions for summary judgment, we review de novo the trial court's findings of fact and conclusions of law addressing this issue. *Forbis*, 361 N.C. at 523–24.

¶ 56 At the outset, we reject the State's argument that the existence of the right-to-amend provision in the Establishing Act automatically negates the Retirees' argument that the 2011 Act substantially impaired their vested rights. This argument suggests that because the General Assembly reserved the right to make (and regularly has made) changes to the terms of the health insurance plans available to retirees, any such changes are necessarily consistent with the Retirees' "objectively reasonable reliance interests." The absurdity of this argument is apparent if taken to its logical conclusion. Under the State's reasoning, the General Assembly would not substantially impair the Retirees' vested rights as long as the legislature continued offering a premium-free 80/20 PPO Plan, even if the State imposed a $1 million copay for covered services or a similarly exorbitant deductible. Yet obviously, under these circumstances the Retirees would rightly perceive that they were being denied the benefit of their bargain. Their vested right is more than just the right to enroll in *a* health insurance plan: this right has a substantive component relating to the value of the plans being offered by the State.

¶ 57 Nonetheless, recognizing that the Retirees' vested rights have a substantive component does not resolve whether those rights were substantially impaired. To answer that question, the Retirees needed to

(1) demonstrate a method for objectively determining the value of a health insurance plan, one that accounted for the numerous variables influencing the "value" of a health insurance plan to a plan member; (2) establish the baseline value of the health insurance plan offered to each Retiree when his or her right to retirement health insurance benefits vested; and (3) show that the plans currently offered by the State are substantially less valuable than those baseline plans. We agree with the State that the trial court erred in resolving these issues on summary judgment.

¶ 58 The trial court entered three findings of fact of particular relevance to its conclusion that the 2011 Act substantially impaired the Retirees' vested rights:

> 27. The currently offered 80/20 "Enhanced" Plan (formerly called the standard plan) [i.e., the 80/20 PPO Plan] was the continuation of the primary "regular state health plan" [i.e., the Major Medical Plan] that had been offered premium-free from 1982 until August 31, 2011.
>
> . . . .
>
> 29. The most appropriate way to measure the value of a health plan received by a member of that plan and to compare the value between offered plans is through the calculation and use of a plan's actuarial value. Through the use of actuarial values, it can be determined whether a given plan is equivalent to another plan or not – the effective actuarial equivalency (hereinafter such calculation methodology referred to as "Equivalent").
>
> . . . .
>
> 31. The health plan(s) offered by the State Health Plan at the 70/30 level and referred to by the State Health Plan as the "Basic" and "Traditional" Plans from 2011-2016 is of a lesser value than the 80/20 Standard Plan and was not and is not Equivalent to the 80/20 Standard Plan.

Contrary to the trial court's characterization of these findings as "[u]ndisputed," each was and remains vigorously contested. The State disagrees that the 80/20 PPO Plan is the continuation of the Major Medical Plan, disputes the validity of the "actuarial equivalency" method for determining the relative value of different health insurance plans,

and asserts that "the State has always offered plaintiffs a health plan with an actuarial value" "that mirrors the Major Medical Plan." There is evidence in the record to support both parties' positions on each of these determinative issues.

¶ 59 The "facts alleged" by the State "are of such nature as to affect the result of the action," and "question[s] as to . . . the weight of evidence" have been brought forth by the parties. *Kessing v. Nat'l Mortg. Corp.*, 278 N.C. 523, 535 (1971). For example, the State argued at summary judgment that the evidence showed that "over 75% of retirees who are enrolled in the State Health Plan are eligible for Medicare" and that for those individuals, the cost difference between the 70/30 and 80/20 PPO Plans is just "slightly over $3 per month." Thus, the State contends that even after 2011 the Retirees could remain in a premium-free health insurance plan providing essentially the same or greater value as the plan offered to them when their rights vested. The State also presented evidence disputing the Retirees' assertion that a sizeable portion of the class was paying premiums as high as $100 per month to maintain their coverage.

¶ 60 At the same time, the Retirees have offered evidence that supports the conclusion that their rights were substantially impaired, including that the plans currently offered cost members, on average, an additional $400 per year, and that the total impairment to the Retirees' contractual rights may exceed $100 million in back premiums. Thus, there are "genuine issues [of] . . . material fact" with respect to the second prong of the *U.S. Trust* test, and these issues are "triable." *N.C Nat'l Bank v. Gillespie*, 291 N.C. 303, 310 (1976). Although some of the material evidence is undisputed, the parties do not agree on the central questions of how to value health insurance plans and whether the health insurance plans offered to retirees after the effective date of the 2011 Act are comparable to or of substantially lesser value than the plans they bargained for. Accordingly, "summary judgment was improperly granted." *N.C. Farm Bureau Mut. Ins. Co. v. Sadler*, 365 N.C. 178, 182 (2011).

¶ 61 Moreover, we note that even if the trial court's findings had been undisputed, the findings would be inadequate to support the conclusion that there was a substantial impairment. The trial court largely based its conclusion that the State substantially impaired class members' contracts on its finding that "[t]he health plan[s] offered by the State Health Plan at the 70/30 level . . . is of a lesser value than the 80/20 Standard Plan and was not and is not Equivalent to the 80/20 Standard Plan." But, in addition to finding that the value of a vested right has been diminished, the trial court also needed to determine the magnitude of the decline in

value in order to ascertain whether any impairment was "substantial." As we explained in *Bailey*, "[w]hen examining whether a contract has been unconstitutionally impaired, the 'inquiry must be whether the state law has, in fact, operated as a substantial impairment of a contractual relationship. . . . Minimal alteration of contractual obligations may end the inquiry at [this] stage.' " *Bailey*, 348 N.C. at 151 (alterations in original) (quoting *Allied Structural Steel Co.*, 438 U.S. at 244–45 (footnote omitted)).[9] Given the complexities inherent in determining the comparative value of different health insurance plans, it was not self-evident that eliminating the premium-free 80/20 PPO Plan while maintaining the premium-free 70/30 PPO Plan worked a substantial impairment.

¶ 62 Further, the parties agreed to defer consideration of the extent of damages, but that evidence may be relevant to whether the contractual impairment was substantial. Different class members vested at different times, and the terms of the Major Medical Plan and the PPO plans the State began offering later have changed over time. These evolutions matter in the Contracts Clause analysis—the terms of the plan offered when each class member vested establish the baseline value of what each individual bargained for. Yet the trial court's findings do not address these nuances, and the evidence at summary judgment indicates that the value of the benefits the Retirees could expect at the time they vested remains hotly contested. It may be that the Retirees can obviate the need to engage with these complexities by proving that all of the noncontributory plans offered to class members who vested before 2011 were more valuable than any of the noncontributory plans offered to class members today—or, vice versa, that the State can prevail by proving that the value of a noncontributory plan offered to every class member today is equivalent to or more generous than the most valuable noncontributory plan available to all class members when they vested. But neither side has met its burden of doing so on summary judgment. This information is actually disputed and is crucial to measuring whether there was an impairment and, if so, whether the impairment was substantial.

¶ 63 The trial court's determination that there was a substantial impairment of the Retirees' contracts was based on an overly simplified characterization of what the Retirees were entitled to when they vested and what they were receiving after the 2011 Act took effect. The trial

9. In assessing whether an impairment is minimal or substantial, courts may consider the "overall impact" of the impairment when measured in the aggregate provided they do so in the context of the size of the class. *Bailey v. State*, 348 N.C. 130 (1998). For example, the $100 million impairment at issue in *Bailey* would likely not have established the existence of a "substantial" impairment if the class had been comprised of one hundred million people.

court's order masks important disputes of material fact that must be resolved before a decision on liability can be made. In *Simpson* this Court held that the plaintiffs "had a contractual right to rely on the terms of the retirement plan as these terms existed at the moment their retirement rights became vested." 88 N.C. App. at 224. In *Faulkenbury*, we explained further that the plaintiffs "expected to receive what they were promised at the time of vesting. They may not have known the exact amount, but this was their expectation. The contract was substantially impaired when the promised amount was taken from them." 345 N.C. at 692–93. Therefore, the crucial factual matters relevant to this issue are the value of the plan in which the Retirees were vested and the value of what was offered to them after the 2011 Act took effect. While it is understandable that the parties and the trial court were not eager to wrestle with the factually complex assessment of which class members suffered what damages, in this case that assessment of damages may be crucial to determining whether, in fact, the impairment of the state employees' contract was substantial and thus constitutionally salient.

D. Whether the impairment was reasonable and necessary.

¶ 64 If the trial court determines that the 2011 Act substantially impaired the Retirees' contractual rights, the final question is whether the impairment was "a reasonable and necessary means of serving a legitimate public purpose." *NCAE*, 368 N.C. at 791. "This portion of the inquiry involves a two-step process, first identifying the actual harm the state seeks to cure, then considering whether the remedial measure adopted by the state is both a reasonable and necessary means of addressing that purpose." *Id.* (citing *Energy Rsrvs. Grp. v. Kan. Power & Light Co.*, 459 U.S. 400, 412 (1983)). At this stage of the analysis, "[t]he burden is upon the State . . . to justify an otherwise unconstitutional impairment of contract." *Id.* (citing *U.S. Trust*, 431 U.S. at 31).

¶ 65 In its order granting the Retirees' partial motion for summary judgment, the trial court found that the State's impairment "was neither reasonable nor necessary to serve an important public purpose." However, underlying this determination are genuine disputes about material facts which require further development at trial. In particular, should it need to reach this question on remand, the trial court must closely examine the State's asserted interest in avoiding an "estimated thirty-five billion dollars in unfunded future outlays" and the Retirees' rejoinder that "there were a multitude of methods to stabilize the State Health Plan without impairing vested rights."

¶ 66 Although answering this question primarily requires resolving disputed issues of fact, certain applicable legal principles can be discerned

from our case law. First, the existence of the problem the State asserts it seeks to address by impairing a contract cannot be assumed. Instead, the State must present "evidence [which] indicates that such a problem existed." *Id.* Second, the State's interest in not expending resources is not, standing alone, sufficient to render an impairment reasonable. Many contracts commit a party to expending resources in the future, even if the party would prefer not to when the time comes to pay; the party's obligation to do so anyway makes it a contract. The fact that disallowing an impairment might require the General Assembly to make difficult choices regarding how to allocate resources to best manage its fiscal obligations does not necessarily justify abrogating the legislature's contractual obligations. *Bailey*, 348 N.C. at 152. Similarly, the fact that certain trends have caused an increase in the State's cost of maintaining the promised benefits does not, on its own, justify an impairment. *See Faulkenbury*, 345 N.C. at 694 ("We do not believe that because the pension plan has developed in some ways that were not anticipated when the contract was made, the state or local government is justified in abrogating it."). Finally, the State "is not free to impose a drastic impairment when an evident and more moderate course would serve its purposes equally well." *U.S. Trust*, 431 U.S. at 31. The existence of "alternative[ ]" methods of advancing the State's asserted interest other than imposing an impairment tends to detract from the State's contention that the impairment is necessary. *NCAE*, 368 N.C. at 792. At the same time, we recognize that "the [e]conomic interest of the state may justify . . . interference with contracts," *Home Bldg. & Loan Ass'n*, 290 U.S. at 437, and that the State always retains the authority to act to protect the public should it be faced with a grievous fiscal emergency. On remand, these principles should guide the trial court's effort to ascertain whether any impairment of the Retirees' rights, if proved, was "reasonable and necessary" and thus permissible under the Contracts Clause.

IV. The State Law of the Land Clause Claim

¶ 67 In addition to their Contracts Clause claim, the Retirees also alleged that the 2011 Act constituted an impermissible taking of private property in violation of article I, section 19 of the North Carolina Constitution. The trial court agreed, concluding that "[i]mposing premiums on the 80/20 Standard Plan . . . constituted a 'taking' under state law of Class Members' private property by restricting and/or eliminating Class Members' contractual right to the non-contributory 80/20 Standard plan and reducing a vested retirement benefit." The Court of Appeals reversed based on its conclusion that the Retirees had failed to demonstrate the existence of any rights implicated by the 2011 Act. *Lake*, 264 N.C. App. at 188.

¶ 68 The Law of the Land Clause of the North Carolina Constitution guarantees in relevant part that "[n]o person shall be . . . in any manner deprived of his . . . property, but by the law of the land." N.C. Const. art. I, § 19. As the Court of Appeals correctly explained, "[a] contractual right is a property right, and the impairment of a valid contract is an impermissible taking of property." *Lake*, 264 N.C. App. at 188; *see also Bailey*, 348 N.C. at 154 ("[V]alid contracts are property . . . ." (quoting *Lynch v. United States*, 292 U.S. 571, 579 (1934))). Thus, in holding that the Retirees do have a vested right in retirement health insurance coverage, we necessarily overrule the Court of Appeals' conclusion that the Retirees lack a colorable state constitutional claim. Of course, even if there is a property right, there can be no constitutionally impermissible taking if there is no taking. *Cf. Dep't of Transp. v. Adams Outdoor Advert. of Charlotte Ltd. P'ship*, 370 N.C. 101, 106 (2017) ("When the State *takes* private property . . . the owner must be justly compensated.") (cleaned up) (emphasis added). Accordingly, on remand, the trial court must reassess the Retirees' Law of the Land Clause claim in light of its resolution of the parties' dispute regarding the value of the noncontributory plans offered by the State to Retirees at various times.

V. Conclusion

¶ 69 This case raises significant questions relating to the State's efforts over the years to attract and retain talented employees while responsibly managing its fiscal obligations. This dispute also raises issues of profound importance to the hundreds of thousands of dedicated public employees who devoted their lives to serving their fellow North Carolinians, often for less immediate remuneration than would have been available to them in the private sector. Although our decision in this case does not end this controversy, it narrows the issues and, hopefully, moves the parties closer to a just resolution.

¶ 70 Today we hold that the Retirees who satisfied the eligibility requirements existing at the time they were hired obtained a vested right in remaining eligible to enroll in a noncontributory health insurance plan for life. These Retirees reasonably relied on the promise of this benefit in choosing to accept employment with the State. They are entitled to the benefit of their bargain, which includes eligibility to enroll in a premium-free plan offering the same or greater coverage value as the one available to them when their rights vested. Nevertheless, we also hold that the trial court erred in concluding that the Retirees brought forth undisputed facts demonstrating that their vested rights were substantially impaired when the General Assembly eliminated the premium-free 80/20 PPO Plan in 2011. In particular, the trial court overlooked genuine

issues of material fact regarding the proper way to assess the relative value of different health insurance plans and potential differences in the value of the bargain struck by class members whose rights vested at different times. The trial court also erred in entering summary judgment against the State on the issue of whether any such impairment was reasonable and necessary.

¶ 71 Accordingly, we overrule the portion of the Court of Appeals decision holding that the Retirees lacked any right which triggered the protections of the Contracts Clause of the United States Constitution and the Law of the Land Clause of the North Carolina Constitution. We affirm the decision of the Court Appeals to the extent it reversed the trial court's grant of partial summary judgment in the Retirees' favor, reverse that court's decision with respect to its conclusion that the State was entitled to summary judgment on liability, and remand this action to the trial court for proceedings not inconsistent with this opinion.

AFFIRMED IN PART; REVERSED IN PART AND REMANDED.

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

Justice BARRINGER concurring in part and dissenting in part.

¶ 72 I agree with the majority that we must remand this case for factual determinations on whether the State substantially impaired a contract and whether such impairment was reasonable and necessary. However, because the evidence in the record, when viewed in the light most favorable to the State, creates a genuine issue of material fact as to whether any contractual obligation is present, we should also remand that issue to the trial court for resolution by the fact-finder. Accordingly, I respectfully concur in part and dissent in part.

Analysis

¶ 73 In determining whether the State has unconstitutionally impaired a contract, North Carolina courts follow a three-part test involving "(1) whether a contractual obligation is present, (2) whether the state's actions impaired that contract, and (3) whether the impairment was reasonable and necessary to serve an important public purpose." *Bailey v. State*, 348 N.C. 130, 141 (1998). The trial court granted summary judgment in plaintiffs' favor on all three of these inquiries. The Court of Appeals reversed the trial court's grant of summary judgment, ruling in the State's favor on the first inquiry that no contractual obligation

was present. *Lake v. State Health Plan for Tchrs. & State Emps.*, 264 N.C. App. 174, 188 (2019). Based on the evidence the parties have put forward, I cannot conclude that either court properly resolved, at the summary judgment stage, the issue of whether a contractual obligation was present.

A. Standard of Review

¶ 74 When there is a motion for summary judgment pursuant to Rule 56, the court may consider evidence consisting of admissions in the pleadings, depositions, answers to interrogatories, affidavits, admissions on file, oral testimony, and documentary materials. . . . The motion shall be allowed and judgment entered when such evidence reveals no genuine issue as to any material fact, and when the moving party is entitled to a judgment as a matter of law.

> An issue is material if the facts alleged would constitute a legal defense, or would affect the result of the action, or if its resolution would prevent the party against whom it is resolved from prevailing in the action. The issue is denominated "genuine" if it may be maintained by substantial evidence.
>
> Summary judgment provides a drastic remedy and should be cautiously used so that no one will be deprived of a trial on a genuine, disputed issue of fact. The moving party has the burden of clearly establishing the lack of triable issue, and his papers are carefully scrutinized and those of the opposing party are indulgently regarded.

Koontz v. City of Winston-Salem, 280 N.C. 513, 518 (1972); *see also* N.C. R. Civ. P. 56(c).

¶ 75 "This Court reviews appeals from summary judgment de novo." *Ussery v. Branch Banking & Tr. Co.*, 368 N.C. 325, 334–35 (2015). "When considering a motion for summary judgment, the trial judge must view the presented evidence in a light most favorable to the nonmoving party." *Dalton v. Camp*, 353 N.C. 647, 651 (2001). "[I]f a review of the record leads the appellate court to conclude that the trial judge was resolving material issues of fact rather than deciding whether they existed, the entry of summary judgment is held erroneous." *Alford v. Shaw*, 327 N.C. 526, 539 (1990).

B. Whether a contractual obligation is present

¶ 76 I agree with the majority that the statute does not expressly indicate an intent to create a contractual obligation. Yet, under our past precedent, plaintiffs can still establish that a contractual obligation is present if plaintiffs demonstrate that they reasonably relied upon the promise of retirement benefits provided by statute in entering into or continuing employment with the State. *Bailey*, 348 N.C. at 145. However, plaintiffs' reliance must have been reasonable, and reasonableness is a question of fact. *Id.* at 146; *see also Olivetti Corp. v. Ames Bus. Sys., Inc.*, 319 N.C. 534, 544 (1987) ("Ordinarily, the question of whether an actor is reasonable in relying on the representations of another is a matter for the finder of fact.").

¶ 77 As evidence of the reasonableness of their reliance, plaintiffs primarily point to booklets distributed by the North Carolina Retirement System. However, multiple booklets contained explicit disclaimers, in boldface type, on the first page that stated:

> DISCLAIMER: The availability and amount of all benefits you might be eligible to receive is governed by Retirement System law. The information provided in this handbook cannot alter, modify or otherwise change the controlling Retirement System law or other governing legal documents in any way, *nor can any right accrue to you by reason of any information provided or omission of information provided herein.* In the event of a conflict between this information and Retirement System law, Retirement System law governs.

(Emphasis added.) Recent booklets, like the one dated 2009, described themselves as "summariz[ing] the benefits available to [employees] as a member of the retirement system, including: [b]enefits [employees] will receive at retirement once [they] meet the service and age requirements . . . .]" The 2009 booklet further explained that a public employee in North Carolina was part of a "defined benefit plan," meaning that when a public employee retired the employee's "life long benefits [we] re guaranteed and protected by the Constitution of the State of North Carolina." The booklets also indicated that after satisfying certain criteria an employee became "vested in the Retirement System," making that employee "eligible to apply to lifetime monthly retirement benefits." This emphatic language, however, was referring to Retirement System benefits in general, as opposed to the State Health Plan.

¶ 78 When discussing the State Health Plan for retirees, the booklets used different language. The booklets stated only that employees "*may* also be eligible for retiree health coverage as described on page 20." (Emphasis added.) On page 20, the booklets stated:

> When you retire, you are eligible to enroll in the State Health Plan, with the costs determined by when you began employment and which health coverage you select, if you contributed to the Teachers' and State Employees' Retirement System for at least five years . . . while employed as a teacher or State employee.
>
> At the time you complete your retirement application, be sure to complete an application to enroll in the retiree group of the State Health Plan.
>
> Under current law, if you were first hired prior to October 1, 2006, and retire with five or more years of State System membership service, the State will pay either all or most of the cost, depending on the plan chosen, for your individual coverage under one of the Preferred Provider Organization (PPO) plans. . . .

(Emphasis omitted.) Accordingly, the description of benefits was expressly recognized as conditional and further conditioned as representing the state of health benefits as they existed "[u]nder current law." In addition, the booklets described pensions as "continu[ing] for the rest of [one's] life" and "vested" but did not use the same language to describe health benefits.

¶ 79 Similarly, in older booklets, the language used to describe retirement benefits was not the same as the language used to describe retiree health insurance. The 1988 retirement booklet did not mention the State Health Plan until the very last section, labeled "Remember," which also discussed programs like Social Security and Medicare. Specifically, the booklet stated, "When you retire, if you have at least 5 years of service as a contributing teacher or State employee, you are eligible for coverage under the State's Comprehensive Major Medical Plan with the State contributing toward the cost of your coverage." (Emphasis omitted.)

¶ 80 Furthermore, the booklets distributed by the State Health Plan to employees explicitly stated on the first or second page that "[t]he North Carolina General Assembly determines benefits for the State Health Plan and has the authority to change benefits." The 1983 booklet warned that "[s]ince the Plan was established by law, benefits and policies can

be changed only through new legislation." The 1986 booklet cautioned that "the level of benefits and claims service have varied from time to time" and that "[g]iven the continued rise in health care costs and utilization (some 12% to 14% a year in this plan alone!) further benefit changes may be necessary." The 2004 booklet included a boldface type section which stated that the "Benefits for the North Carolina Teachers' and State Employees' Comprehensive Major Medical Plan are based upon legislation enacted by the North Carolina General Assembly." Finally, the booklets repeatedly noted that "[i]f any information in [the booklets] conflict[ed] with . . . the General Statutes . . . the General Statutes . . . w[ould] prevail."

¶ 81 As for the General Statutes, one section contains language noting that the State "undertakes to make available a State Health Plan . . . for the benefit of . . . eligible retired employees," but that statement is modified in the same sentence with a clause explaining that the plan "will pay benefits in accordance with the terms of this Article." N.C.G.S. § 135-48.2(a) (2021). The very next section of the statute contains an explicit disclaimer that the terms of the article are subject to alteration and termination, stating, "The General Assembly reserves the right to alter, amend, or repeal this Article." N.C.G.S. § 135-48.3 (2021).

¶ 82 While under our precedent the presence of a right-to-amend provision does not necessarily prevent a contractual obligation from arising from a statute, *see Simpson v. N.C. Loc. Gov't Emps.' Ret. Sys.*, 88 N.C. App. 218, 221, 223–24 (1987), *aff'd per curiam*, 323 N.C. 362 (1988), a right-to-amend provision is relevant to the plaintiffs' reasonable reliance. As the Supreme Court of the United States has observed, reserving the "rights to repeal, alter, or amend, [an a]ct at any time" is "hardly the language of a contract." *Nat'l R.R. Passenger Corp. v. Atchison Topeka & Santa Fe Ry. Co.*, 470 U.S. 451, 467 (1985) (cleaned up).

¶ 83 Further, not only did the General Assembly explicitly reserve the right to alter, amend, or repeal the State Health Plan, the undisputed evidence in the record reveals that the General Assembly frequently exercised this amendment power. Since the inception of the State Health Plan, the State has regularly amended it, raising coinsurance amounts from 5% to 10% to 20%, increasing the deductible from $100 to $150 to $250 to $350 to $450, and enlarging the out-of-pocket maximum from $100 to $300 to $1,000 to $1,500 to $2,000. In the twenty-nine years between 1982 and 2011, the record reflects that the General Assembly passed at least twenty-nine bills amending the State Health Plan, making almost two hundred individual changes.

¶ 84 In short, when plaintiffs' evidence is "carefully scrutinized" and the State's evidence is "indulgently regarded," *Koontz*, 280 N.C. at 518, and when all inferences are drawn in the light most favorable to the State, *Dalton*, 353 N.C. at 651, there is a genuine issue of material fact as to plaintiffs' reasonable reliance. The record does not evidence "multiple unequivocal written statements in official publications and employee handbooks" promising plaintiffs lifetime noncontributory health insurance in exchange for their public service as state employees. *Bailey*, 348 N.C. at 138, 146. While certainly some materials supporting plaintiffs' position exist, plaintiffs must also admit the existence of other materials that directly contradict the reasonableness of their reliance. When the entirety of the record is viewed in the light most favorable to the State, the right-to-amend provision, the disclaimers in the booklets, and the constant statutory changes are substantial evidence that could support a finding that plaintiffs did not reasonably rely on a promise of health benefits provided by statute in entering into or continuing employment with the State.

¶ 85 Additionally, as part of the determination of whether a contractual obligation exists, the fact-finder must also determine what the terms of a contractual obligation produced by plaintiffs reasonable reliance would be. On appeal, the plaintiffs asked this Court to reinstate the term of the contractual obligation found by the trial court; namely, a contract for "the 80/20 'Enhanced' Plan (as offered by the State Health Plan in September 2011), or its Equivalent, premium-free to all non-Medicare-eligible Class Members for the duration of their retirements." The majority, however, now recognizes a different contractual obligation, one that requires the State to provide a health plan of "equivalent or greater value to the one offered" at the time each individual plaintiff "met the applicable statutory eligibility requirements and became eligible to enroll in a noncontributory health insurance plan." Yet for the entirety of the State Health Plan's thirty-year existence, retirees have never received a health plan at a locked-in, unchanging value. Rather, retirees received whatever plan the State was then offering to current employees, which varied from year to year. Given this constant variance, the question of what terms would attach to a contractual obligation arising out of plaintiffs' reasonable reliance is also a genuine issue of material fact, one that the fact-finder should resolve in this case.

Conclusion

¶ 86 In adherence to this Court's admonition that summary judgment should be "used cautiously . . . so that no one will be deprived of a trial on a genuine, disputed issue of fact," *Koontz*, 280 N.C. at 518, I have

no choice but to conclude that this case should be remanded to the fact-finder. Based on the evidence in the record, the question of whether a contractual obligation could have arisen through plaintiffs' reasonable reliance and what terms would apply to such a contractual obligation is a genuine issue of material fact. Accordingly, I would remand that issue to the trial court for further proceedings not inconsistent with this opinion. Otherwise, I concur in the majority's opinion.

Justice BERGER joins in this concurring in part and dissenting in part opinion.

M.E.
v.
T.J.

No. 18A21

Filed 11 March 2022

1. Civil Procedure—voluntary dismissal—amended by hand—functional Rule 60(b) motion—domestic violence protective order action

Where plaintiff dismissed her Chapter 50B domestic violence protective order action but, thirty-nine minutes later, struck through the notice and wrote "I do not want to dismiss this action" on the Notice of Voluntary Dismissal form, the trial court acted within its broad discretion in exercising jurisdiction over the Chapter 50B complaint. Plaintiff's amended notice of dismissal functionally served as a motion for equitable relief under Civil Procedure Rule 60(b), and her later amendment to the complaint, which defendant consented to, functionally served as a refiling.

2. Appeal and Error—preservation of issues—constitutional argument—raised and ruled upon

Plaintiff properly preserved her argument regarding the constitutionality of Chapter 50B where plaintiff's counsel raised the issue before the trial court—by asserting that the statute was unconstitutional based on a recent opinion of the United States Supreme Court, stating that there was no rational basis for the statutory provision at issue, and citing an out-of-state case in support of plaintiff's argument—and obtained a ruling from the trial court.

3. Appeal and Error—preservation of issues—mandatory joinder—raised for first time on appeal—challenge to N.C. law

Defendant did not properly preserve her mandatory joinder argument—that the opinion of the Court of Appeals declaring a portion of Chapter 50B unconstitutional must be vacated and remanded for the mandatory joinder of the General Assembly pursuant to Civil Procedure Rule 19(d)—where the mandatory joinder issue was first raised by the Court of Appeals' dissenting opinion. Even assuming that Rule 19(d) mandatory joinder may be raised for the first time on appeal, plaintiff's Chapter 50B action for obtaining a domestic violence protective order—in which plaintiff asserted an as-applied constitutional defense to prevent dismissal of her action—did not qualify as a civil action challenging the validity of a North Carolina statute.

Justice BERGER dissenting.

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

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 275 N.C. App. 528 (2020), reversing the ruling entered 7 June 2018 by Judge Anna Worley in the District Court of Wake County, and remanding for further proceedings. Heard in the Supreme Court on 5 January 2022.

Scharff Law Firm, PLLC, by Amily McCool; ACLU of North Carolina Legal Foundation, by Irena Como and Kristi L. Graunke; and Patterson Harkavy LLP, by Christopher A. Brook, for plaintiff-appellee.

Nelson Mullins Riley & Scarborough LLP, by Lorin J. Lapidus, D. Martin Warf, and G. Gray Wilson, for defendant-appellant.

Joshua H. Stein, Attorney General, by Ryan Y. Park, Solicitor General, for State of North Carolina and Governor Roy Cooper, amici curiae.

Brooks, Pierce, McLendon, Humphrey, & Leonard, LLP, by Sarah M. Saint and Eric M. David; and Kathleen Lockwood and Nisha Williams, for North Carolina Coalition Against Domestic Violence, amicus curiae.

M.E. v. T.J.

[380 N.C. 539, 2022-NCSC-23]

Poyner Spruill LLP, by Andrew H. Erteschik, John Michael Durnovich, N. Cosmo Zinkow; and Robinson, Bradshaw, & Hinton, P.A., by Stephen D. Feldman, Mark A. Hiller, and Garrett A. Steadman, for Legal Aid of North Carolina, The North Carolina Justice Center, and The Pauli Murry LGBTQ+ Bar Association, amici curiae.

Womble Bond Dickinson (US) LLP, by Kevin A. Hall, Samuel B. Hartzell, and Ripley Rand, for Former District Court Judges, amicus curiae.

HUDSON, Justice.

¶ 1 For well over a century, North Carolina courts have abided by the foundational principle that administering equity and justice prohibits the elevation of form over substance. *See, e.g.*, *Currie v. Clark*, 90 N.C. 355, 361 (1884) ("This would be to subordinate substance to form and subserve no useful purpose."); *Moring v. Privott*, 146 N.C. 558, 567 (1908) ("Equity disregards mere form and looks at the substance of things."); *Fidelity & Casualty Co. v. Green*, 200 N.C. 535, 538 (1931) ("To hold otherwise, we apprehend, would be to exalt the form over the substance."). In alignment with this principle, our Rules of Civil Procedure are intended to *facilitate* access to justice, not obstruct it. *See Pyco Supply Co. v. American Centennial Ins. Co.*, 321 N.C. 435, 443 (1988) (noting that "deny[ing] plaintiff its day in court simply for its imprecision with the pen . . . would be contrary to the purpose and intent of . . . the modern rules of civil procedure."). Indeed, "it is the essence of the Rules of Civil Procedure that decisions be had on the merits and not avoided on the basis of mere technicalities." *Mangum v. Surles*, 281 N.C. 91, 99 (1972).

¶ 2 This principle holds particular salience in the realm of Domestic Violence Protective Orders (DVPO). Survivors of domestic violence who turn to courts for protection typically do so shortly after enduring physical or psychological trauma, and without the assistance of legal counsel. Maria Amelia Calaf, *Breaking the Cycle: Title VII, Domestic Violence, and Workplace Discrimination*, 21 Law & Ineq. 167, 170 (2003) (noting that "the effects [of domestic violence] extend beyond the physical harms, causing substance abuse, severe psychological trauma, and stress-related illnesses."); Julia Kim & Leslie Starsoneck, *North Carolina District Courts' Response to Domestic Violence* 57 (Dec. 2007), https://www.nccourts.gov/assets/inline-files/dv_studyreport.pdf

[hereinafter Kim & Starsoneck] (noting that "generally most 50B plaintiffs and defendants appear pro se."). Accordingly, "[t]he procedures under N.C.[G.S.] § 50B-2 are intended to provide a method for trial court judges or magistrates to quickly provide protection from the risk of acts of domestic violence by means of a process which is readily accessible to *pro se* complainants." *Hensey v. Hennessy*, 201 N.C. App. 56, 63 (2009).

¶ 3 Today, we apply these longstanding principles here, where plaintiff struck through and wrote "I do not want to dismiss this action" on a Notice of Voluntary Dismissal form that she had filed thirty-nine minutes previously, after learning that she could, in fact, proceed with her original Chapter 50B DVPO complaint. Defendant contends, *inter alia*, that this handwritten amendment could not revive plaintiff's previously dismissed complaint, and therefore that the trial court erred in exercising jurisdiction over the subsequent hearing. Holding so, however, "would be to exalt the form over the substance." *Fidelity & Casualty Co.*, 200 N.C. at 538.

¶ 4 Accordingly, we hold that the district court did not err in determining that it had subject matter jurisdiction to allow plaintiff to proceed with her Chapter 50B DVPO action. Further, we hold that plaintiff's constitutional argument was properly preserved for appellate review, and that defendant's Rule 19(d) necessary joinder argument was not properly preserved for appellate review. Finally, we note that the merits of the Court of Appeals' ruling that N.C.G.S. § 50-B(1)(b)(6)'s exclusion of complainants in same-sex dating relationships from DVPO protection is unconstitutional were not at issue before this Court, and therefore stand undisturbed and maintain normal precedential effect. We therefore modify and affirm the ruling of the Court of Appeals below reversing the trial court's denial of plaintiff's Chapter 50B complaint.

I. Factual and Procedural Background

A. Chapter 50B Filings and District Court Rulings

¶ 5 Plaintiff M.E. and defendant T.J., both women, were in a dating relationship that ended badly. After plaintiff ended the relationship on 29 May 2018, she alleged that defendant became verbally and physically threatening toward plaintiff, including attempting to force her way into plaintiff's house and needing to be removed by police. On the morning of 31 May 2018, plaintiff, accompanied by her mother, went to the Wake County Clerk of Superior Court office seeking the protections of a Domestic Violence Protective Order and an ex parte temporary DVPO pursuant to N.C.G.S. Chapter 50B. After plaintiff explained her situation to staff members at the clerk's office, they provided her

with the appropriate forms to file a Chapter 50B "Complaint and Motion for Domestic Violence Protective Order" (AOC-CV-303), which include a section to request a temporary "Ex Parte Domestic Violence Order of Protection." *See* N.C.G.S. § 50B-2(d) (2021) (establishing that "[t]he clerk of superior court of each county shall provide pro se complainants all forms that are necessary or appropriate to enable them to proceed pro se pursuant to this section.").

¶ 6 Plaintiff then filled out the Chapter 50B forms she had been given. Plaintiff checked Box 4 of the form, which alleges that "[t]he defendant has attempted to cause or has intentionally caused me bodily injury; or has placed me or a member of my family or household in fear of imminent serious bodily injury or in fear of continued harassment that rises to such a level as to inflict sustained emotional distress . . ." In the subsequent space for further details, plaintiff wrote:

> May 29th 2016[.] Became aggressive after stating the relationship was over. Had to push her back twice and lock her out of my home then placed 911 call. Officer arrived and she appeared to have left. She was hiding in back yard. Attempted to force entry into the home. 911 was called again. Defendant has not stopped attempting to contact me.

Plaintiff also checked Box 6, indicating that "I believe there is danger of serious and imminent injury to me or my child(ren)." Finally, plaintiff checked Box 9, indicating that "[t]he defendant has firearms and ammunition as described below." Below, plaintiff wrote "access to father[']s gun collection[.]"

¶ 7 Plaintiff requested "emergency relief" by way of "an Ex Parte Order before notice of a hearing is given to the defendant." Plaintiff further requested that the court order Defendant: "not to assault, threaten, abuse, follow, harass, or interfere with me[;]" "not to come on or about . . . my residence [or] . . . the place where I work[;]" "[to] have no contact with me[;]" "[not] possess[ ] or purchas[e] a firearm[;]" and take "anger management classes." After filing this paperwork, plaintiff was instructed by the staff members to return to court later that day for her hearing.

¶ 8 When plaintiff returned to court for her hearing, the trial court "informed [her] that because both she and [d]efendant were women, and only in a 'dating' . . . relationship, N.C.G.S. § 50B-1(b)(6) did not allow the trial court to grant her an ex parte DVPO or any other protections afforded by Chapter 50B." *M.E.*, 275 N.C. App. at 533. Indeed, N.C.G.S. § 50B-1(a) limits DVPO protection to those who are in or have been in

a "personal relationship," and N.C.G.S. § 50B-1(b) subsequently defines "personal relationship" as "a relationship wherein the parties involved:"

> (1) Are current or former spouses;
>
> (2) Are persons *of opposite sex* who live together or have lived together;
>
> (3) Are related as parents and children . . . ;
>
> (4) Have a child in common;
>
> (5) Are current or former household members; [or]
>
> (6) Are persons *of the opposite sex* who are in a dating relationship or have been in a dating relationship.

(emphasis added). As such, the statute excludes from DVPO eligibility any person, like plaintiff, who is or was in a same-sex dating relationship. Instead of seeking a DVPO under Chapter 50B, trial court informed plaintiff

> that she could seek a civil ex parte temporary no-contact order and a permanent civil no-contact order, pursuant to Chapter 50C. *See* N.C.G.S. § 50C-2 (2017). Chapter 50C expressly states that its protections are for "persons against whom an act of unlawful conduct has been committed by another person *not involved in a personal relationship* with the person *as defined in G.S. 50B-1(b)*." N.C.G.S. § 50C-1(8) (2017) (emphasis added).

M.E., 275 N.C. App. at 533. Notably, however, unlike DVPOs under Chapter 50B, no-contact orders under Chapter 50C do not allow the trial court to place any limits upon the defendant's right to possess a weapon.

¶ 9 Accordingly, plaintiff returned to the clerk's office and explained to staff members what the judge had told her. Staff members then gave plaintiff a new stack of forms to complete, including the Chapter 50C forms and a notice of voluntary dismissal of her previous Chapter 50B complaint. Plaintiff filled out the forms and gave them back to the staff members, who filed them. Plaintiff's notice of voluntary dismissal was filed-stamped 3:12 p.m.

¶ 10 Shortly thereafter, after a conversation among the staff, staff members informed plaintiff that she could still request a DVPO under Chapter 50B even if the trial court was going to deny it. Staff members then gave the original file-stamped notice of voluntary dismissal back to plaintiff. Plaintiff struck through the notice and wrote on it: "I strike through this

voluntary dismissal. I do not want to dismiss this action[.]" Plaintiff then returned the form to the staff, who wrote "Amended" at the top and re-filed it. The amended form was file-stamped a second time at 3:51 p.m., thirty-nine minutes after the original filing.

¶ 11 Plaintiff's four actions (Chapter 50B ex parte DVPO, Chapter 50B permanent DVPO, Chapter 50C ex parte Temporary No-Contact Order for Stalking, and Chapter 50C permanent Temporary No-Contact Order for Stalking) were then heard at the afternoon session of district court that same day, 31 May 2018. Plaintiff was present without counsel at this hearing; defendant was not present. The court had before it the full record of the case, including plaintiff's amended voluntary dismissal form. The court "denied [p]laintiff's request for a Chapter 50B *ex parte* DVPO, but set a hearing date of 7 June 2018 for a hearing on [p]laintiff's request for a permanent DVPO." *M.E.*, 275 N.C. App. at 533. Specifically, the trial court concluded in its order that: "allegations are significant but parties are in same[-]sex relationship and have never lived together, [and] therefore do not have relationship required in statute." The trial court did, however, grant plaintiff's ex parte request pursuant to Chapter 50C by entering a "Temporary No-Contact Order for Stalking or Nonconsensual Sexual Conduct" that same day. *See* N.C.G.S. § 50C-6(a) (2021).

> In the *ex parte* 50C Order, the trial court found as fact that "plaintiff has suffered unlawful conduct by defendant in that:" "On 5/29/18, defendant got physically aggressive and was screaming in plaintiff's face; defendant then left after LEO (law enforcement officers) were called; after LEO left," defendant "attempted to re-enter plaintiff's house; LEO returned to remove defendant from plaintiff's house; since that date, defendant has repeatedly called plaintiff, texted plaintiff from multiple numbers, and contacted plaintiff's friends and family." The trial court found that defendant "continues to harass plaintiff," and that "defendant committed acts of unlawful conduct against plaintiff." The trial court concluded that the "only reason plaintiff is not receiving a 50B DVPO today" is because plaintiff and defendant had been "in a same[-]sex relationship and do not live together," and that N.C.G.S. § 50B-1(b), as plainly written, requires the dating relationship to have consisted of people of the "opposite sex."

M.E., 275 N.C. App. at 534 (cleaned up).

¶ 12 On 7 June 2018, the trial court conducted its subsequent hearing on plaintiff's Chapter 50B and Chapter 50C permanent motions. Plaintiff appeared with counsel at this hearing; defendant appeared pro se. Here again, the trial court enjoyed the benefit of the full case record, including plaintiff's amended voluntary dismissal form. First, regarding the Chapter 50B complaint, "[d]efendant consented to an amendment to the order to indicate her relationship with [p]laintiff was one 'of same sex currently or formerly in dating relationship.' " *Id.* at 535. The trial court then stated: "I do not have a complaint . . . that would survive a Rule 12 motion [to dismiss]" because the plain language of N.C.G.S. § 50B-1(b)(6) does not include same-sex dating relationships within its definition of covered "personal relationships." The trial court and plaintiff's counsel then engaged in the following exchange:

> [Plaintiff's counsel]: Your honor, with that amended, I understand what you already said, that you don't believe it would survive a motion to dismiss. However, . . . we do feel at this point that [plaintiff] should be allowed to proceed with the Domestic Violence Protective Order, that it's—the statute, that 50B, is unconstitutional as it's written post the same-sex marriage equality case from the Supreme Court in *Obergefell* and that there's no rational basis at this point to have a statute that limits dating relationships to folks of opposite sex. So we would ask that Your Honor consider allowing [plaintiff] to proceed with her Domestic Violence Protective Order case.
>
> [The court]: Do you have any precedent?
>
> [Plaintiff's counsel]: Not in North Carolina.
>
> [The court]: Other than the *Obergefell* case.
>
> [Plaintiff's counsel]: No, Your Honor, not in North Carolina.
>
> [The court]: In anywhere else that has a similar statute?
>
> [Plaintiff's counsel]: Your Honor[,] . . . South Carolina recently just overturned their statute that was written similarly.
>
> [The court]: In what procedure?
>
> [Plaintiff's counsel]: In a Domestic Violence Protective Order procedure.

> [The court]: By what court?
>
> [Plaintiff's counsel]: Either their court of appeals or their supreme court. Not by a district court, Your Honor. Yes, I believe it was a court of appeals case.
>
> [The court]: And in checking the legislative history, when was the last time our legislature addressed this?
>
> [Plaintiff's counsel]: Your Honor, our legislature has amended 50B for different reasons, but they have not amended the personal relationship categories any time in the recent past that I can recall. And, your honor, we've explained to [plaintiff], certainly, the bind that the [c]ourt is in in being bound by the language of the statute.
>
> [The court]: Without a more expansive argument on constitutionality, I won't do it. I think there is room for that argument. I think that with some more presentation that maybe we could get there, but I don't think on the simple motion that I'm ready to do that.
>
> [Plaintiff's counsel]: Thank you, Your Honor. Then with the [c]ourt's denial of the plaintiff's 50B action, then we would like to proceed with the 50C.
>
> [The court]: Okay.

¶ 13 In its subsequent form order, the trial court ruled that:

> plaintiff has failed to state a claim upon which relief can be granted pursuant to the statute, due to the lack of [a] statutorily defined personal relationship. . . . [H]ad the parties been of opposite genders, those facts would have supported the entry of a Domestic Violence Protective Order (50B).
>
> N.C.G.S. [§] 50B was last amended by the legislature in 2017 without amending the definition of "personal relationship" to include persons of the same sex who are in or have been in a dating relationship. This recent amendment in 2017 was made subsequent to the United States Supreme Court decision in *Obergefell v. Hodges*, 576 U.S. [664,] (2015), and yet the legislature did not amend the definition of personal relationship to include dating partners of the same sex.

Accordingly, the trial court dismissed plaintiff's Chapter 50B DVPO motion.

¶ 14 Later, the trial court issued a subsequent written order regarding plaintiff's Chapter 50B DVPO motion. There, the trial court concluded the following:

> 2. The [p]laintiff, through her counsel, argued that she should be allowed to proceed on her request for a [DVPO] because the current North Carolina General Statute 50B-1(b) is unconstitutional after the United States Supreme Court decision in *Obergefell v. Hodges* and that there is no rational basis for denying protection to victims in same-sex dating relationships who are not spouses, ex-spouses, or current or former household members.
>
> 3. North Carolina General Statute 50B was passed by the North Carolina General Assembly in 1979 and later amended on several occasions. It states that an aggrieved party with whom they have a personal relationship may sue for a [DVPO] in order to prevent further acts of domestic violence. The question for the [c]ourt is how a personal relationship is defined. North Carolina General Statute 50B-1 states: "for purposes of this section, the term 'personal relationship' means wherein the parties involved: (1) are current or former spouses; (2) are persons of opposite sex who live together or have lived together; (3) are related as parents and children, including others acting in loco parentis to a minor child, or as grandparents and grandchildren. For purposes of this subdivision, an aggrieved party may not obtain an order of protection against a child or grandchild under the age of 16; (4) have a child in common; (5) are current or former household members; (6) are persons of the opposite sex who are in a dating relationship or have been in a dating relationship."
>
> . . . .
>
> 4. This definition prohibits victims of domestic violence in same sex dating relationships that are not spouses, ex-spouses, or current of former household

members from seeking relief against a batterer under Chapter 50B.

5. The [c]ourt must consider whether it has jurisdiction to create a cause of action that does not exist and to enter an order under this statute when the statute specifically excludes it. The difficult answer to this question is no, it does not. The General Assembly has the sole authority to pass legislation that allows for the existence of any domestic violence protective order. The legislature has not extended this cause of action to several other important family relationships including siblings, aunts, uncles, "step" relatives, or in-laws.

6. In this context, the [c]ourts only have subject matter jurisdiction and the authority to act and enjoin a defendant when the legislature allows it. On numerous occasions the Court of Appeals has stricken orders entered by the District Court that do no[t] include proper findings of fact or conclusions of law that are necessary to meet the statute. [ ] Defendant must be on notice that a cause of action exists under this section when the act of domestic violence is committed. The [c]ourt cannot enter a [DVPO] against a [d]efendant when there is no statutory basis to do so. In the case before the [c]ourt, the [d]efendant had no such notice.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED as follows:

1. The [p]laintiff has failed to prove grounds for issuance of a [DVPO] as [p]laintiff does not have a required "personal relationship" with the [d]efendant as required by North Carolina General Statute [Chapter] 50B.

¶ 15 The trial court did, however, grant plaintiff's Chapter 50C motion for a No-Contact Order for Stalking or Nonconsensual Sexual Conduct, ordering defendant not to "visit, assault, molest, or otherwise interfere with the plaintiff" for one year from the date issued, 7 June 2018.

¶ 16 On 29 June 2018, plaintiff appealed the trial court's denial of her DVPO motion to the North Carolina Court of Appeals. In response,

defendant sent a letter to plaintiff's counsel and the trial court that: denied that she and plaintiff were in a dating relationship; requested that the Court of Appeals not hear the case; asserted that "the LGBT community is asking for special treatment[ ] in this proceeding" and that "[t]hey should not be given equal access to protection under law as heterosexual relationships[;]" and emphasized that she did not want to be involved in the appeal.

B. Court of Appeals

¶ 17 Before the Court of Appeals, plaintiff argued "that the trial court's denial of her request for a DVPO violated [her] constitutional rights protected by the Due Process and Equal Protection Clauses of the Fourteenth Amendment [of the United States Constitution], as well as the associated provisions of the North Carolina Constitution." *M.E.*, 275 N.C. App. at 538.

¶ 18 The Court of Appeals also allowed several parties to file *amicus curiae* briefs in favor of the plaintiff. These amici included the Attorney General of North Carolina, who submitted a brief on behalf of the State seeking "to vindicate the State's powerful interests in safeguarding all members of the public from domestic violence." *Id.*

¶ 19 Defendant did not file an appellate brief, and no *amici* sought to file briefs contesting plaintiff's arguments on appeal.

> There were also no motions filed by any entity of the State to submit an *amicus* brief, or otherwise intervene in th[e] action, for the purpose of arguing in favor of the constitutionality of the Act. Therefore, [the Court of Appeals], on its own motion and by order entered 3 May 2019, appointed an *amicus curiae* ("*Amicus*"), to brief an argument in response to [p]laintiff's arguments on appeal.

Id.

¶ 20 On 31 December 2020, the Court of Appeals filed an opinion in which it agreed with plaintiff's claims under both the North Carolina and United States constitutions. Accordingly, the Court of Appeals reversed the trial court's denial of Plaintiff's complaint for a Chapter 50B DVPO and remanded for entry of an appropriate order. *Id.* at 590. Further, the court explicitly stated that its holding applied with equal force "to all those similarly situated with Plaintiff who are seeking a DVPO pursuant to Chapter 50B; that is, the 'same-sex' or 'opposite sex' nature of their

"dating relationship" shall not be a factor in the decision to grant or deny a petitioner's DVPO claim under the Act." *Id.*

¶ 21 Judge Tyson dissented. *Id.* Specifically, the dissent would have held that plaintiff's appeal was not properly before the court because of five purported jurisdictional and procedural defects: (1) plaintiff's filing of a voluntary dismissal of her 50B complaint; (2) plaintiff's failure to subsequently file a post-dismissal Rule 60 motion; (3) plaintiff's failure to argue and preserve any constitutional issue for appellate review; (4) plaintiff's failure to join necessary parties; and (5) plaintiff's failure to comply with Rule 3 to invoke appellate review. *Id.* (Tyson, J., dissenting). Additionally, the dissent asserted that the majority's dismissal of the arguments of the appointed *amicus curiae* regarding the trial court's jurisdiction was erroneous.

¶ 22 First, the dissent asserted that plaintiff's filing of her voluntary dismissal of her previous 50B complaint extinguished the trial court's jurisdiction over that action. *Id.* at 591–92 (Tyson, J., dissenting). The dissent would have held that plaintiff's informal nullification of the voluntary dismissal did not properly revive her claim—she instead should have re-invoked the district court's jurisdiction with a new complaint. *Id.* at 592 (Tyson, J., dissenting).

¶ 23 Second, and as an alternative to filing a new complaint, the dissent asserted that plaintiff should have filed a Rule 60(b) motion to seek to revive the dismissed complaint. *Id.* (Tyson, J., dissenting). Without a refiling or a 60(b) motion, the dissent contended, plaintiff's complaint was extinguished by her voluntary dismissal. *Id.* at 593 (Tyson, J., dissenting).

¶ 24 Third, the dissent asserted that plaintiff did not properly preserve her constitutional argument for appellate review. *Id.* at 593–94 (Tyson, J., dissenting). The dissent would have instead held that plaintiff counsel's reference to *Obergefell* did not adequately raise a constitutional question, and, in any event, the trial court did not rule on the act's constitutionality, so that plaintiff may not now argue on appeal that the Act is unconstitutional. *Id.* at 594 (Tyson, J., dissenting).

¶ 25 Fourth, the dissent would have held that, because this is a civil action challenging the validity of a North Carolina statute, the Speaker of the House of Representatives and the President Pro Tempore of the Senate must be joined as defendants under Rule 19(d) of the North Carolina Rules of Civil Procedure. *Id.* at 595 (Tyson, J., dissenting). Separate from and in addition to the trial court's lack of subject matter jurisdiction, then, the dissent asserted that no further action or review is proper until this statutory defect is cured. *Id.* (Tyson, J., dissenting).

¶ 26 Fifth, the dissent noted that plaintiff's trial counsel's hard copy of the notice of appeal was filed with the clerk of superior court and bore no manuscript signature. *Id.* at 596 (Tyson, J., dissenting). Accordingly, the dissent asserted, the notice of appeal is defective under N.C. R. App. P. 3(d), which requires that a notice of appeal be signed by the counsel of record. *Id.* (Tyson, J., dissenting).

¶ 27 Finally, the dissent took issue with the majority's failure to review and dismissal of the arguments regarding subject matter jurisdiction raised by the appointed *amicus curiae*. *Id.* at 597 (Tyson, J., dissenting). The dissent asserted that amicus' supplemental filing and motion to dismiss for lack of jurisdiction were vital and should have been included in the record on appeal. *Id.* at 597–99 (Tyson, J., dissenting).

¶ 28 In sum, the dissent would have held that no appeal was actually pending before the court due to the trial court's lack of jurisdiction, among other procedural defects. *Id.* at 599–600 (Tyson, J., dissenting).

C. Present Appeal

¶ 29 On 11 January 2021, defendant, now represented by the former court-appointed *amicus* counsel, filed a notice of appeal in this Court based on the Court of Appeals dissent.

¶ 30 First, defendant asserts that the trial court and the Court of Appeals lacked proper jurisdiction due to plaintiff's voluntary dismissal of the Chapter 50B complaint and plaintiff's failure to include the dismissal in the record on appeal, on the basis that plaintiff's Chapter 50B DVPO complaint was completely extinguished upon the filing of the notice of voluntary dismissal at 3:12 p.m. on 31 May 2018. Accordingly, defendant asserts, because plaintiff never formally filed a new Chapter 50B complaint and no request for Rule 60(b) relief was sought or granted by the trial court, "the action was rendered moot and the [trial] court was divested of subject matter jurisdiction to proceed with the merits disposition." Defendant further contends that because the trial court lacked subject matter jurisdiction on the Chapter 50B action, its subsequent order on the action was void *ab initio*.

¶ 31 Correspondingly, defendant asserts that when plaintiff did not include the notice of voluntary dismissal form in her record on appeal, she "failed to meet her burden of establishing jurisdiction of the [trial] court and Court of Appeals by omitting a court paper essential to the determination of whether such jurisdiction existed." Independent of this omission, though, defendant contends that the Court of Appeals had a duty to evaluate its own appellate jurisdiction over plaintiff's purported appeal before proceeding to a disposition on the merits. Defendant argues that

"by deciding an appeal with a blind eye towards" a missing jurisdictional document, the [Court of Appeals] majority failed to carry out its duty to properly examine [its own] jurisdiction."

¶ 32 Second, defendant asserts that plaintiff failed to specifically preserve the constitutional issue for review by the Court of Appeals pursuant to Rule 10(a) of the North Carolina Rules of Appellate Procedure, or to obtain a ruling from the trial court on the issue upon the party's request, objection, or motion." Here, defendant contends, plaintiff's "vague constitutional reference" did not properly specify the grounds of her objection, and the trial court "confined its ruling to non[-]constitutional grounds." Accordingly, defendant asserts, the Court of Appeals erred in considering plaintiff's constitutional argument.

¶ 33 Third, defendant contends that the Court of Appeals ruling must be vacated and remanded for the mandatory joinder of the North Carolina General Assembly under Rule 19(d) of the North Carolina Rules of Civil Procedure. Defendant notes that Rule 19(d) requires that

> [t]he Speaker of the House of Representatives and the President Pro Tempore of the Senate, as agents of the State through the General Assembly, must be joined as defendants in any civil action challenging the validity of a North Carolina Statute or provision of the North Carolina Constitution under State or federal law.

Echoing the reasoning first raised in the Court of Appeals dissent, defendant contends that "[b]ecause plaintiff has challenged the constitutionality of N.C.G.S. § 50B-1(b)(6), the President *Pro Tempore* of the Senate and the Speaker of the House of Representatives are necessary parties and '*must be joined as defendants*' in the civil action." "Consequently," defendant argues, "no disposition on appeal or before the [trial] court can occur until mandatory joinder is completed as provided by statute."

¶ 34 In response, plaintiff first argues that the trial court had proper jurisdiction to hear her DVPO complaint and motions where, at the suggestion of court staff, she quickly withdrew a notice of voluntary dismissal filed mistakenly or inadvertently because she wished to continue prosecuting her case. Plaintiff claims that defendant waived her objection regarding the notice of voluntary dismissal when she failed to raise it in the trial court or the Court of Appeals. In any event, plaintiff contends, the trial court had authority and discretion to construe plaintiff's filings in her favor and permit amendment as needed to promote justice where plaintiff was proceeding pro se in a domestic violence action. To prevent

injustice and inefficiency, plaintiff asserts, "trial courts have discretion to take steps to protect litigants poised to relinquish their cases, particularly where those litigants are vulnerable."

¶ 35 Further, plaintiff asserts, the trial court had inherent authority to grant plaintiff relief under Rule 60(b) in the interest of justice. Although plaintiff's amended notice of dismissal was not styled as a formal 60(b) motion, plaintiff contends that it was "nonetheless sufficient for the trial court to award her equitable relief from the unintended dismissal under" that rule because it met the substantive requirements of that rule, namely that it was filed inadvertently or mistakenly, and was quickly fixed.

¶ 36 Second, plaintiff addresses defendant's preservation argument. As an initial matter, plaintiff again argues that by failing to raise objections to constitutional preservation below, defendant waived those objections. Indeed, plaintiff notes, in Defendant's lone submission during the appellate process (the letter to the trial court after its ruling), defendant herself briefly engaged in the constitutional merits without objecting to preservation. But even if defendant has not waived her preservation challenge, plaintiff argues, the constitutional issue was properly preserved. Specifically, plaintiff contends that the record makes clear that the trial court had notice of the constitutional issue before it and ruled on it, which is sufficient to preserve it for appeal. Plaintiff agues that her counsel expressly preserved the constitutional issue by mentioning *Obergefell* by name, arguing that the statute was unconstitutional because there was no rational basis supporting the exclusion of same-sex couples, and noting a recent South Carolina Supreme Court case raising the same constitutional issues. Further, plaintiff asserts, the trial court ruled on the constitutional issue where it expressly engaged with the issue both on the record during oral argument and in its final written order before denying the DVPO motion.

¶ 37 Third and finally, plaintiff addresses defendant's joinder challenge, arguing first that Defendant waived her joinder defense where she failed to raise it in either the trial court or the Court of Appeals. Even if defendant has not waived her objection to joinder, though, plaintiff argues that joining legislative leaders is not required here because actions under Chapter 50B are not "civil actions challenging the validity of a North Carolina statute" under Rule 19(d). Rather, plaintiff asserts that her Chapter 50B complaint was brought for the sole purpose of obtaining a DVPO, and the as-applied constitutional question was raised merely in defense of the trial court's statutory jurisdiction to hear the claim of a person in a same-sex dating relationship.

¶ 38 Finally, this Court allowed several *amici* to file briefs, including: (1) North Carolina Solicitor General Ryan Park, on behalf of the State; (2) the North Carolina Coalition Against Domestic Violence; (3) Legal Aid of North Carolina, the North Carolina Justice Center, and the Pauli Murray LGBTQ+ Bar Association; and (4) ten former North Carolina District Court judges. All *amicus* briefs filed supported the ruling of the Court of Appeals and plaintiff's positions on appeal.

II. Analysis

¶ 39 We now consider each of defendant's claims before this Court. As conclusions of law, each of the issues raised by defendant "are reviewed de novo and are subject to full review." *State v. Biber*, 365 N.C. 162, 168 (2011).

¶ 40 First, we conclude that the trial court acted within its broad discretion in exercising jurisdiction over plaintiff's Chapter 50B complaint because plaintiff's amended notice of dismissal functionally served as a motion for equitable relief under Rule 60(b), and plaintiff's amendment to the complaint—which defendant consented to—functionally served as a refiling. Second, we hold that plaintiff properly preserved the constitutional issue for appellate review. Third, we conclude that defendant did not properly preserve her joinder argument because it was first raised by the Court of Appeals dissent without being argued before that court. Accordingly, we modify and affirm the ruling of the Court of Appeals below reversing the trial court's denial of plaintiff's Chapter 50B complaint.

A. Jurisdiction

¶ 41 **[1]** First, defendant asserts that the trial court and the Court of Appeals lacked jurisdiction due to plaintiff's voluntary dismissal of the Chapter 50B complaint and plaintiff's failure to include the dismissal in the record on appeal. We disagree.

¶ 42 Generally, trial court judges enjoy broad discretion in the efficient administration of justice and in the application of procedural rules toward that goal. *See Miller v. Greenwood*, 218 N.C. 146, 150 (1940) ("It is within [a judge's] discretion to take any action [toward ensuring a fair and impartial trial] within the law and so long as he [or she] does not impinge upon [statutory] restrictions.") Indeed,

> [i]t is impractical and would be almost impossible to have legislation or rules governing all questions that may arise on the trial of a case. Unexpected developments, especially in the field of procedure, frequently

> occur. When there is no statutory provision or well recognized rule applicable, the presiding judge is empowered to exercise his [or her] discretion in the interest of efficiency, practicality, and justice.

Shute v. Fisher, 270 N.C. 247, 253 (1967).

¶ 43 Accordingly, rather than erecting hurdles to the administration of justice, "[t]he Rules of Civil Procedure [reflect] a policy to resolve controversies on the merits rather than on technicalities of pleadings." *Quackenbush v. Groat*, 271 N.C. App. 249, 253 (2020) (cleaned up).

> A suit at law is not a children's game, but a serious effort on the part of adult human beings to administer justice; and the purpose of process is to bring parties into court. If [procedural filings use] such terms that every intelligent person understands [what] is meant, it has fulfilled its purpose; and courts should not put themselves in the position of failing to recognize what is apparent to everyone else.

Harris v. Maready, 311 N.C. 536, 544 (1984) (cleaned up).

¶ 44 These general principles are particularly important within the context of DVPOs. In fact, the remedies of N.C.G.S. Chapter 50B are specifically written with ease of access for pro se complainants in mind. For instance, N.C.G.S. § 50B-2(a) notes that "[a]ny aggrieved party entitled to relief under this Chapter may file a civil action and proceed pro se, without the assistance of legal counsel." Further, subsection (d) of that statute is dedicated entirely to establishing procedures for "Pro se Forms[:]"

> The clerk of superior court of each county shall provide to pro se complainants all forms that are necessary or appropriate to enable them to proceed pro se pursuant to this section. The clerk shall, whenever feasible, provide a private area for complainants to fill out forms and make inquiries. The clerk shall provide a supply of pro se forms to authorized magistrates who shall make the forms available to complainants seeking relief under . . . this section.

N.C.G.S. § 50B-2(d).

¶ 45 This statutory emphasis recognizes and accounts for the factual reality of domestic violence adjudication: survivors of domestic violence who turn to courts for protection typically do so shortly after enduring

physical or psychological trauma, and without the assistance of legal counsel. Calaf, 21 Law & Ineq. at 170; Kim & Starsoneck at 57. As such, "[t]he procedures under N.C.[G.S.] § 50B-2 are intended to provide a method for trial court judges or magistrates to quickly provide protection from the risk of acts of domestic violence by means of a process which is readily accessible to *pro se* complainants." *Hensey*, 201 N.C. App. at 63.

¶ 46 Rule 60 of the North Carolina Rules of Civil Procedure provides trial courts with a procedure through which they can provide equitable relief from various judgments, orders, or proceedings. N.C.G.S. § 1A-1, R. 60. Specifically, Rule 60(b) establishes that "[o]n motion and upon such terms as are just, the court may relieve a party or [her] legal representative from a final judgment, order, or proceeding for . . . mistake, inadvertence, surprise, or excusable neglect." *Id.*

¶ 47 Here, the trial court acted well within its broad discretion, and with the benefit of the full record before it, when exercised jurisdiction over plaintiff's Chapter 50B DVPO complaint. Specifically, plaintiff's amended notice of voluntary dismissal—in which she struck through and handwrote "I do not want to dismiss this action" on the form she had inadvertently or mistakenly filed thirty-nine minutes previously—served as functional Rule 60(b) motion through which the trial court could, and did, grant equitable relief. There is plainly no doubt as to plaintiff's intentions as expressed through the amended form: she "d[id] not want to dismiss th[e] action." Likewise, when the trial court allowed plaintiff to amend her Chapter 50B complaint—without objection from defendant—at the 7 June hearing on the merits, it reasonably could have considered this amendment as, in essence, a refiling after a voluntary dismissal.[1] While it may have been preferable for plaintiff to have filed an official 60(b) motion or a new Chapter 50B complaint for formality's sake, her amendment nevertheless expressed her intention to proceed with the complaint "in such terms that every intelligent person understands [what] is meant, [and therefore] has fulfilled its purpose; and courts should not put themselves in the position of failing to recognize what is apparent to everyone else." *Harris*, 311 N.C. at 544. Indeed, "[t]o hold otherwise . . . would be to exalt the form over the substance." *Fidelity & Casualty Co.*, 200 N.C. at 538.

¶ 48 Plaintiff here is exactly the type of complainant that the *pro se* provisions of Chapter 50B contemplate: one who is navigating the complex

1. In light of defendant's consent to this amendment, there can be no doubt that she had ample notice that plaintiff was pursuing a DVPO under Chapter 50B.

arena of legal procedure for the first time, without the assistance of legal counsel, soon after experiencing significant trauma. At every turn on 31 May 2018, plaintiff diligently followed the direction of court staff: in filing her initial Chapter 50B forms that morning, in completing the stack of new forms including the notice of voluntary dismissal at 3:12 p.m., and in amending and refiling that form thirty-nine minutes later to express her intention to proceed with her complaint. When the trial court exercised jurisdiction over plaintiff's Chapter 50B complaint, it did so with the benefit of the full record before it, including the court file (the trial court noted it was entering an order denying the DVPO "after hearing from the parties and reviewing the file") which held the amended notice of voluntary dismissal. It was squarely within the discretion of the trial court to understand the plain intent of plaintiff's amended notice of voluntary dismissal as a Rule 60(b) motion for equitable relief or her amended Chapter 50B complaint as a functional refiling, and to subsequently exercise its jurisdiction. To be clear, this is not to say that plaintiff, acting without legal counsel in the harried setting of the clerk's office, intended for her amendment to the voluntary dismissal form to serve as a formal 60(b) motion, or that she or her counsel intended for the Chapter 50B complaint amendment at the 7 June hearing to serve as a formal refiling. They likely did not. Rather, we hold that it was within the trial court's broad discretion—with the benefit of the full record before it—to *treat* these two amendments as a functional 60(b) motion or refiling in light of the plaintiff's plain intention to move forward with her Chapter 50B complaint.[2] While we cannot know precisely from the record whether the trial court considered these procedures when it determined that it had jurisdiction, its decision to exercise jurisdiction itself evidences that the court understood plaintiff's plain intention to proceed. It is not the job of this Court to second-guess the trial court's determination of its own jurisdiction when that determination was supported by competent evidence and practical common sense. Accordingly, the trial court did not err in exercising jurisdiction, and the Court of Appeals did not err in its subsequent review.

B. Preservation

¶ 49 **[2]** Second, defendant asserts that plaintiff failed to preserve the constitutional issue for appeal. Again, we disagree.

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2. While the dissent warns that this understanding of the trial court's discretion "will disrupt the orderly flow of cases through our trial courts[,]" the facts here prove the opposite: it ensures that common sense and the smooth functioning of vital remedial procedures, like those protecting survivors of domestic violence, will not be thwarted by overly technical scrutiny of that discretion.

¶ 50 Rule 10(a)(1) of the North Carolina Rules of Appellate Procedure establishes that

> [i]n order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context. It is also necessary for the complaining party to obtain a ruling upon the party's request, objection, or motion. Any such issue that was properly preserved for review by action of counsel taken during the course of proceedings in the trial tribunal by objection noted . . . may be made the basis of an issue presented on appeal.

Put differently, Rule 10(a)(1) creates two distinct requirements for issues preservation: (1) a timely objection clearly (by specific language or by context) raising the issue; and (2) a ruling on that issue by the trial court. These requirements are grounded in judicial efficiency; they "prevent[ ] unnecessary retrials by calling possible error to the attention of the trial court so that the presiding judge may take corrective action if it is required." *State v. Bursell*, 372 N.C. 196, 199 (2019). "Practically speaking, Rule 10(a)(1) contextualizes the objection for review on appeal, thereby enabling the appellate court to identify and thoroughly consider the specific legal question raised by the objecting party." *Id.*

¶ 51 Notably, Rule 10(a)(1) does not require a party to recite certain magic words in order to preserve an issue; rather, it creates a functional requirement of bringing the trial court's attention to the issue such that the court may rule on it. *See State v. Garcia*, 358 N.C. 382, 410 (2004) (noting that because an issue was not raised at trial, "the trial court was denied the opportunity to consider, and, if necessary, to correct the error.") For instance, in *State v. Murphy*, this Court determined that "[a]lthough the issue of defendant's invocation of his right to remain silent was not clearly and directly presented to the trial court, . . . the defendant's theory was implicitly presented to the trial court and thus [was properly preserved for appellate review]." 342 N.C. 813, 822 (1996). Contrastingly, in cases where this Court has determined that an issue was *not* properly preserved, the records tend to include no reference to the issue at trial. *See, e.g.*, *Bursell*, 372 N.C. at 200 (noting "the absence of any reference to the Fourth Amendment, *Grady*[,] or other relevant SBM case law, privacy, or reasonableness"); *Garcia*, 358 N.C. at 410 (noting that "defendant did not raise this constitutional issue at trial."); *State v. McKenzie*,

292 N.C. 170, 176 (1997) (noting that because "[n]o argument was made in the trial court on that issue . . . the trial court was wholly unaware" of the issue.).

¶ 52 Regarding the second requirement of Rule 10(a)(1), this Court has observed that appellate courts "will not pass upon a constitutional question unless it affirmatively appears that such question was raised and passed upon in the court below." *State v. Jones*, 242 N.C. 563, 564 (1955). For instance, in *State v. Dorsett*, this Court declined to consider a constitutional issue after the trial court "expressly declined to rule on th[e] question." 272 N.C. 227, 229 (1967).

¶ 53 Here, plaintiff properly raised and received a ruling on her claim that it would be unconstitutional to deny relief under N.C.G.S. Chapter 50B because she was in a same-sex dating relationship. Thus, the question of whether DVPO protection could be denied to those in same-sex dating relationships was properly preserved for appeal. First, there can be no doubt that plaintiff's counsel properly raised the issue during the hearing. Specifically, plaintiff's counsel asserted that "[Chapter] 50B[ ] is unconstitutional as it's written post the same-sex marriage equality case in *Obergefell* and . . . there's no rational basis at this point to have a statute that limits dating relationships to folks of opposite sex." In this statement, plaintiff's counsel expressly: (1) asserted that the judge's application of the statute in question was unconstitutional; (2) cited by name the landmark United States Supreme Court ruling on the unconstitutionality of same-sex marriage prohibitions under the Fourteenth Amendment, *see Obergefell v. Hodges*, 576 U.S. 644 (2015); and (3) recited a specific legal standard associated with judicial analysis under that amendment. Contrary to the claim of the dissenting opinion below that plaintiff's counsel's statement was merely a "cryptic reference to *Obergefell*[,]" we understand it to clearly and explicitly challenge the constitutionality of the application of the statute in question under well-established Due Process and Equal Protection doctrines.

¶ 54 Next, when asked by the trial court if any other jurisdictions have struck down similar DVPO restrictions, plaintiff's counsel noted a recent case in which the South Carolina Supreme Court, citing *Obergefell*, ruled that the sections of their state's DVPO statute that excluded people in same-sex relationships from protection were unconstitutional under the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the U.S. Constitution. *Doe v. State*, 421 S.C. 490, 495–96, 507 n.12 (2017).

¶ 55 Finally, the trial court's subsequent written order explicitly acknowledged that plaintiff had raised this constitutional issue, noting that

> [p]laintiff, through her counsel, argued that she should be allowed to proceed on her request for a [DVPO] because the current [N.C.G.S. §] 50B-1(b) is unconstitutional after the United States Supreme Court decision in *Obergefell v. Hodges* and that there is no rational basis for denying protection to victims in same-sex dating relationships . . . .

Accordingly, plaintiff clearly raised her constitutional argument at trial, thus satisfying the first requirement for issue preservation under Rule 10(a)(1).

¶ 56 Second, the record makes clear that the trial court sufficiently ruled on the constitutional issue, thus satisfying the second requirement for issue preservation under Rule 10(a)(1). Specifically, the trial court "passed upon" this issue in three distinct places: (1) during the hearing; (2) in its subsequent form order; and (3) in its subsequent written order.

¶ 57 First, the trial court ruled upon plaintiff's constitutional argument during the hearing. In response to plaintiff's counsel's request "that Your Honor consider allowing [plaintiff] to proceed with her [DVPO] case" in light of the constitutional argument, the trial court stated: "Without a more expansive argument on constitutionality, I won't do it. I think there is room for that argument. I think that with some more presentation that maybe we could get there, but I don't think on the simple motion I'm ready to do that." Plainly, this exchange constitutes the trial court making a determination, or "passing upon," plaintiff's argument.

¶ 58 Second, the trial court ruled upon plaintiff's constitutional argument within its subsequent form order denying plaintiff's DVPO motion. Specifically, after noting that "had the parties been of opposite genders, th[e]se facts would have supported the entry of a [DVPO,]" the trial court observed that the General Assembly's 2017 amendment to Chapter 50B "was made subsequent to the United Statutes Supreme Court decision in *Obergefell v. Hodges*, 567 U.S. [644,] (2015), and yet the legislature did not amend the definition of personal relationship to include dating partners of the same sex." Again, this statement indicates the trial court's rejection of, and thus ruling upon, plaintiff's constitutional argument in light of legislative intent.

¶ 59 Third, the trial court ruled upon plaintiff's constitutional argument within its subsequent written order. Specifically, after summarizing plaintiff's constitutional argument and noting Chapter 50B's legislative history and exclusion of same-sex dating relationships from DVPO protection, the trial court stated:

> 5. The [c]ourt must consider whether it has jurisdiction to create a cause of action that does not exist and to enter an order under this statute when the statute specifically excludes it. The difficult answer to this question is no, it does not. The General Assembly has the sole authority to pass legislation that allows for the existence of any [DVPO]. The legislature has not extended this cause of action to several other important family relationships including siblings, aunts, uncles, "step" relatives, or in-laws.
>
> 6. In this context, the [c]ourts only have subject matter jurisdiction and the authority to act and enjoin a defendant when the legislature allows it. . . .

As above, this statement indicates the trial court's rejection of plaintiff's constitutional argument on the grounds of legislative intent.

¶ 60 Finally, it is also worth noting that in her only submission in this case from the trial court's initial ruling to her notice of appeal to this Court, defendant directly engaged in the constitutional issue raised by plaintiff at trial. Specifically, defendant asserted "that the LGBT community is asking for special treatment[ ] in this proceeding . . . [and] should not be given equal access to protection under law as heterosexual relationships." This direct engagement by defendant in the constitutional issue further indicates that the issue was properly preserved for appellate review.

¶ 61 Accordingly, plaintiff's argument regarding the constitutionality of Chapter 50B as applied to DVPO complainants in same-sex dating relationships was properly preserved for appellate review. We therefore hold that the Court of Appeals did not err in determining the same.

C. Joinder

¶ 62 **[3]** Third, defendant contends that the Court of Appeals ruling must be vacated and remanded for the mandatory joinder of the North Carolina General Assembly under Rule 19(d) of the North Carolina Rules of Civil Procedure. Because this argument was not raised by defendant below and was first raised by the Court of Appeals dissent, though, it is not properly before this Court, and we therefore decline to consider it. In any event, even assuming *arguendo* that mandatory joinder under Rule 19(d) need not be raised below in order to be considered here, joining the legislative leaders is not required here.

¶ 63 "This Court has long held that issues and theories of a case not raised below will not be considered on appeal . . . ." *Westminster Homes*,

Inc. v. Town of Cary Zoning Bd. of Adjustment, 354 N.C. 298, 309 (2001); *see, e.g.*, *Smith v. Bonney*, 215 N.C. 183, 184–85 (1939) (noting that "[t]o sustain the assignments of error would be to allow the appellant to try the case in the Superior Court upon one theory and to have the Supreme Court to hear it upon a different theory."). Indeed, when "[a]n examination of the record discloses that the cause was not tried upon that theory [below], . . . the law does not permit parties to swap horses between courts in order to get a better mount in the Supreme Court." *Weil v. Herring*, 207 N.C. 6, 10 (1934).

¶ 64 Rule 19(d) of the North Carolina Rules of Civil Procedure establishes that "[t]he Speaker of the House of Representatives and the President Pro Tempore of the Senate, as agents of the State through the General Assembly, must be joined as defendants in any civil action challenging the validity of a North Carolina statute or provision of the North Carolina Constitution under State or federal law." This Rule, however, must be read in harmony with its preceding Rules. Specifically, Rule 12(h)(2) establishes that "a defense of failure to join a necessary party . . . may be made in any pleading permitted or ordered under Rule 7(a), or by motion for judgment on the pleadings, or at the trial on the merits." Further, "[a]lthough a defense of lack of subject matter jurisdiction may not be waived and may be asserted for the first time on appeal[,] a failure to join a necessary party does not result in a lack of jurisdiction over the subject matter of the proceeding." *Stancil v. Bruce Stancil Refrigeration, Inc.*, 81 N.C. App. 567, 574 (1986) (citing Wright & Miller, *Fed. Practice and Procedure: Civil* § 1392 (1969)), *disc. review denied*, 318 N.C. 418, (1986). Accordingly, and in alignment with our well-established prohibition of raising new issues on appeal, "[t]he defense of failure to join a necessary party must be raised before the trial court and may not be raised for the first time on appeal." *Phillips v. Orange County Health Dept.*, 237 N.C. App. 249, 255 (2017).

¶ 65 Here, defendant did not raise the issue of necessary joinder of the legislature under Rule 19(d) before the trial court. Further, neither defendant nor the appointed *amicus* counsel raised this issue before the Court of Appeals. Indeed, the first time that this issue was raised in this case was by the dissenting opinion below. *See M.E.*, 275 N.C. App. at 595 (Tyson, J., dissenting). Specifically, the Court of Appeals dissent cites this Court's ruling in *Booker v. Everhart*, 294 N.C. 146, 158 (1978), for the proposition that "neither the district court, nor [the Court of Appeals], can address the underlying merits of [p]laintiff's assertions until this mandatory joinder defect is cured." *M.E.*, 275 N.C. App. at 595 (Tyson, J., dissenting). In *Booker*, however, the defendants directly raised their

necessary joinder issue before the trial court by making a motion to dismiss under Rule 12(b)(7). *Booker*, 294 N.C. at 149. Here, contrastingly, the necessary joinder issue was raised neither by defendant nor by the trial court *ex meru motu* and was not mentioned until the Court of Appeals dissent. Accordingly, this issue is not properly before this Court, and we therefore decline to consider it. To the extent that *Booker* suggests that an *appellate* court must correct a necessary joinder defect *ex meru motu* before a ruling on the merits, it is overruled.

¶ 66 In any event, even assuming *arguendo* that mandatory joinder under Rule 19(d) may be raised for the first time on appeal, joining the legislative leaders is not required here because plaintiff's arguments do not fall within the purview of Rule 19(d). Rule 19(d) establishes that legislative leaders "must be joined as defendants in any civil action challenging the validity of a North Carolina statute or provision of the North Carolina Constitution under State or federal law." Here, contrastingly, plaintiff's complaint was brought under N.C.G.S. Chapter 50B for the sole purpose of obtaining a DVPO through a judicial proceeding under that chapter, not as an action challenging the facial validity of that statute. Although plaintiff asserted an as-applied constitutional defense in order to prevent the dismissal of her action, this alone does not convert her action seeking a DVPO into a "civil action challenging the validity of a North Carolina statute."

¶ 67 Accordingly, even if defendant's Rule 19(d) joinder argument could be raised for the first time on this appeal, it is meritless within the context of the present case.

III. Court of Appeals' Constitutional Ruling Undisturbed

¶ 68 Finally, we note that defendant has not challenged the Court of Appeals' substantive ruling on the merits of the constitutional issue. Accordingly, we do not address the Court of Appeals' ruling that Chapter 50B's exclusion of complainants in same-sex relationships from DVPO protection is unconstitutional as applied to plaintiff and those similarly situated, and this portion of the holding stands undisturbed.

IV. Conclusion

¶ 69 As explained above, we hold that the trial court acted within its broad discretion in exercising its jurisdiction over plaintiff's Chapter 50B DVPO complaint where plaintiff's amended form served as a functional Rule 60(b) motion for equitable relief from her mistaken or inadvertent dismissal filed thirty-nine minutes previously, and the Court of Appeals did not err in determining the same. Further, we hold that plaintiff's constitutional argument was properly preserved for appellate

review under Rule 10(a)(1). Next, we hold that defendant's Rule 19(d) necessary joinder argument is not properly before this Court, and in any event is meritless as intervention of legislative leaders, though optional, was not mandatory in the context of plaintiff's Chapter 50B complaint. Finally, we note that because the Court of Appeals' substantive constitutional ruling was not at issue before this court, its decision on this issue remains undisturbed.

MODIFIED AND AFFIRMED.

Justice BERGER dissenting.

¶ 70 The Rules of Civil Procedure "govern the procedure in the superior and district courts of the State of North Carolina in all actions and proceedings of a civil nature except when a differing procedure is prescribed by statute." N.C.G.S. § 1A-1, Rule 1 (2021). These rules exist to provide order and certainty for all parties involved in civil litigation. There is a predictable outcome for this case if the Rules of Civil Procedure are respected. However, because the majority fails to adhere to these basic rules, and because the majority's newly crafted "mistaken or inadvertent dismissal" rule cannot be found in the Rules of Civil Procedure, I respectfully dissent.

¶ 71 A complaint seeking entry of a domestic violence protective order pursuant to Chapter 50B is a civil action. N.C.G.S. § 50B-2(a) (2021). "A civil action is commenced by filing a complaint with the court." N.C.G.S. § 1A-1, Rule 3(a) (2021). Any action or claim may be dismissed by the plaintiff without order of court by filing a notice of dismissal at any time before the plaintiff rests his case. N.C.G.S. § 1A-1, Rule 41(a) (2021).

¶ 72 "It is well settled that a Rule 41(a) dismissal strips the trial court of authority to enter further orders in the case, except as provided by Rule 41(d) which authorizes the court to enter specific orders apportioning and taxing costs." *Brisson v. Kathy A. Santoriello, M.D., P.A.*, 351 N.C. 589, 593, 528 S.E.2d 568, 570 (2000) (cleaned up). "After a plaintiff takes a Rule 41(a) dismissal, there is nothing the defendant can do to fan the ashes of that action into life, and the court has no role to play." *Id.* (cleaned up). "A universal principle as old as the law is that the proceedings of a court without jurisdiction of the subject matter are a nullity." *Burgess v. Gibbs*, 262 N.C. 462, 465, 137 S.E.2d 806, 808 (1964).

¶ 73 "An application to the court for an order shall be by motion which, unless made during a hearing or trial or at a session at which a cause is on the calendar for that session, shall be made in writing, shall state with

particularity the ground therefor, and shall set forth the relief or order sought." N.C.G.S. § 1A-1, Rule 7(b)(1) (2021). On motion and upon such terms as are just, the court may relieve a party from a final judgment, order, or proceeding for mistake, inadvertence, surprise, or excusable neglect. N.C.G.S. § 1A-1, Rule 60(b) (2021). However, "[a] voluntary dismissal with prejudice, or a voluntary dismissal without prejudice, once a year has elapsed and the action cannot be refiled, constitutes a final adjudication subject to relief under [Rule 60(b)]." G. Gray Wilson, 2 *North Carolina Civil Procedure* § 60-2 (4th ed. 2021) (footnotes omitted).

¶ 74 On May 31, 2018, plaintiff commenced her Chapter 50B action against defendant upon the filing of her "Complaint and Motion for Domestic Violence Protective Order." Later that day, plaintiff dismissed her Chapter 50B action against defendant by filing a notice of voluntary dismissal. Plaintiff's voluntary dismissal of the Chapter 50B action was filed eight minutes after she filed a Chapter 50C "Complaint for No-Contact Order for Stalking or Nonconsensual Sexual Conduct." Plaintiff subsequently attempted to withdraw the voluntary dismissal she had filed by striking through the paper with a diagonal line, writing the word "amended" at the top along with a sentence at the bottom explaining "I strike through this voluntary dismissal. I do not want to dismiss this action." Plaintiff filed these various documents pro se and the trial court granted her motion for a Chapter 50C temporary no-contact order, denied her motion for a Chapter 50B emergency DVPO, and set the matter for a plenary hearing on the merits for June 7, 2018. As defendant was not present at the initial hearing, she was not provided with notice of the complaints until after the May 31, 2018. Defendant was never served with the voluntary dismissal of the Chapter 50B action.

¶ 75 At the June 7, 2018, hearing, plaintiff was represented by two attorneys. Defendant did not file an answer to either complaint, appeared pro se, and did not raise any objections during the hearing. In fact, according to the transcript, defendant spoke just once during the hearing in which she acknowledged to the trial court her understanding of the Chapter 50C no-contact order. Despite the fact that plaintiff's voluntary dismissal had already "strip[ped] the trial court of authority," *Brisson*, 351 N.C. at 593, 528 S.E.2d at 570, over the Chapter 50B claim, the trial court entered an order dismissing the Chapter 50B complaint on other grounds and granted the Chapter 50C no-contact order.

¶ 76 The majority does not take issue with the trial court's lack of jurisdiction. Rather, the majority relies on the notion that trial courts have broad discretion to take any action within the law to ensure a fair and impartial trial "so long as he [or she] does not impinge upon [statutory]

restrictions." The majority further states that "[w]hen there is no statutory provision or well recognized rule applicable, the presiding judge is empowered to exercise his [or her] discretion in the interest of efficiency, practicality, and justice." One glaring gap in this logic, however, is that there *is* a statutory provision and well recognized rule such that a trial court's exercise of jurisdiction after a complaint has been voluntarily dismissed *does* impinge upon such statutory restrictions. *See* N.C.G.S. § 1A-1, Rule 41(a); *Brisson*, 351 N.C. at 593, 528 S.E.2d at 570.

¶ 77 According to the majority, plaintiff's voluntary dismissal "served as [a] functional Rule 60(b) motion through which the trial court could, and did, grant equitable relief." Untethered to the rules, the majority divines the intent of plaintiff, stating that "courts should not put themselves in the position of failing to recognize what is apparent to everyone else." Thus, the majority reasons, "[i]t was squarely within the discretion of the trial court to understand the plain intent of plaintiff's amended notice of voluntary dismissal as a Rule 60(b) motion for equitable relief or her amended Chapter 50B complaint as a functional refiling, and to subsequently exercise its jurisdiction." However, this approach is contrary to the Rules of Civil Procedure as plaintiff filed no motion with the Court, there was no final judgment, and her attorneys never requested the relief granted by the majority today. N.C.G.S. § 1A-1, Rule 7(b)(1), N.C.G.S. § 1A-1, Rule 60(b). The idea that plaintiff's filing was a motion pursuant to Rule 60(b) likely comes as a surprise to the trial court and both of plaintiff's counsel below. Nowhere in the transcript or the trial court's order is it intimated that the trial court "underst[ood] the plain intent of plaintiff's amended notice of voluntary dismissal as a Rule 60(b) motion for equitable relief or her amended Chapter 50B complaint as a functional refiling." Indeed, neither of plaintiff's attorneys argued before the trial court that the diagonal strikethrough and statement on the voluntary dismissal should in any way be considered as a Rule 60(b) motion. If neither the trial court nor plaintiff's lawyers recognized plaintiff's "mistaken or inadvertent dismissal" as a Rule 60(b) motion, it is difficult to comprehend how "every intelligent person underst[ood what was] meant." There plainly was never a subsequent motion filed by the plaintiff upon which the trial court could grant the relief allowed by the majority.

¶ 78 It is interesting that in one breath the majority claims there is "no doubt as to plaintiff's intentions" and in another, the majority concedes that it "cannot know precisely from the record whether the trial court considered [the amendment to the voluntary dismissal as a Rule 60(b) motion or a refiling of the Chapter 50B complaint] when it determined that it had jurisdiction." Further, according to the majority, plaintiff and

her counsel "likely did not" intend for her amendment to the voluntary dismissal or her amended Chapter 50B complaint to serve as a 60(b) motion or a formal refiling, respectively. Even assuming "every intelligent person" should understand what plaintiff intended based on documents in the court file, the majority is apparently uncertain itself about whether plaintiff was refiling her Chapter 50B complaint or requesting relief pursuant to Rule 60(b).[1]

¶ 79 Rule 60(b) is meant to relieve a party from a final judgment, order, or proceeding. N.C.G.S. § 1A-1, Rule 60(b). It strains credibility for this Court to contend that plaintiff's "inadvertent or mistaken voluntary dismissal" was in fact a Rule 60(b) motion as no final judgment had been entered, and plaintiff was ineligible for such relief under the plain wording of the rule. *See Robinson v. General Mills Restaurants, Inc.*, 110 N.C. App. 633, 637, 430 S.E.2d 696, 699, *review allowed* 334 N.C. 623, 435 S.E.2d 340 (1993), *review denied as improvidently granted* 335 N.C. 763, 440 S.E.2d 274 (1994) (holding that "once the one-year period for refiling an action has elapsed and the action can no longer be resurrected, the voluntary dismissal acts as a final adjudication for purposes of Rule 60(b)"); *see also* Wilson, 2 *North Carolina Civil Procedure* § 60-2 (footnotes omitted) (a voluntary dismissal is not a "final adjudication subject to relief under [Rule 60(b)]" unless "a year has elapsed and the action cannot be refiled[.]").

¶ 80 In reaching their decision, the majority ignores that the Rules of Civil Procedure apply to Chapter 50B proceedings. N.C.G.S. § 1A-1, Rule 1; N.C.G.S. § 50B-2(a). Instead, the majority bases its reasoning on the purpose of Chapter 50B — "provid[ing] a method for trial court judges or magistrates to quickly provide protection from the risk of acts of domestic violence by means of a process which is readily accessible to *pro se* complainants." While the purpose of the statute is important, it does not provide a license to ignore the Rules of Civil Procedure, or the due process rights of an adverse party.

¶ 81 The majority proclaims that "[p]laintiff here is exactly the type of complainant that the *pro se* provisions of Chapter 50B contemplate: one who is navigating the complex arena of legal procedure for the first time, without the assistance of legal counsel, soon after experiencing significant trauma." Notably, however, the majority fails to discuss that

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1. Treating plaintiff's voluntary dismissal as a new civil action disregards the filing requirements set forth in Rule 3; issuance of a summons as required by Rule 4; service requirements in Rule 5; and the fact that, if this were new action, the Clerk of Court would have assigned a separate file number.

plaintiff was represented by not one, but two attorneys at the hearing. *Cf. Brown v. Kindred Nursing Centers East, L.L.C.*, 364 N.C. 76, 84, 692 S.E.2d 87, 92 (2010) ("[I]t it well settled that 'the rules [of civil procedure] must be applied equally to all parties to a lawsuit, without regard to whether they are represented by counsel.' ").

¶ 82 Importantly, defendant never received notice that plaintiff had filed a voluntary dismissal in the Chapter 50B action. In addition, and unsurprisingly, defendant had no notice that the trial court was considering a Rule 60(b) motion, again, because plaintiff's two attorneys did not make the motion and the trial court did not rule on any such motion. The majority's professed concern for pro se litigants does not seem to apply to this defendant, who was, ironically, the only party to appear pro se.

¶ 83 The law going forward appears to be that, even if the Rules of Civil Procedure yield a particular result, trial courts are free reach a contrary outcome so long as an "intelligent person understands [what] is meant[.]" *But see Goins v. Puleo*, 350 N.C. 277, 281, 512 S.E.2d 748, 751 (1999) (stating that "the Rules of Civil Procedure promote the orderly and uniform administration of justice, and all litigants are entitled to rely on them"); *Pruitt v. Wood*, 199 N.C. 788, 790, 156 S.E. 126, 127 (1930) ("When litigants resort to the judiciary for the settlement of their disputes, they are invoking a public agency, and they should not forget that rules of procedure are necessary and must be observed[.]").

¶ 84 The Rules of Civil Procedure either apply or they don't. The rules provide certainty for all parties involved in civil litigation. By failing to adhere to these basic rules, the majority makes our system of justice less predictable and causes our law to become more unsettled. The majority's new "mistaken or inadvertent dismissal" rule is antithetical to our adversarial system and will disrupt the orderly flow of cases through our trial courts under the guise of "facilitat[ing] access to justice[.]" This is not a case in which the record shows that the parties and trial court knew that relief under Rule 60(b) was sought or where the trial court granted relief under Rule 60(b). Thus, the majority's approach shifts appellate review from the text of the rules and the arguments of the parties in the trial court to allow reverse engineered arguments based on sympathies and desired results.

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

PONDER v. BEEN

[380 N.C. 570, 2022-NCSC-24]

MARK W. PONDER
v.
STEPHEN R. BEEN

No. 70A21

Filed 11 March 2022

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 275 N.C. App. 626, 853 S.E.2d 302 (2020), reversing an order entered on 29 October 2019 by Judge W. Robert Bell in Superior Court, Mecklenburg County. Heard in the Supreme Court on 15 February 2022.

Sodoma Law, by Amy Simpson, for plaintiff-appellant.

James, McElroy & Diehl, P.A., by Preston O. Odom, III, and Claire Samuels Law, PLLC, by Claire J. Samuels, for defendant-appellee.

PER CURIAM.

For the reasons stated in the dissenting opinion, the decision of the Court of Appeals is reversed.

REVERSED.

STATE v. MEDLIN

[380 N.C. 571, 2022-NCSC-25]

STATE OF NORTH CAROLINA
v.
JAMES GREGORY MEDLIN

No. 246PA21

Filed 11 March 2022

On writ of certiorari pursuant to N.C.G.S. § 7A-32(b) to review a divided decision of the Court of Appeals, 278 N.C. App. 345, 2021-NCCOA-313, holding no error in a judgment entered on 17 September 2019 by Judge Anna M. Wagoner in Superior Court, Cabarrus County. Heard in the Supreme Court on 14 February 2022.

Joshua H. Stein, Attorney General, by William F. Maddrey, Assistant Attorney General, for the State-appellee.

Sandra Payne Hagood, for defendant-appellant.

PER CURIAM.

¶ 1 North Carolina General Statutes Section 15A-1343(a) reads, in its entirety, as follows:

> In General. — The court may impose conditions of probation reasonably necessary to insure that the defendant will lead a law-abiding life or to assist him to do so.

N.C.G.S. § 15A-1343(a) (2021).

¶ 2 A challenged condition of probation imposed by a trial court is valid when it is reasonably related to a defendant's offense and reasonably related to his rehabilitation. *State v. Cooper*, 304 N.C. 180, 184 (1981). In the absence of proof to the contrary, it is presumed that a trial court acted with proper discretion with respect to a condition of probation imposed by the trial court. *State v. Smith*, 233 N.C. 68, 70 (1950). Further, the Court looks with favor upon the observation of the Court of Appeals that "[t]he [trial] court has substantial discretion in devising conditions under th[e] [probation statute]." *State v. Harrington*, 78 N.C. App. 39, 48 (1985).

¶ 3 In the present case, the trial court properly exercised its substantial discretion in devising and imposing special conditions of probation that were sufficiently reasonable in their relationship to defendant's rehabilitation. Consequently, without proof to the contrary, there was

no abuse of the discretion properly exercised here by the trial court in its specification of defendant's special conditions of probation. In determining a defendant's special conditions of probation and assuring their compatibility with one another as well as with the general conditions of probation, a trial court must exercise caution and vigilance to avoid inadvertent conflicts between and among the probationary conditions which are tailored for a defendant's rehabilitation pursuant to N.C.G.S. § 15A-1343.

AFFIRMED.

STATE OF NORTH CAROLINA
v.
KELVIN ALPHONSO ALEXANDER

No. 234PA20

Filed 11 March 2022

Criminal Law—post-conviction DNA testing—availability after guilty plea—materiality

In a case arising from a fatal shooting in connection with a robbery, defendant's guilty plea to second-degree murder did not disqualify him from seeking post-conviction DNA testing pursuant to N.C.G.S. § 15A-269. Nevertheless, the trial court properly denied defendant's motion for post-conviction DNA testing of the shell casings and projectile found at the crime scene, where he failed to show that the test results would be material to his defense (according to credible eyewitness testimony, defendant was one of two people involved in the crime, and therefore the presence of another's DNA on the shell casings or projectile would not necessarily have exonerated him).

Chief Justice NEWBY concurring in the result.

Justice BARRINGER joins in this concurring opinion.

Justice EARLS concurring in part and dissenting in part.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 271 N.C. App. 77 (2020), affirming an order entered on 1 October 2018 by Judge Henry W. Hight, Jr., in Superior Court, Warren County, denying defendant's motion for postconviction DNA testing. Heard in the Supreme Court on 5 October 2021.

Joshua H. Stein, Attorney General, by Kristin J. Uicker, Assistant Attorney General, for the State-appellee.

Glenn Gerding, Appellate Defender, by Anne M. Gomez, Assistant Appellate Defender, for defendant-appellant.

Julie Boyer, Attorney at Law, by Julie C. Bower; Kelly M. Dermody; and Evan J. Ballan, for The Innocence Network, amicus curiae.

ERVIN, Justice.

¶ 1 This case arises from a motion for postconviction DNA testing pursuant to N.C.G.S. § 15A-269 filed by defendant Kelvin Alphonso Alexander over two decades after he entered a plea of guilty to second-degree murder. At the conclusion of a hearing held for the purpose of considering defendant's motion, the trial court entered an order denying defendant's request for postconviction DNA testing on the grounds that defendant had failed to show that the requested testing would be material to his defense. On appeal, we have been asked to determine (1) if defendants who are convicted on the basis of a guilty plea are entitled to obtain postconviction DNA testing pursuant to N.C.G.S. § 15A-269 and (2) if so, whether defendant made the necessary showing of materiality in this case. After careful consideration of the record in light of the applicable law, we affirm the decision of the Court of Appeals.

I. Factual Background

A. Substantive Facts

¶ 2 On the morning of 17 September 1992, Carl Boyd was found dead behind the counter of the Amoco service station that he managed in Norlina. After being dispatched to the Amoco station, Deputy Sheriff William H. Aiken of the Warren County Sheriff's Office, who was accompanied by Special Agent D.G. McDougall of the State Bureau of Investigation, discovered that Mr. Boyd had been shot multiple times. A subsequent autopsy revealed that Mr. Boyd had sustained four gunshot wounds to his back, abdomen, and forearm, with the medical examiner

having expressed the opinion that these wounds had been inflicted using a .22 caliber handgun.

¶ 3 In the course of their examination of the Amoco station, Deputy Aiken and Special Agent McDougall seized several items of evidence, including a .22 caliber projectile and three .22 caliber shell casings that were discovered on the service station floor. In addition, Special Agent McDougall collected eighteen latent print lifts from various parts of the service station. An SBI analyst later determined that these lifts contained five usable latent fingerprints and two usable latent palm prints and that three of the fingerprints belonged to Mr. Boyd and his wife. The firearm that had been used to kill Mr. Boyd was never recovered.

¶ 4 On 19 September 1992, Deputy Aiken interviewed Orlinda Lashley, who had been in the crowd outside the Amoco station while the investigating officers were there. According to a subsequent report prepared by Special Agent R.G. Sims of the State Bureau of Investigation, Ms. Lashley told Deputy Aiken that she had arrived at the Amoco station at approximately 7:15 a.m. and had been standing next to the gas tanks when she heard shouting, followed by two loud noises, emanating from the interior of the service station. At that point, according to Ms. Lashley, two men emerged from the front of the store, one of whom Ms. Lashley identified by name as defendant. As defendant emerged from the Amoco station, defendant told Ms. Lashley, "Hold it bitch, if you make a move, you're dead," after which he and the other man got into a vehicle that they were using and drove away. Ms. Lashley claimed to have left to go home before returning to the service station, in which she found Mr. Boyd, who died while holding her hands. After walking to another business across the street and contacting law enforcement officers, Ms. Lashley noticed that defendant was in the crowd that had gathered outside the Amoco station.

¶ 5 In light of the information that Ms. Lashley had provided, Deputy Aiken placed defendant under arrest. At the time that he was questioned by investigating officers, defendant denied having had any involvement in the killing of Mr. Boyd and claimed that he had been at home in bed at the time of the robbery and murder. Defendant did, on the other hand, admit to having gone to the Amoco station and to having stood outside while investigating officers were in the building, although he denied having ever entered the service station after Mr. Boyd began operating the business. Tanika Brown, the teenage daughter of defendant's father's girlfriend, who lived with defendant, told Special Agent Sims that defendant had been in bed on the morning of Mr. Boyd's death and that she had spoken to defendant at approximately 7:10 a.m. or 7:15 a.m. about

borrowing a gold chain from him given that school photographs were to be taken that day.

¶ 6 On 21 September 1992, Deputy Aiken and Special Agent Sims interviewed Ms. Lashley for a second time. Although the investigating officers showed her a photographic lineup that contained images of six suspects, including defendant, Ms. Lashley failed to identify any of the individuals depicted in the photographic array. At the time of defendant's sentencing hearing, Ms. Lashley explained that, even though she had recognized defendant's photo when she was shown the photographic lineup, she had not pointed him out because she had been asked to identify the second person that she had seen leaving the Amoco station rather than defendant. After the second interview, Ms. Lashley provided a formal statement describing what she had seen, which was handwritten by Special Agent Sims and which Ms. Lashley annotated and signed.

¶ 7 In this written statement, Ms. Lashley said that, after leaving the Amoco station, she had parked in a nearby driveway to clean herself and change her clothes,[1] at which point her "conscience was kicking in" and she "knew [she] had to go back." In light of this attack of conscience, Ms. Lashley said that she drove to the F&S Convenience Store, which was located across the street from the Amoco station, where she learned that Mr. Boyd had been shot. After determining that investigating officers and emergency medical personnel had been dispatched to the wrong location, Ms. Lashley claimed to have called 911 and informed the dispatcher that the officers and emergency medical personnel were needed at the Amoco station. According to Ms. Lashley, she accompanied the paramedics into the service station, where she saw Mr. Boyd's body, but did not "administer aid or touch him in any way." Ms. Lashley stated that she had not spoken to investigating officers at that time because she "was scared to death," that she had known defendant for "most of his life," that defendant had gone to school with her nephew, and that she knew defendant's father. Although she was shown the photographic lineup again at the conclusion of this second interview, Ms. Lashley again failed to identify any of the individuals who were depicted in that array.

¶ 8 On 20 October 1992, Special Agent McDougall interviewed Nell and Bonnie Ricks concerning a robbery that had occurred at a rest area located on Interstate 85 on the morning of Mr. Boyd's murder. At the time of that conversation, Mr. Ricks stated that, at approximately 7:00 a.m.,

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1. At defendant's sentencing hearing, Ms. Lashley testified that she was scared and had "lost control of her bladder."

he and his wife had stopped at the rest area, which Deputy Aiken claimed to be a "two or three minutes' drive" from the Amoco station, and that he was using the restroom when a Black male held him at gunpoint using what appeared to be a sawed-off shotgun or .22 caliber rifle and demanded to be given Mr. Ricks' wallet. After handing over his wallet to the assailant, Mr. Ricks remained in the restroom for another minute before returning to his car and calling law enforcement officers. Ms. Ricks told Special Agent McDougall that she had seen a Black man who was at least six feet tall, slender, and approximately twenty-five years old exit the rest area building and enter an older, medium-sized white car. Although Ms. Ricks was later shown a photographic lineup that contained defendant's image, Ms. Ricks did not identify anyone depicted in the lineup as the person that she had seen at the rest area.

B. Procedural History

¶ 9 On 19 October 1992, the Warren County grand jury returned bills of indictment charging defendant with first-degree murder and robbery with a dangerous weapon. In the course of pretrial proceedings, the prosecutor informed defendant's trial counsel that the State had a "credible eyewitness" who could identify defendant as Mr. Boyd's killer and that there was a "substantial possibility that [defendant] would be convicted of first-degree murder." The prosecutor did not, however, provide defendant's trial counsel with Ms. Lashley's name or give defendant's trial counsel access to either Special Agent Sims' report concerning Deputy Aiken's initial interview with Ms. Lashley or the handwritten statement that Ms. Lashley had annotated and signed at the time of her second interview.

¶ 10 The charges against defendant came on for trial before Judge Knox V. Jenkins, Jr., at the 15 November 1993 criminal session of Superior Court, Warren County. On 16 November 1993, during the process of selecting a death-qualified jury, defendant entered into a plea agreement with the State pursuant to which he agreed to plead guilty to second-degree murder in return for the dismissal of the robbery with a dangerous weapon charge, with sentencing to be left to Judge Jenkins' discretion. In addition, the State agreed to produce its eyewitness at the sentencing hearing, during which she could be cross-examined by defendant's trial counsel. After accepting defendant's guilty plea, Judge Jenkins scheduled a sentencing hearing for the following day.

¶ 11 In the course of the ensuing sentencing hearing, Ms. Lashley testified in a manner that was generally consistent with the written statement that she had signed and annotated at the time of her second interview

with the investigating officers. Among other things, Ms. Lashley reiterated that, after leaving the Amoco station, she had stopped to clean herself and change clothes before returning to the F&S Convenience Store and calling for emergency assistance and that she had only entered the Amoco station with the paramedics for a brief period of time before returning to the exterior of the building. Finally, Ms. Lashley testified that she had known defendant "[p]ractically all his life" and added that their families had been close for as long as she could remember.

¶ 12 Defendant's father, Willie Alexander, testified at the sentencing hearing concerning defendant's background and education without making any mention of defendant's whereabouts on the date of Mr. Boyd's death. In the course of his sentencing argument, defendant's trial counsel commented that Ms. Lashley had "presented a slightly different version" of what happened during the photo lineup proceedings, mentioned Ms. Lashley's assertion that she had not been asked to identify defendant, and highlighted testimony from a classmate of Ms. Lashley's nephew to the effect that, while he and defendant "may have [had] a slight crossing of paths" in high school, they had graduated four years apart. Finally, defendant's trial counsel pointed to Ms. Lashley's testimony that she had not lived in Warren County from 1977, when defendant was five years old, to 1990, when defendant was eighteen years old. Prior to announcing his sentencing decision, Judge Jenkins observed that, in light of her demeanor, manner, and appearance, he believed that Ms. Lashley had "an obvious lack of any interest, bias[,] or prejudice" and "appeared to be fair in her testimony." At the conclusion of the sentencing hearing and after finding the existence of two aggravating factors and no mitigating factors, Judge Jenkins entered a judgment sentencing defendant to a term of life imprisonment.

¶ 13 On 20 November 2002, defendant, who was proceeding *pro se*, filed a motion for appropriate relief in which he asserted claims for ineffective assistance of counsel and prosecutorial misconduct. On 4 April 2006, an evidentiary hearing was held before Judge R. Allen Baddour, Jr., for the purpose of considering the issues raised by defendant's motion for appropriate relief. At the 4 April 2006 hearing, the prosecutor testified that the State's case against defendant "rested almost exclusively on Ms. Lashley's identification" of defendant as one of the men whom she had seen leaving the Amoco station and that he "presumed" that, in the event that Ms. Lashley had been unable to identify defendant as one of the perpetrators of the murder, Judge Jenkins would have permitted defendant to withdraw his guilty plea.

¶ 14 Marvin Rooker, who served as one of defendant's trial attorneys, testified that, although he had been aware that there were some potential issues relating to Ms. Lashley's ability to identify defendant after viewing the photographic lineup, he believed that her testimony at the sentencing hearing had been "very credible" and that she had been "a good witness for the State." Frank Ballance, who served as defendant's other trial counsel, indicated that he had understood that defendant would have been allowed to withdraw his guilty plea in the event that the State's alleged eyewitness had failed to testify. Mr. Alexander testified that defendant had been at home at the time of Mr. Boyd's death and that he had told defendant's trial counsel about his availability as an alibi witness prior to the entry of defendant's guilty plea, with Mr. Rooker confirming that, even though he was aware of the possibility that defendant might be able to mount an alibi defense, defendant had elected to plead guilty anyway.

¶ 15 Dominic White, who had pled guilty to federal criminal charges in 2004 and remained in federal custody, testified that, while he was being debriefed by federal authorities, he had told them that, in 1992, his friend, John Terry, had confessed to having robbed and shot the owner of a convenience store in Warren County. Mr. White said that, while he and Mr. Terry had been driving through the area, Mr. Terry had stopped the car, run into the woods, and returned with what appeared to Mr. White to be a .22 caliber short-barrel assault rifle, which Mr. Terry claimed to have been the firearm used in the robbery and shooting. On the other hand, Mr. Terry, who also testified at the evidentiary hearing, denied having shot Mr. Boyd or told Mr. White that he had done so and claimed that he did not know defendant and had never met him.

¶ 16 On 8 January 2007, Judge Baddour entered an order denying defendant's motion for appropriate relief on the grounds that, at the time that defendant had entered his guilty plea, "he was fully aware that the State claimed it had an eyewitness" even though his trial counsel did not know the witness' identity and had not had time to investigate her story, with the purpose of her testimony at sentencing having been to allow defendant "the opportunity to assess her testimony and credibility." In addition, Judge Baddour determined that, by failing to seek to withdraw his guilty plea following Ms. Lashley's testimony, defendant had expressed satisfaction "with the nature and quality of the testimony of [Ms.] Lashley" and that, even if defendant's trial counsel had provided him with deficient representation in light of their failure to learn Ms. Lashley's identity until the time of the sentencing hearing, there was "no reasonable probability" that, in the absence of that error, defendant would not have entered a plea of guilty.

¶ 17 On 18 March 2016, defendant filed a motion seeking postconviction DNA testing pursuant to N.C.G.S. § 15A-269 in which he requested the entry of an order compelling the performance of DNA and fingerprint testing on the three shell casings and projectile that had been found in the Amoco station on the theory that, in the event that Mr. Terry's DNA or fingerprints could be detected on these items, such a result would exonerate defendant. On 1 October 2018, the trial court entered an order denying defendant's motion on the grounds that defendant had "failed to show that all the requirements of [N.C.G.S. §] 15A-269 ha[d] been met" and that "the evidence sought is not material in this post-conviction setting" given that "the firearm which fired the bullet that killed Carl Eugene Boyd has never been recovered and the requested DNA testing would not reveal the identity of who fired th[e] firearm [that] killed Carl Eugene Boyd." Defendant noted an appeal to the Court of Appeals from the trial court's order.

C. Court of Appeals Decision

¶ 18 In seeking relief from the trial court's order before the Court of Appeals, defendant contended that the trial court had erred by determining that the requested DNA evidence was not material. Arguing in reliance upon the Court of Appeals' earlier decision in *State v. Randall*, defendant asserted that the proper standard for assessing materiality in cases involving guilty pleas focused upon the extent to which "there is a reasonable probability that DNA testing would have produced a different outcome"—specifically, that the defendant "would not have pleaded guilty and otherwise would not have been found guilty." 259 N.C. App. 885, 887 (2018). Defendant contended that, had a third person's DNA had been found on the shell casings and projectile and defendant's DNA not been detected there, those results would have provided significant support for a conclusion that someone else had been involved in the commission of the crime that defendant had been convicted of committing. In defendant's view, had such evidence been available and had he known about the "numerous problems" that tended to undermine Ms. Lashley's identification testimony, there was a reasonable probability that he would not have entered a guilty plea. In addition, defendant asserted that there was a reasonable probability that, had he insisted upon going to trial instead of pleading guilty, he would not have been convicted given the newly available DNA evidence and the other exculpatory evidence that was available to him.

¶ 19 In response, the State contended that defendant was not entitled to seek postconviction DNA testing because he had entered a guilty plea. In the State's view, defendant's guilty plea deprived him of the ability to

make the necessary showing of materiality given that he had not presented a "defense" for purposes of N.C.G.S. § 15A-296(a)(1) and could not have obtained a "more favorable verdict" in the absence of a decision with respect to the issue of guilt rendered by a jury. In addition, the State asserted that the Court of Appeals' decision in *Randall* had been overruled in *State v. Sayre*, 255 N.C. App. 215 (2020), *aff'd per curiam*, 371 N.C. 468 (2018) (observing that, "by entering into plea agreement with the State and pleading guilty, [the] defendant presented no 'defense' pursuant to [N.C.G.S.] § 15A-269(a)(1)"). Finally, the State argued that, even if defendant's guilty plea did not preclude him from seeking postconviction DNA testing, he had failed to make the necessary showing of materiality given that the evidence of his guilt was overwhelming and given that the presence of a third party's DNA upon the relevant items of evidence "would show at best that someone other than [d]efendant touched the shell casings or projectile at some time [and] for some reason that need not have been related to the robbery-murder." In the same vein, the State noted that Mr. White's testimony, which had been given more than a decade after the entry of defendant's guilty plea, could not support a finding of materiality given that the evidence in question had not been available at the time that defendant pled guilty and was sentenced.

¶ 20 In rejecting the State's argument that a defendant who pleads guilty is not entitled to seek postconviction DNA testing pursuant to N.C.G.S. § 15A-269, the Court of Appeals concluded that its prior decision in *Randall* was controlling with respect to this issue and that "there may be rare situations where there is a reasonable probability that a defendant would not have pleaded guilty in the first instance and would have not otherwise been convicted had the results of DNA testing" been available at the time of the defendant's guilty plea. *State v. Alexander*, 271 N.C. App. 77, 79 (2020) (citing *Randall*, 259 N.C. App. at 887). After acknowledging that the use of the word "verdict" might tend to suggest that the General Assembly intended to limit the availability of postconviction DNA testing to cases in which the defendant had been convicted based upon a decision by a jury, the Court of Appeals concluded that "there is a strong counter-argument that the General Assembly did not intend for the word 'verdict' to be construed in such a strict, legal sense" and that the General Assembly had, instead, "intended for 'verdict' to be construed more broadly, to mean 'resolution,' 'judgment' or 'outcome' in a particular matter," particularly given that a decision to adopt the more restrictive reading upon which the State relied might lead to the absurd result that postconviction DNA testing would not be available to a defendant who had been convicted at the conclusion of a bench trial.

Id. at 80; *see id.* at 80 n. 1 (citing *State v. Hemphill*, 273 N.C. 388, 389 (1968); N.C.G.S. § 1A-1, Rule 52 (2015)). Finally, the Court of Appeals concluded that this Court's decision to affirm the Court of Appeals' decision in *Sayre* did not constitute acceptance of the State's position that postconviction DNA testing was not available to defendants who had been convicted on the basis of a guilty plea rather than a jury verdict because that question had not been before the Court in *Sayre*. *Id.* at 81.

¶ 21 After determining that defendant's guilty plea did not preclude him from seeking postconviction DNA testing, the Court of Appeals held that the trial court had correctly concluded that defendant had failed to make the necessary showing of materiality. *Id.* at 81–82. In support of this decision, the Court of Appeals pointed to the "substantial evidence of [d]efendant's guilt," including (1) Ms. Lashley's testimony; (2) defendant's admission that he had been at the Amoco station on the date of the murder; and (3) defendant's guilty plea. *Id.* In addition, the Court of Appeals concluded that the mere presence of a third party's DNA on the evidence that defendant sought to have tested did not necessarily exonerate him given the existence of a number of alternative explanations for the presence of a third party's DNA on that evidence. *Id.* at 82.

¶ 22 In a separate opinion concurring in the result, then-Judge Berger opined that defendants who had been convicted on the basis of a plea of guilty plea did not have the right to seek postconviction DNA testing. *Id.* at 82 (Berger, J., concurring). As an initial matter, Judge Berger disputed the validity of the Court of Appeals' determination that this Court's decision in *Sayre* was limited to the issue of materiality. *Id.* at 83–85. In addition, Judge Berger noted that, by pleading guilty, defendant had "waive[d] all defenses other than that the indictment charges no offense[,]" with the defenses that defendant had waived by entering a guilty plea having included the right to seek postconviction DNA testing. *Id.* at 85 (quoting *State v. Smith*, 279 N.C. 505, 506 (1971)). Judge Berger asserted that his colleagues had construed the term "verdict" in an excessively broad manner, that the relevant statutory expression should be understood in accordance with its "plain meaning," and that, in order for a defendant to make the necessary showing of materiality, "there must have been a verdict returned by a jury." *Id.* at 86–87. Finally, after noting that N.C.G.S. § 15A-269(b)(3) provides that a defendant seeking to obtain DNA testing must execute an affidavit of innocence, Judge Berger opined that "[a] defendant who, under oath, admits guilt to a charged offense, cannot thereafter provide a truthful affidavit of innocence" as required by N.C.G.S. § 15A-269(b)(3). *Id.* at 87. This Court allowed defendant's petition for discretionary review of the Court of Appeals' decision on 12 August 2020.

II. Substantive Legal Analysis

A. Standard of Review

¶ 23 This Court reviews decisions of the Court of Appeals for errors of law. N.C. R. App. P. 16(a); *State v. Melton*, 371 N.C. 750, 756 (2018). "In reviewing a denial of a motion for postconviction DNA testing, '[f]indings of fact are binding on this Court if they are supported by competent evidence and may not be disturbed absent an abuse of discretion.' " *State v. Lane*, 370 N.C. 508, 517 (2018) (alteration in original) (quoting *State v. Gardner*, 227 N.C. App. 364, 365–66 (2013)). "A trial court's determination of whether defendant's request for postconviction DNA testing is 'material' to his defense, as defined in N.C.G.S. § 15A-269(b)(2), is a conclusion of law, and thus we review de novo [a] trial court's conclusion that defendant failed to show the materiality of his request." *Id.* at 517–18.

B. Availability of Postconviction DNA Testing Following a Guilty Plea

¶ 24 According to N.C.G.S § 15A-269, a convicted defendant is entitled to obtain postconviction DNA testing of evidence that:

> (1) Is material to the defendant's defense.
>
> (2) Is related to the investigation or prosecution that resulted in the judgment.
>
> (3) Meets either of the following conditions:
>
> a. It was not DNA tested previously.
>
> b. It was tested previously, but the requested DNA test would provide results that are significantly more accurate and probative of the identity of the perpetrator or accomplice or have a reasonable probability of contradicting prior test results.

N.C.G.S. § 15A-269(a) (2021). A trial court is required to allow a request for postconviction DNA testing in the event that the criteria specified in N.C.G.S. § 15A-269(a) have been established and that:

> (2) If the DNA testing being requested had been conducted on the evidence, there exists a reasonable probability that the verdict would have been more favorable to the defendant; and

(3) The defendant has signed a sworn affidavit of innocence.

N.C.G.S. § 15A-269(b). "Materiality" as used in the statutory provisions governing postconviction DNA testing should be understood in the same way that "materiality" is understood in *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny, *Lane*, 370 N.C. at 519, with the relevant inquiry being whether "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Bagley*, 473 U.S. 667, 682 (1985).

¶ 25 The initial issue that we need to address in evaluating the validity of defendant's challenge to the Court of Appeals' decision to uphold the trial court's order is whether our decision in *Sayre* should be understood to deprive defendants convicted on the basis of guilty pleas of the right to seek and obtain postconviction DNA testing even if they are otherwise able to satisfy the applicable statutory requirements. The majority at the Court of Appeals held in *Sayre* that the defendant's "bare assertion that testing the identified evidence would 'prove that [he] is not the perpetrator of the crimes' is not sufficiently specific to establish that the requested DNA testing would be material to his defense." *State v. Sayre*, No. COA17-68, 2017 WL 3480951, at *2 (N.C. Ct. App. Aug. 15, 2017) (unpublished). In addition, the Court of Appeals observed that, "by entering into a plea agreement with the State and pleading guilty, [the] defendant presented no 'defense' pursuant to [N.C.G.S.] § 15A-269(a)(1)" and did not have the right to seek or obtain postconviction DNA testing. *Id.* at *2. In light of his belief that defendant had, in fact, made a sufficient showing of "materiality," Judge Murphy dissented from his colleagues' decision and concluded that the case should have been remanded to the trial court for further proceedings. *Id.* at *3 (Murphy, J., dissenting). The defendant noted an appeal from the Court of Appeals' decision to this Court based upon Judge Murphy's dissent.

¶ 26 According to well-established North Carolina law, "[w]hen an appeal is taken pursuant to [N.C.G.S.] § 7A-30(2), the only issues properly before the Court are those on which the dissenting judge in the Court of Appeals based his dissent." *Clifford v. River Bend Plantation, Inc.*, 312 N.C. 460, 463 (1984). In light of that fact, the only issue before this Court in *Sayre* was whether the defendant had sufficiently alleged that the performance of postconviction DNA testing would be "material." For that reason, our decision in *Sayre* did not address, much less resolve, the issue of whether a defendant whose conviction stemmed from a guilty plea is entitled to seek and obtain postconviction DNA testing. As a result, the extent to which a plea of guilty operates as a categorial bar to

postconviction DNA testing pursuant to N.C.G.S. § 15A-269 is a question of first impression for this Court.

¶ 27 In seeking to persuade us that defendants who have been convicted on the basis of a guilty plea are ineligible to seek postconviction DNA testing, the State contends that, "[u]nder the plain, unambiguous language of [N.C.G.S. §] 15A-269, a defendant who pled guilty cannot meet the statutory requirements that would entitle him to postconviction DNA testing." In the State's view, the statutory reference to a "verdict" demonstrates the General Assembly's intent that the only persons entitled to seek postconviction DNA testing are those who were convicted as the result of a jury verdict. According to the State, this relatively strict reading of the relevant statutory language would not exclude those found guilty at a bench trial from obtaining postconviction DNA testing given that N.C.G.S. § 15A-269 had been enacted in 2001, while criminal bench trials had not been authorized until 2013. As further support for this contention, the State directs our attention to several cases in which this Court used the term "verdict" to refer to the decision that the trial judge makes at the conclusion of a bench trial, *see, e.g.*, *State v. Puckett*, 299 N.C. 727, 727 (1980); *State v. Willis*, 285 N.C. 195, 197 (1974); *State v. Brooks*, 287 N.C. 392, 405 (1975), and a decision by the Court of Appeals describing the ruling made by a district court judge at the conclusion of a bench trial as a "verdict," *see State v. Surles*, 55 N.C. App. 179, 182 (1981). As a result, the State contends that "the standard [applicable to requests for postconviction DNA testing] does not apply to defendants who were convicted by means other than a factfinder's decision at a trial."

¶ 28 In addition, the State argues that, even though "[N.C.G.S. §] 15A-269(a)(1) presupposes that the defendant presented a 'defense' in order to evaluate whether the [DNA] evidence is relevant to that defense," "a defense was never presented" "when a defendant enters a plea of guilty." On the contrary, the State argues that, by pleading guilty, "the defendant admitted his guilt" and "waived all defenses" other than a challenge to the sufficiency of the indictment, including "his right to test the evidence before a jury." In other words, the State contends that the fact that the defendant entered a guilty plea demonstrates that he or she had no "defense" to which postconviction DNA testing could be material, with "[a]ny analysis of whether testing is material to [the d]efendant's 'defense' [in cases involving guilty pleas necessarily] begin[ning] with speculation as to what his defense was."

¶ 29 Aside from these arguments, which rely directly upon specific language that appears in N.C.G.S. § 15A-269, the State advances a number of prudential arguments in opposition to a decision to allow defendants

convicted on the basis of guilty pleas to seek and obtain postconviction DNA testing. For example, the State asserts that allowing such a defendant access to postconviction DNA testing would be inconsistent with the statutory requirement that a defendant seeking such testing "sign[ ] a sworn affidavit of innocence," N.C.G.S. § 15A-269(b)(3), on the theory that, in order "[t]o comply with this requirement, a defendant who pled guilty and swore himself to be 'in fact guilty' of the crime must either: (1) lie and swear he is innocent even though he knows he is not or (2) admit that his earlier statement of factual guilt was untrue." In addition, the State argues that "[t]here is no precedent binding in North Carolina that applies *Brady* to guilty pleas," a fact that the State believes to be "relevant because [N.C.G.S.] § 15A-269(b)(2) adopts the *Brady* standard" and "[t]he General Assembly is presumed to act 'with full knowledge of prior and existing law and its construction by the courts,' " *State v. Anthony*, 351 N.C. 611, 618 (2000). Similarly, the State argues that a defendant's decision to enter a guilty plea obviates the necessity for the State to make a full evidentiary presentation at trial, "mak[ing] it difficult[,] if not impossible[,] for any court to evaluate how potential DNA testing might affect the fact finder's assessment of the evidence." Finally, the State expresses concern about the possibility that defendants might engage in "gamesmanship" by pleading guilty in order to avoid the full development of a trial record before filing a subsequent motion for postconviction DNA testing pursuant to N.C.G.S. § 15A-269.

¶ 30 In seeking to persuade us to uphold the Court of Appeals' decision with respect to this issue, defendant argues, in reliance upon *Randall*, that, when the General Assembly enacted N.C.G.S. § 15A-269, it intended for defendants who were convicted based upon a plea of guilty to be able to seek post-conviction DNA testing. In support of this assertion, defendant directs our attention to the language of the statute, the practical consequences that will result from the differing ways in which the relevant statutory language can be construed, the remedial nature of the statute, the title of the legislation that enacted the statute, and the political and social context in which the statute was enacted. More specifically, defendant asserts that N.C.G.S. § 15A-269 was enacted during a period in which many individuals convicted of serious crimes were being exonerated through the use of modern DNA testing procedures, with the relevant statutory provisions having arisen from "concerns that there are people who have been convicted of serious crimes who are innocent." In light of the remedial nature of N.C.G.S. § 15A-269, defendant contends that its language "must not be given an interpretation that will result in injustice if it 'may reasonably be otherwise consistently construed with the intent of the act,' " *Nationwide Mut. Ins. Co.*, 293 N.C.

431, 440 (1977). According to defendant, interpreting N.C.G.S. § 15A-269 to exclude defendants whose convictions were based upon guilty pleas would result in significant injustice given that many defendants plead guilty in spite of the fact that they are factually innocent.

¶ 31 In defendant's view, nothing in the language of N.C.G.S. § 15A-269 expressly excludes defendants who plead guilty from seeking postconviction DNA testing, with the manner in which Judge Berger parsed the relevant statutory language having involved a failure to give appropriate regard to the "eminently reasonable" reading of the statute that the Court of Appeals adopted in *Randall* and having overlooked the fact that, even though "the [General Assembly] has amended N.C.G.S. § 15A-269 several times since its enactment," it "has chosen not to amend the statute in reaction to *Randall*." Furthermore, defendant contends that a strict reading of the term "verdict" would lead to the absurd result that any defendant convicted by a jury, but not a defendant convicted at a bench trial or a defendant who enters a plea of guilty in reliance upon the decision of the Supreme Court of the United States in *North Carolina v. Alford*, 400 U.S. 25 (1970), could successfully seek and obtain postconviction DNA testing by making the required statutory showing.

¶ 32 Defendant points out that his sentencing hearing took place prior to the recent enactment of criminal justice reform legislation and at a time when defendants had limited access to pre-trial discovery and when prosecutors were required to try a first-degree murder case capitally if the record contained evidence tending to show that at least one aggravating circumstance existed. In addition, defendant notes that, at the time that he entered his guilty plea, there was strong public support for the death penalty and a significant number of death sentences were being imposed. *See* Barbara O'Brien & Catherine M. Grosso, *Confronting Race: How a Confluence of Social Movements Convinced North Carolina to Go Where the* McCleskey *Court Wouldn't*, 2011 Mich. St. L. Rev. 463, 488 (2011); Cynthia F. Adcock, *The Twenty-Fifth Anniversary of Post-*Furman *Executions in North Carolina: A History of One Southern State's Evolving Standards of Decency*, 1 Elon L. Rev. 113, 131, 131 n. 96 (2009) (citations omitted). According to defendant, it was "against this backdrop that defendants charged with first-degree murder in the early 1990's who were actually innocent had to decide whether to plead guilty rather than roll the dice with a jury and the appellate courts."

¶ 33 Finally, defendant notes that he was not provided with either of Ms. Lashley's statements and that he did not know the identity of the State's eyewitness or the nature of her testimony prior to the sentencing hearing, so that he was left without "crucial information about the weakness

of the State's evidence" at the time that he entered his guilty plea even though, in light of the fact that the State had evidence tending to show the existence of at least two possible statutory aggravating circumstances,[2] his case had to be tried capitally. Defendant asserts that, despite the fact that he had "strongly and repeatedly proclaimed his innocence from the time of his arrest through the time of his plea," "the lack of almost any knowledge of the evidence against him, combined with the fact that he was facing the death penalty in a very death-prone state, could cause even the most resolute of defendants to crack under the pressure." As a result, for all of these reasons, defendant contends that defendants who enter guilty pleas should not be precluded from seeking and obtaining postconviction DNA testing pursuant to N.C.G.S. § 15A-269.

¶ 34 "The primary rule of construction of a statute is to ascertain the intent of the legislature and to carry out such intention to the fullest extent." *Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205, 209 (1990). Although the first step in determining legislative intent involves an examination of the "plain words of the statute," *Elec. Supply Co. of Durham v. Swain Elec. Co.*, 328 N.C. 651, 656 (1991), "[l]egislative intent can be ascertained not only from the phraseology of the statute but also from the nature and purpose of the act and the consequences which would follow its construction one way or the other," *Sutton v. Aetna Cas. & Sur. Co.*, 325 N.C. 259, 265 (1989) (citations omitted). As this Court has clearly stated, remedial statutes such as N.C.G.S. § 15A-269 "should be construed liberally, in a manner which assures fulfillment of the beneficial goals, for which [they were] enacted and which brings within [them] all cases fairly falling within its intended scope." *Burgess v. Joseph Schlitz Brewing Co.*, 298 N.C. 520, 524 (1979).

¶ 35 As defendant points out, nothing in the text of N.C.G.S. § 15A-269 expressly precludes defendants who have pleaded guilty from seeking postconviction DNA testing.[3] In addition, the relevant statutory

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2. The aggravating circumstances that the State might have had sufficient evidence to attempt to establish included that Mr. Boyd was killed during the commission of an armed robbery, *see* N.C.G.S. § 15A-2000(e)(5) (1992), and that the killing of Mr. Boyd "was committed for pecuniary gain," *see* N.C.G.S. § 15A-2000(e)(6) (1992). However, in accordance with this Court's decision in *State v. Quesinberry*, 319, N.C. 228, 238 (1987), the jury would have only been entitled to consider one of these two factors had it been called upon to determine whether defendant should have been sentenced to death.

3. The General Assembly does, of course, understand how to limit the rights of convicted criminal defendants who have entered pleas of guilty to seek relief from their convictions and related sentences on direct appeal. For example, N.C.G.S. § 15A-1444 limits the ability of a convicted criminal defendant who entered a plea of guilty to seek appellate review of his or her conviction as a matter of right by providing that such a defendant

language is not devoid of ambiguity. *See Winkler v. N.C. State Bd. of Plumbing*, 374 N.C. 726, 730 (2020) (describing an ambiguous statute as one that is "equally susceptible of multiple interpretations"). Although the presence of the term "verdict" in the relevant statutory language may suggest that the General Assembly did, in fact, primarily have jury trials in mind at the time that it drafted N.C.G.S. § 15A-269, we are unable to understand the term "verdict" to operate as a limitation upon the reach of postconviction DNA testing given the manner in which the statute, considered as a whole, is written and the circumstances that led to its enactment. *See State v. Winslow*, 274 Neb. 427, 434, 740 N.W.2d 794, 799 (2007) (concluding that, despite the reference to a "trial" in Nebraska's postconviction DNA testing statute, that statute, when considered "as a whole," indicates that the Nebraska legislature did not intend to limit the availability of postconviction DNA testing to persons who had been convicted at the conclusion of a contested trial on the issue of guilt or innocence). While the decision of a jury may be the quintessential example of what constitutes a "verdict," the fact that a "verdict" can consist of "an opinion or judgment," *New Oxford American Dictionary* 1921 (3d ed. 2010), or "[a]n expressed conclusion; a judgment or opinion," *American Heritage Dictionary* (5th ed. 2012), and the State's concession that the term "verdict" as used in N.C.G.S. § 15A-269(b)(2) can encompass more than "a jury's or decision on the factual issues of a case," *Verdict*, *Black's Law Dictionary* (11th ed. 2019), suggests that the term "verdict" can be understood in a broader sense as well. *See also id.* (recognizing that "verdict" can also be defined "loosely, in a nonjury trial, [as] a judge's resolution of the issues of a case" and that today the term "typically survives in contexts not involving a jury"). We have previously recognized that "[c]ourts may and often do consult dictionaries" to determine the ordinary meaning of words used in statutes and that

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may only contend on direct appeal that the evidence admitted at the sentencing hearing did not support the sentence imposed by the trial court or in the event that the trial court sentenced the defendant to a term of imprisonment that falls outside the presumptive range for a defendant convicted of committing an offense of the same class with the same prior record level, N.C.G.S. § 15A-1444(a1) (2021), and on the grounds that the trial court erred in ascertaining the defendant's prior record level or the trial court's judgment contained an unauthorized disposition or term of imprisonment. N.C.G.S. § 15A-1444(a2). Similarly, a defendant whose conviction rests upon a guilty or no contest plea may appeal the trial court's decision to deny his motion to withdraw his plea of guilty or no contest. N.C.G.S. § 15A-1444(e). Finally, a defendant convicted on the basis of a plea of guilty is entitled to appellate review of the trial court's decision to deny his or her motion to suppress unlawfully obtained evidence under certain circumstances. N.C.G.S. § 15A-979(b) (2021); *see also State v. Reynolds*, 298 N.C. 380, 397 (1979). Aside from these instances, however, a defendant convicted on the basis of a plea of guilty is only entitled to direct review in the appellate division by seeking the issuance of a writ of certiorari. N.C.G.S. § 15A-1444(a1).

such words "are construed in accordance with their ordinary meaning *unless some different meaning is definitively indicated by the context*." *State v. Ludlum*, 303 N.C. 666, 671 (1981) (emphasis added). As a result, the mere fact that the relevant statutory language speaks in terms of a "verdict" does not, without more, necessarily suggest that postconviction DNA testing is only available to situations in which the defendant's conviction stems from a decision on the merits of the issue of guilt or innocence by a trier of fact.

¶ 36 Similarly, we are not persuaded that the term "defense" as used in N.C.G.S. § 15A-269(a)(1) should be limited to the specific arguments that the defendant advanced before the trial court prior to his or her conviction. In ordinary parlance, a "defense" is nothing more than an "attempted justification or vindication of something." *New Oxford American Dictionary* 454 (3d ed. 2010). Although a "defense" can be understood as "[a] defendant's stated reason why the plaintiff or prosecutor has no valid case," it can also be understood as "[a] defendant's *method and strategy* in opposing the plaintiff or the prosecution," *Defense*, *Black's Law Dictionary* (11th ed. 2019) (emphasis added), with other sources having broadly defined the term as "any matter that the defendant will in practice raise," Glanville Williams, *Textbook of Criminal Law* 114 n.3 (1978); "[a] fact or law that provides a full or partial exoneration of the defendant against the charges or claims made in a lawsuit or prosecution," *American Heritage Dictionary* (5th ed. 2012); and "the method and collected facts adopted by a defendant to protect himself against a plaintiff's action," *Webster's Third Int'l Dictionary* (1961). Thus, the statutory reference to a "defense" is sufficiently broad to include any argument that might have been available to a defendant to preclude a conviction or establish guilt for a lesser offense.

¶ 37 The practicalities of the manner in which the criminal process functions provide additional grounds for believing that "defense" as used in N.C.G.S. § 15A-269 should be read broadly. Aside from the fact that a defendant may contemplate relying upon many possible defenses before settling upon one or more of them for use before the trial court, a defendant may ultimately decide to refrain from presenting any "defense" at all and to enter a plea of guilty for a number of reasons that do not hinge upon his or her actual guilt or innocence, including a concern that the risk of a conviction is so great that a guilty plea represents the best way to avoid the imposition of a more severe sentence. *See State v. Harbison*, 315 N.C. 175, 180 (1985) (recognizing that there are "situations where the evidence is so overwhelming that a plea of guilty is the best trial

strategy"). As a result, the mere fact that a particular defendant elects to enter a guilty plea does not mean that he or she had no defense and would not have been willing to assert it had additional evidence been available. *Cf. State v. Hewson*, 220 N.C. App. 117, 124 (2012) (assessing whether the requested DNA evidence would be material to a heat of passion defense, even though that defense had not been raised at trial).

¶ 38 A broader reading of the reference to a "defense" in N.C.G.S. § 15A-269(a)(1) than that contended for by the State is also supported by other portions of the relevant statutory language, which requires a litigant seek such testing to show that postconviction DNA testing "[i]s material to the defendant's defense" rather than to the defense that the defendant actually presented at trial. N.C.G.S. § 15A-269(a)(1). Put another way, the fact that N.C.G.S. § 15A-269(a)(1) is couched in the present tense suggests a recognition on the part of the General Assembly that a defendant's "defense" may evolve in light of newly available DNA evidence. As a result, the statutory reference to the defendant's "defense" does not, without more, satisfy us that the General Assembly intended to limit the availability of postconviction DNA testing to defendants who were convicted at the conclusion of a contested trial on the issue of guilt or innocence.

¶ 39 The General Assembly enacted N.C.G.S. § 15A-269 by means of a piece of legislation entitled "An Act to Assist an Innocent Person Charged With or Wrongly Convicted of a Criminal Offense in Establishing the Person's Innocence." S.L. 2001-282, § 4, 2001 N.C. Sess. Laws 833, 837. As we have previously held, "even when the language of a statute is plain, 'the title of an act should be considered in ascertaining the intent of the legislature.' " *Ray v. N.C. Dep't of Transp.*, 366 N.C. 1, 8 (2012) (quoting *Smith Chapel Baptist Church v. City of Durham*, 350 N.C. 805, 812 (1999)). "[T]he title is part of the bill when introduced, being placed there by its author, and probably attracts more attention than any other part of the proposed law; and if it passes into law, the title thereof is consequently a legislative declaration of the tenor and object of the act." *State v. Keller*, 214 N.C. 447, 447 (1938). As the title to the relevant legislation makes clear, the General Assembly enacted N.C.G.S. § 15A-269 for the purpose of allowing wrongly convicted persons to assert and establish their innocence.

¶ 40 As of the date upon which the General Assembly enacted N.C.G.S. § 15A-269, a number of defendants who had been convicted of committing serious crimes had been exonerated as a result of DNA testing, a technology that had only become widely available in the relatively recent past. According to the National Registry of Exonerations, 102 people

across the United States had been exonerated as a result of DNA testing from 1989 to 2001, with three of these cases having involved North Carolina defendants,[4] one of whom had served four years in prison after having entering a plea of guilty to committing a sexual assault before DNA testing demonstrated that he did not commit that crime.[5]

¶ 41 Any argument that innocent people do not enter guilty pleas and that the General Assembly could not have intended to create a situation in which defendants were allowed to make conflicting sworn statements concerning their guilt or innocence fails for a number of reasons as well. Aside from the fact that at least one North Carolina defendant who had been convicted based upon his plea of guilty had been exonerated through the use of DNA testing even before enactment of N.C.G.S. § 15A-269, of the 2,997 documented cases since 1989 in which individuals who have been exonerated after having been wrongfully convicted, 672—or over 22 percent—involved guilty pleas,[6] with this number including thirteen cases arising in North Carolina, eight of whom were exonerated on the basis of DNA testing.[7] For that reason, the available evidence clearly suggests that innocent people do, in fact, enter guilty pleas.

¶ 42 An innocent person may plead guilty to the commission of a criminal offense for a number of perfectly understandable reasons. For example, an innocent defendant may elect to plead guilty to avoid the risks and uncertainties associated with a trial that may result in a more severe sentence than the one offered by the prosecutor pursuant to a plea agreement. *See* Corinna B. Lain, *Accuracy Where it Matters: Brady v. Maryland in the Plea Bargaining Context*, 80 Wash. U. L. Q. 1, 29 (2002) (observing that an innocent defendant may choose to "cut [his or her] losses" and plead guilty when he or she is "faced with an intolerably high estimate of the chance of conviction at trial"). As evidence of that fact, we note that a 2002 report by the North Carolina Sentencing and Policy Advisory

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4. National Registry of Exonerations, https://www.law.umich.edu/special/exoneration/Pages/detaillist.aspx. The registry is a project of the Newkirk Center for Science & Society at the University of California-Irvine, the University of Michigan Law School, and the Michigan State University College of Law.

5. Profile of Keith Brown, National Registry of Exonerations, https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3062 (last visited Mar. 2, 2022).

6. National Registry of Exonerations, https://www.law.umich.edu/special/exoneration/Pages/detaillist.aspx (apply filter for "Guilty Plea") (last visited March 2, 2022).

7. National Registry of Exonerations, https://www.law.umich.edu/special/exoneration/Pages/detaillist.aspx. (apply filters for "North Carolina" and "Guilty Plea") (last visited March 2, 2022).

Commission, a body that provides recommendations to the General Assembly regarding sentencing legislation, found that defendants who enter guilty pleas "may get a shorter active sentence or avoid active time altogether by getting probation." N.C. Sent'g & Pol'y Advisory Comm'n, *Sentencing Practices Under North Carolina's Structured Sentencing Laws* 24 (2002) [hereinafter *Sentencing Practices*].[8] In addition, entering a guilty plea provides the defendant with "more control over the sentence" and facilitates an outcome that "is more predictable than what a judge and jury may decide to do." *Id.* Finally, defendants often plead guilty "out of pure fear" that they will be treated more harshly if they insist upon pleading not guilty and going to trial, Daina Borteck, Note, *Pleas for DNA Testing: Why Lawmakers Should Amend State Post-Conviction DNA Testing Statutes to Apply to Prisoners Who Pled Guilty*, 25 Cardozo L. Rev. 1429, 1440 (2004), as is evidenced by the Sentencing and Policy Advisory Commission's conclusion that "prosecutors are more likely to seek an aggravated sentence or to ask for consecutive sentences in cases that proceed through trial," *Sentencing Practices* at 24, despite the fact that a defendant has a constitutional right not to be penalized for exercising the right to plead not guilty and be tried by a jury of his or her peers, *State v. Maske*, 358 N.C 40, 61 (2004).

¶ 43 An innocent defendant may be particularly prone to enter a guilty plea in a potentially capital case like this one. As the Innocence Network points out in its amicus brief, an innocent defendant may be confronted with the difficult choice of "falsely plead[ing] guilty and serv[ing] time in prison, or risk[ing] execution," with "many understandably choos[ing] the guilty plea" when "[f]aced with that dilemma." Similarly, Judge Jed S. Rakoff of the United States District Court for the Southern District of New York has noted that the "plea bargain[ing] system, by creating such inordinate pressures to enter into plea bargains, appears to have led a significant number of defendants to plead guilty to crimes they never actually committed," with defendants charged with rape and murder having presumably done "so because, even though they were innocent, they faced the likelihood of being convicted of capital offenses and sought to avoid the death penalty, even at the price of life imprisonment." Jed S. Rakoff, *Why Innocent People Plead Guilty*, N.Y. Rev. of Books (Nov. 20, 2014).[9] As a result, an innocent defendant may well choose the relative

8. Available at https://www.nccourts.gov/assets/documents/publications/disparityreportforwebR_060209.pdf?1iTr9wYxjAeDSGBuk5MdRLfgFq0ELkz.

9. Available at https://www.nybooks.com/articles/2014/11/20/why-innocent-people-plead-guilty/?lp_txn_id=1298990.

certainty of the more lenient sentence associated with the entry of a guilty plea to the risk of receiving a more severe one following a guilty verdict rendered at trial. Any decision to limit the scope of the relief that the General Assembly intended to make available by means of the enactment of N.C.G.S. § 15A-269 to those whose convictions resulted from decisions made at the conclusion of trials on the merits overlooks the extent to which innocent people can be wrongfully convicted after pleading guilty, with there being no reason that we can identify for the General Assembly to have decided that wrongfully convicted individuals who pled guilty should be treated differently than wrongfully convicted individuals who were incarcerated as the result of decisions made by juries or trial judges sitting without a jury.

¶ 44 Finally, a criminal defendant is not required to admit guilt as a precondition for entering a valid plea of guilty. Aside from the fact that nothing in N.C.G.S. § 15A-1022 requires the defendant to make such an admission, the Supreme Court of the United States clearly held in *Alford* that "[a]n individual accused of crime may voluntarily, knowingly, and understandingly consent to the imposition of a prison sentence even if he is unwilling or unable to admit his participation in the acts constituting the crime." 400 U.S. at 37. As a result, we do not believe that precluding a convicted criminal defendant from seeking postconviction DNA testing pursuant to N.C.G.S. § 15A-269 serves any interest that the State might have in upholding that truthfulness of information submitted for a court's consideration, and that the concern that a defendant may execute an affidavit of innocence that conflicts with an earlier admission of guilt is insufficient, in our view, to justify a refusal to deprive a person who claims to have been wrongfully convicted of the right to seek and obtain postconviction DNA testing pursuant to N.C.G.S. § 15A-269.

¶ 45 The other prudential arguments that the State has advanced in support of a construction that denies the relief otherwise available pursuant to N.C.G.S. § 15A-269 to convicted defendants who enter guilty pleas do not strike us as persuasive either. As should be obvious, the most likely relief that a defendant who successfully obtains postconviction DNA testing that produces an exculpatory result can obtain will be the granting of a new trial. *See* N.C.G.S. § 15A-270(c) (2021). Although the ways of convicted criminal defendants are sometimes difficult to fathom, we find it hard to believe that such a person would enter a plea of guilty in order to improve his odds of procuring a new trial through the use of postconviction DNA testing given that he or she could have had a trial without subjecting himself or herself to the imposition of criminal sanction. For that reason, we do not find the State's expression of concern

about "gamesmanship" on the part of criminal defendants who elect to enter pleas of guilty to be particularly compelling.

¶ 46 The same is true of the State's contention that the General Assembly could not have intended for postconviction DNA testing to be made available to defendants who entered guilty pleas in light of the State's interest in the finality of criminal judgments and the fact that this Court has never held that *Brady* relief was available to defendants whose convictions rested upon pleas of guilty.[10] As an initial matter, we note that the State's interest in the finality of criminal judgments is not absolute; indeed, the existence of statutory provisions relating to motions for appropriate relief and postconviction DNA testing demonstrates the General Assembly's recognition that, on occasion, the State's interest in finality should give way to other considerations. Moreover, the General Assembly has required a defendant to make a materiality showing as a precondition for obtaining postconviction DNA testing in recognition of the importance of the finality interest upon which the State relies. *Lane*, 370 N.C. at 524 (stating that allowing DNA testing in the absence of a materiality requirement "would set a precedent for allowing criminal defendants to ceaselessly attack the finality of criminal convictions without significantly assisting in the search for truth"). In addition, it seems to us that, subject to any constitutional limitations that may otherwise exist, the General Assembly is free to adopt whatever standard for making postconviction DNA testing available to convicted criminal defendants that it thinks best and elected, in the exercise of its legislative authority, to use a *Brady*-based standard for that purpose in N.C.G.S. § 15A-269. *See Lane*, 370 N.C. at 519. Finally, the Supreme Court of the United States and other courts have successfully analyzed both materiality and the related concept of prejudice in the postconviction context in cases arising from guilty pleas. *See Hill v. Lockhart*, 474 U.S. 52, 58–59 (1985) (holding that, in order to make the showing of prejudice necessary to support an ineffective assistance of counsel claim in a guilty plea context, the defendant "must show that there is a reasonable probability that, but

10. Although the Supreme Court of the United States has not addressed the extent to which *Brady* claims can be asserted by defendants convicted on the basis of a guilty plea, at least three federal circuit courts have expressly allowed the assertion of such claims, *Sanchez v. United States*, 50 F.3d 1448, 1454 (9th Cir. 1995); *Miller v. Angliker*, 848 F.2d 1312, 1322 (2d Cir. 1988); *White v. United States*, 858 F.2d 416, 424 (8th Cir. 1988), with one circuit having reached the opposite conclusion, *United States v. Conroy*, 567 F.3d 174, 178 (5th Cir. 2009), and with other circuits having expressed uncertainty about the extent to which such claims are available without having explicitly prohibited them, *see United States v. Moussaoui*, 591 F.3d 263, 285 (4th Cir. 2010); *United States v. Mathur*, 624 F.3d 498, 506 (1st Cir. 2010).

for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial"); *see also Buffey v. Ballard*, 236 W. Va. 509, 515–16, 782 S.E.2d 204, 210–11 (2015) (holding that the State's failure to disclose certain DNA evidence violated the defendant's due process rights on the grounds that, if the evidence in question had been disclosed to the defendant, he would not have entered a guilty plea or been advised to do so by his attorney and would have been able to raise a reasonable doubt about his guilt at trial); *Miller*, 848 F.2d at 1322 (concluding that, "if there is a reasonable probability that but for the withholding of the information the accused would not have entered the recommended plea but would have insisted on going to a full trial, the withheld information is material" for purposes of *Brady*); *Sanchez*, 50 F.3d at 1454 (holding that "the issue in a case involving a guilty plea is whether there is a reasonable probability that but for the failure to disclose the *Brady* material, the defendant would have refused to plead and would have gone to trial"). As a result, aside from the fact that the General Assembly appears to have had an absolute right to adopt a *Brady*-based standard for use in determining whether a defendant who had been convicted as the result of a guilty plea was entitled to postconviction DNA testing, there is ample basis for concluding that such a standard can readily be applied in the guilty plea context and is frequently used in addressing the validity of similar claims.[11]

¶ 47 Finally, the State's expressions of concern about the difficulty of defeating a defendant's effort to make the required showing of materiality arising from the fact that the factual basis presentation that is necessary to support the acceptance of a guilty plea is less extensive than that needed to support a conviction at a contested trial on the merits and the risk that allowing defendants who entered guilty pleas to seek postconviction DNA testing will result in a flood of frivolous applications for such testing strike us as overstated. Although we acknowledge that our decision may well result in the filing of additional applications for

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11. The State's argument in reliance upon *Brady* appears to rest upon the assumption that, by holding that the use of a *Brady*-based materiality standard was inherent in N.C.G.S. § 15A-269, we incorporated the entirety of the Supreme Court's *Brady*-related jurisprudence in North Carolina's postconviction DNA testing statute. Any such assumption misreads our decision in *Lane*, which did nothing more than utilize a materiality standard deemed appropriate for use in evaluating claims arising from the State's failure to disclose exculpatory evidence to determine whether the defendant had made a sufficient showing to justify the entry of an order requiring postconviction DNA testing. As a result, the extent to which a convicted criminal defendant would have the ability to seek relief on the basis of *Brady* has no relevance to the proper resolution of the issue of whether a defendant who entered a guilty plea is entitled, in appropriate instances, to obtain postconviction DNA testing pursuant to N.C.G.S. § 15A-269.

postconviction DNA testing, the ability of the trial courts to summarily deny such applications in the event that the defendant fails to make an adequate initial showing of materiality should limit the resulting imposition upon the trial judiciary. In addition, we see no reason why the State should be precluded from submitting additional information bearing upon the issue of materiality in the event that the information contained in the existing record is not sufficient to permit the trial court to make an appropriate materiality determination.

¶ 48 As this Court has previously recognized, "[p]erhaps no interpretive fault is more common [in statutory construction cases] than the failure to follow the whole-text canon, which calls on the judicial interpreter to consider the entire text, in view of its structure and of the physical and logical relation of its many parts." *N.C. Dep't of Transp. v. Mission Battleground Park*, 370 N.C. 477, 483 (2018) (quoting Antonin Scalia & Bryan A. Gardner, *Reading Law: The Interpretation of Legal Texts* 167 (2012)). After conducting such a review, we hold that, when read in context and in light of its underlying purposes, N.C.G.S. § 15A-269 makes postconviction DNA testing available to individuals whose convictions rest upon guilty pleas in the event that those persons are otherwise able to satisfy the relevant statutory requirements. Any other construction of the relevant statutory language would thwart the General Assembly's apparent intent to ensure that individuals who claim to have been wrongfully convicted and are able to make a credible showing of innocence have the opportunity to take advantage of a technology that has the potential to both definitively acquit the innocent and convict the guilty. As a result, for all of these reasons, we hold that the Court of Appeals did not err in determining that a defendant who pleads guilty is not disqualified from seeking postconviction DNA testing pursuant to N.C.G.S. § 15A-269.

C. Materiality of DNA Evidence to Defendant's Defense

¶ 49 The final issue that must be addressed in evaluating the validity of defendant's challenge to the Court of Appeals' decision to uphold the denial of defendant's request for postconviction DNA testing is whether defendant made a sufficient showing of materiality, which requires defendant to demonstrate that, if the relevant evidence had been admitted at trial, "there exists a reasonable probability that the verdict would have been more favorable to the defendant." N.C.G.S. § 15A-269(a)–(b); *Lane*, 370 N.C. at 519; *see also State v. Byers*, 375 N.C. 386, 394 (2020) (construing "reasonable probability" to mean "a probability sufficient to undermine confidence in the outcome" (quoting *State v. Allen*, 360 N.C. 297, 316 (2006)). The required "materiality" determination should be made based

upon a consideration of the entire record and focus "upon whether the evidence would have affected the jury's deliberations," *Lane*, 370 N.C. at 519, with the applicable standard in guilty plea cases being whether "there is a reasonable probability that DNA testing would have produced a different outcome; for example, that [the] [d]efendant would not have pleaded guilty *and otherwise would not have been found guilty*," *Randall*, 259 N.C. App. at 887 (emphasis in original).

¶ 50 In seeking relief from the Court of Appeals' decision with respect to the materiality issue, defendant begins by arguing that the Court of Appeals erred by requiring him to "show that the requested testing necessarily would exclude his involvement in the crime." In addition, defendant contends that the Court of Appeals "failed to conduct its materiality analysis in the context of the entire record" by neglecting to consider "highly relevant facts concerning [defendant's] decision to plead guilty and the nature of the State's evidence," including the fact that defendant had "repeatedly proclaimed his innocence, went to trial, was very reluctant to plead guilty, and had a strong alibi." In light of the fact that he had an alibi and the fact that the State's case rested upon the testimony of a "single highly impeachable purported eyewitness," defendant asserts that it was reasonably probable that he would have been acquitted in the event that he was able to show the presence of third-party DNA on the shell casings and projectile found at the Amoco station.

¶ 51 According to defendant, the "reasonable probability" test applicable in postconviction DNA testing proceedings should be distinguished from both a "preponderance-of-the-evidence" test and a "sufficiency-of-the-evidence" test, with the Court of Appeals having erred by requiring him to show that "the presence of another's DNA or fingerprints on . . . [the] evidence would . . . necessarily exclude [his] involvement in the crime," *Alexander*, 271 N.C. App. at 82, given that this legal standard is "plainly inconsistent with the *Brady* standard of materiality this Court adopted in *Lane*." In addition, defendant contends that the Court of Appeals decided the "materiality" issue based upon what it believed to be "substantial evidence of [d]efendant's guilt," which consisted of (1) Ms. Lashley's eyewitness testimony; (2) defendant's admission to having been at the Amoco station during the investigation into the robbery and murder; and (3) the admission of guilt inherent in defendant's decision to plead guilty, *see Alexander*, 271 N.C. App. at 81–82, and argues that the Court of Appeals should have also considered (1) his continued protestations of innocence and his reluctance to plead guilty; (2) the fact that neither defendant nor his attorneys knew Ms. Lashley's identity before the entry of defendant's guilty plea; (3) his alibi evidence; (4) his

claim that he had not been permitted to enter an *Alford* plea; and (5) his claim that his trial counsel had pressured him to plead guilty and had told him that he would be released after serving ten years in the event that he pleaded guilty. As a result, defendant argues that, had the Court of Appeals conducted a proper materiality analysis, it would have determined that it was reasonably probable that he would not have entered a guilty plea in the event that he had been able to prove that third-party DNA had been detected on the shell casings and the projectile recovered from the Amoco station and that his own DNA had not been present on that evidence.

¶ 52 Similarly, defendant contends that, had he elected to plead not guilty and gone to trial, there is a reasonable probability that he would not have been convicted of second-degree murder. In defendant's view, the Court of Appeals erred by assuming that two people were involved in the robbery and murder of Mr. Boyd based upon Ms. Lashley's "highly suspect" testimony, having devoted a substantial portion of his brief to an attack upon Ms. Lashley's credibility that focused upon the conflicting accounts that Ms. Lashley gave of her activities on the day of the robbery and murder, her claims to have known defendant and his family for a lengthy period of time, and her failure to select defendant's image from the photographic array that was shown to her. As a result, defendant contends that "it is reasonably probable [that] the jury would have found that she did not witness anything at all; that she was only at the Amoco [station] after the fact; and that there was only one person involved in the crime," with evidence concerning the absence of defendant's DNA from the shell casings and projectile having a tendency to further undermine Ms. Lashley's credibility and corroborate his contention that Ms. Lashley did not actually see him leaving the Amoco station in the aftermath of the robbery and murder.

¶ 53 Aside from his reliance upon what he contends is the suspect quality of Ms. Lashley's testimony, defendant points to (1) the lack of forensic evidence linking him to the crime, (2) the existence of witnesses who could testify that he had been at home at the time of the murder, (3) the fact that another robbery during which a similar weapon was used had been committed in the vicinity of the Amoco station earlier that day, and (4) Mr. Terry's alleged admission to having robbed and killed Mr. Boyd. In addition, defendant argues that his presence at the Amoco station in the aftermath of the robbery and murder had no significance given that "Norlina is a small town where a murder would [have been] a rare event" and that "there were many other people that had gathered at the crime scene besides [defendant]." As a result, defendant claims that

"[t]here is more than a reasonable probability . . . that a jury would not have convicted [defendant] of [the] robbery and murder of [Mr.] Boyd" had third-party DNA been found on the shell casings and projectile and his own DNA not been detected.

¶ 54 In seeking to persuade us to uphold the Court of Appeals' decision with respect to the materiality issue, the State begins by arguing that, "[w]hile the [Court of Appeals] did say that the requested testing would not exclude [d]efendant from having been involved in the crime, it never said exclusion was the standard for showing materiality" and that the Court of Appeals had, instead, utilized the materiality standard articulated in *Lane*. According to the State, "[d]efendant himself [ ] introduced the idea that DNA testing would exclude him as the perpetrator when he stated in his motion that testing showing [Mr.] Terry's DNA would 'exculpate' him."

¶ 55 Secondly, the State contends that, even though "materiality is analyzed in the context of the entire record, the record is limited to only the evidence available at the time of the first trial." For that reason, the State contends that the only evidence that this Court can consider in addressing the materiality issue is the testimony of the witnesses who took the stand at the sentencing hearing, with the only sentencing hearing evidence that had any bearing upon the issue of defendant's guilt or innocence being the testimony of Ms. Lashley. In the State's view, defendant is not entitled to rely upon any of the reports generated by investigating officers and forensic experts prior to the entry of defendant's guilty plea on the grounds that "[n]o party authenticated, offered, or moved to admit these items into evidence at any proceeding" and that, even though "the reports very well may be authentic," this Court cannot speculate concerning the manner in which or extent to which any party might have used those reports at trial. In the same vein, the State contends that the Court cannot consider testimony from Mr. Alexander, defendant's father, or Ms. Brown, the daughter of Mr. Alexander's girlfriend, concerning defendant's location at the time of the robbery and murder given that they did not testify at defendant's sentencing hearing and that the Court should disregard Mr. White's testimony concerning Mr. Terry's alleged involvement in the robbery and murder given that Mr. White provided this information years after defendant entered his guilty plea.

¶ 56 Finally, the State argues that defendant cannot show that the requested DNA evidence is material given that "the State's eyewitness testimony identifying [d]efendant as one of the two robber-murders was overwhelming and favorable DNA test results would not contradict that evidence." According to the State, "the presence of DNA from someone

other than [d]efendant on a shell casing or projectile does not call into question [d]efendant's guilt" because "[s]uch results would show at best that someone other than [d]efendant touched the shell casings or projectile at some time for some reason that need not have been related to the robbery-murder." In addition, the State notes that Ms. Lashley had stated in all three of the accounts that she gave of her actions on the day of the robbery and murder that, after hearing gunshots, she had seen defendant and an unknown man leaving the Amoco station and that defendant had returned to the Amoco station later that day. The State describes Ms. Lashley's account of the relevant events as "internally consistent and . . . based on personal experiences that made her testimony believable," as even defendant's trial counsel had acknowledged. As a result, the State urges us to uphold the Court of Appeals' determination that defendant had failed to make the necessary showing of materiality.

¶ 57 A careful review of the Court of Appeals' opinion satisfies us that it did not misstate or misapply the applicable legal standard. After reciting the "reasonable probability" standard and noting that the burden of making the necessary showing of materiality rested upon defendant, the Court of Appeals stated that defendant had

> failed to show how it is reasonably probable that he would not [have] been convicted of at least second-degree murder based on the results of the DNA and fingerprint testing. That is, the presence of another's DNA or fingerprints on this or other evidence would not necessarily exclude [d]efendant's involvement in the crime. The presence of another's DNA or fingerprints could be explained by the possibility that someone else handled the casings/projectile prior to the crime or that the DNA or fingerprints are from [d]efendant's accomplice, as there were two involved in the murder.

Alexander, 271 N.C. at 81–82. As we read the quoted language, the Court of Appeals simply stated that defendant had to provide sufficient evidence that he was not involved in the commission of a second-degree murder in order to show materiality and that a showing of the presence of a third party's DNA on the shell casings and projectile did not, without more, tend to show that defendant had no involvement in the killing of Mr. Boyd.[12] Nothing in the Court of Appeals' opinion in any way

12. In the interest of clarity, we note that our references to the presence of third-party DNA on the shell casings and projectile recovered from the Amoco station assume that defendant's DNA is not detected on those items either.

suggests that a defendant seeking to obtain postconviction DNA testing is required to prove that, in the event of favorable test results, the State's evidence would have been insufficient to support a conviction or that the defendant would have definitely been acquitted. Instead, as the Court of Appeals noted, the inquiry that a court confronted with a request for postconviction DNA testing is required to conduct must focus upon whether it is "reasonably probable" that the outcome at trial would have been different. *See Bagley*, 473 U.S. at 682. As a result, we see nothing exceptional in the understanding of the applicable legal standard upon which the Court of Appeals relied in this case.

¶ 58 In addition, defendant has not satisfied us that the Court of Appeals failed to make its materiality decision "in the context of the entire record." *Lane*, 370 N.C. at 519 (quoting *State v. Howard*, 334 N.C. 602, 605 (1993)). The mere fact that the Court of Appeals did not address each and every piece of evidence presented by defendant does not mean that it failed to consider the entire record. Instead, as the Court of Appeals recognized, the fundamental problem with defendant's materiality argument is that it overlooks certain weaknesses in the evidence upon which he relies and fails to recognize that the evidence that he hopes to obtain from the performance of DNA testing upon the shell casings and projectile has very little bearing upon the issue of his own involvement in the robbery of the Amoco station and the killing of Mr. Boyd. Aside from the fact that the State did not need to show that defendant handled the weapon from which the fatal rounds were fired in order to establish his guilt, proof of the presence of third-party DNA on the shell casings and projectile would do nothing more than establish that, at some unspecified point in time, someone other than defendant touched these items, an event that could have happened before defendant or his accomplice obtained possession of the weapon or in the aftermath of the killing of Mr. Boyd at or before the time that the items were taken into the possession of the investigating officers.[13] As a result, since none of these explanations for the presence of third-party DNA on the shell casings and projectile would be in any way inconsistent with Ms. Lashley's contention that she saw two men, one of whom was defendant, leaving the Amoco station in the aftermath of the robbery and murder and since defendant would have been guilty of the murder of Mr. Boyd on an acting in concert theory in the event that he had been present for and participated in the commission of those crimes even if he had never

13. In view of the fact that the weapon from which the fatal shots were fired was never recovered, there is no way for postconviction DNA testing to shed any direct light upon the identity of the person who actually killed Mr. Boyd.

personally held the weapon from which the fatal shots were fired, *see State v. Barnes*, 345 N.C. 184, 233 (1997) (holding that, in the event that "two persons join in a purpose to commit a crime, each of them, if actually or constructively present, is not only guilty as a principal if the other commits that particular crime, but he is also guilty of any other crime committed by the other in pursuance of the common purpose" (quoting *State v. Erlewine*, 328 N.C. 626, 637 (1991)), we are unable to determine that the performance of DNA testing on the shell casings and projectile recovered from the Amoco station would provide material evidence of defendant's innocence of second-degree murder.

¶ 59 In addition, we note that Judge Jenkins had the opportunity to hear Ms. Lashley's testimony during the sentencing hearing and stated that he found her "to be fair in her testimony" and that her testimony was "reasonable and consistent with other believable evidence in the case." Judge Jenkins' assessment of Ms. Lashley's credibility is reinforced by the actions of defendant's trial counsel, who made no effort to obtain authorization to seek the withdrawal of defendant's guilty plea after hearing Ms. Lashley testify on direct and cross-examination. *See State v. Handy*, 326 N.C. 532, 539 (1990) (listing "the strength of the State's proffer of evidence" as one of the factors that should be considered in deciding whether to allow a defendant to withdraw a guilty plea). Finally, we note that, despite the inconsistencies in the accounts that she gave of her activities on the morning of the robbery and murder, Ms. Lashley consistently asserted that she had visited the Amoco station on the morning in question, that she had heard a commotion inside the store, and that she had seen two men, one of whom was defendant, leave the service station. As a result, given the contemporaneous assessments of Ms. Lashley's testimony as credible; the fact that most, if not all, of the grounds for challenging the credibility of Ms. Lashley's account of her activities on the morning of the robbery and murder were known to defendant's trial counsel before the entry of judgment against defendant; and the fact that the DNA evidence that defendant seeks to obtain in this case would not tend to undercut the credibility of Ms. Lashley's contention that defendant was one of the two men that she saw outside the Amoco station, we cannot conclude that the performance of the requested DNA testing would have had a material effect upon defendant's or a jury's evaluation of Ms. Lashley's credibility at the time that Judge Jenkins entered judgment in this case.

¶ 60 We are also unpersuaded that the availability of evidence tending to provide defendant with an alibi controls the resolution of the materiality issue that is before us in this case. All of the witnesses whom defendant

claims can corroborate his alibi were available at the time that defendant decided to enter his guilty plea. In addition, the existence of evidence tending to show the presence of third-party DNA on the shell casings and projectile recovered from the Amoco station would not have had any additional impact upon an evaluation of the credibility of defendant's alibi witnesses given the fact that such evidence has little tendency to show that defendant was not involved in the robbery of the Amoco station and the murder of Mr. Boyd. The same is true of the evidence concerning the robbery at the rest area, which has no clear relation to the issue of defendant's guilt or innocence of the robbery of the Amoco station and the murder of Mr. Boyd, particularly given the absence of any non-hearsay evidence concerning Mr. Terry's involvement in the commission of the crime which led to the entry of defendant's guilty plea, the fact that Mr. Terry has denied any involvement in the commission of this crime, and the fact that evidence implicating Mr. Terry does not tend to exculpate defendant given Ms. Lashley's claim to have seen two men leaving the Amoco station. *See Barnes*, 345 N.C. at 233.[14]

¶ 61 At the end of the day, this case is not materially different from *Lane*, in which the defendant was convicted of the kidnapping, rape, and first-degree murder of a five-year-old girl. *Lane*, 370 N.C. at 509, 513–14. In seeking postconviction DNA testing of hair samples taken from the trash bag in which the victim's body was discovered, the defendant in *Lane* argued that DNA testing "could potentially relate to another perpetrator, and potentially the only perpetrator of [the] murder." *Id.* at 516. In rejecting the defendant's challenge to the trial court's determination that he had failed "to show that the requested postconviction DNA testing of hair samples [was] material to his defense," we pointed to "the additional overwhelming evidence of defendant's guilt presented at trial," the absence "of evidence at trial pointing to a second perpetrator," and "the inability of forensic testing to determine whether the hair samples at issue are relevant to establish a third party was involved" in the commission of the crimes for which the defendant was convicted. *Id.* at

14. We do agree with defendant that the Court of Appeals should not have considered the fact that he entered a guilty plea in making the required materiality determination or treated it as "substantial evidence" of guilt in light of the fact that the relevant issue for purposes of requests for postconviction DNA testing submitted by persons who entered guilty pleas is whether the new evidence would have impacted defendant's decision to plead guilty in the first place. The same is true, however, of defendant's persistence in proclaiming his innocence and his reluctance to enter a plea of guilty. Instead, the required materiality determination should focus upon the strength of the substantive evidence of defendant's guilt and the likely impact that the results of the requested DNA testing would have had upon defendant's decision to plead guilty and upon defendant's chances for success at a subsequent trial on the merits.

516–20. In determining that, "even if the hair samples in question were tested and found not to belong to the victim or defendant, they would not necessarily implicate another individual as a second perpetrator," we emphasized the fact that the defendant had not shown that the hair samples had been put into the trash bag at the time of the crime and that "there was great potential for contamination of the hole-ridden, weathered trash bag." *Id.* at 522. Although the evidence of defendant's guilt in this case is not as strong as the evidence of the defendant's guilt in *Lane*, the relevance of the requested DNA evidence in the two cases is strikingly similar and suggests that the two cases should be resolved in the same manner.

¶ 62 The ultimate question that must be decided in resolving the materiality issue that is before use in this case is whether, all else remaining the same, a favorable DNA test result would have (1) probably caused defendant to refrain from pleading guilty and (2) probably resulted in a verdict that was more favorable to defendant at any ensuing trial. After conducting the required analysis, we conclude that the presence of third-party DNA on the shell casings and projectile recovered from the Amoco station would have done little, if anything, to improve defendant's odds of achieving a more successful outcome than he actually obtained as a result of his guilty plea given the applicable legal standard, which focuses upon whether defendant actively participated in the robbery and murder that led to his conviction rather than upon whether defendant was the person that fired the fatal shots, and the fact that the availability of such evidence would had little tendency to show that defendant would have been better positioned to mount a successful defense to the charges that had been lodged against him or upon a jury's evaluation of the credibility and weight that should be given to the other available evidence, including the credibility of Ms. Lashley's testimony that she saw defendant leaving the Amoco station immediately after gunshots emanating from that location had been heard. As a result, we hold that the Court of Appeals did not err by concluding that defendant had failed to make the showing of materiality necessary to support an award of postconviction DNA testing.

III. Conclusion

¶ 63 Thus, for the reasons set forth above, we hold that a defendant who enters a plea of guilty is not statutorily disqualified from seeking postconviction DNA testing pursuant to N.C.G.S. § 15A-269. We further hold, however, that defendant has failed to establish that the requested DNA testing would be material to his defense in this case. As a result, the decision of the Court of Appeals is affirmed.

AFFIRMED.

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

Chief Justice NEWBY concurring in the result.

¶ 64 I agree with the majority's ultimate decision to uphold the trial court's denial of defendant's motion to test DNA evidence. I write separately, however, because I would hold that a defendant who pleads guilty cannot prevail on a postconviction motion to test DNA evidence under N.C.G.S. § 15A-269.[1] Therefore, I concur in the result.

¶ 65 N.C.G.S. § 15A-269 provides in relevant part:

> (a) A defendant may make a motion before the trial court that entered the judgment of conviction against the defendant for performance of DNA testing and, if testing complies with FBI requirements and the data meets NDIS criteria, profiles obtained from the testing shall be searched and/or uploaded to CODIS if the biological evidence meets all of the following conditions:
>
> (1) Is material *to the defendant's defense*.
>
> (2) Is related to the investigation or prosecution that resulted in the judgment.
>
> (3) Meets either of the following conditions:
>
> a. It was not DNA tested previously.
>
> b. It was tested previously, but the requested DNA test would provide results that are significantly more accurate and probative of the identity of the perpetrator or accomplice or have a reasonable probability of contradicting prior test results.

1. Were I to reach the issue of whether defendant made the necessary showing of materiality in this case, I would agree with the majority's analysis, except for the majority's statement in footnote fourteen of its opinion.

> (b) The court shall grant the motion for DNA testing . . . upon its determination that:
>
> (1) The conditions set forth in subdivisions (1), (2), and (3) of subsection (a) of this section have been met;
>
> (2) If the DNA testing being requested had been conducted on the evidence, there exists a reasonable probability *that the verdict would have been more favorable to the defendant*; and
>
> (3) The defendant has signed a sworn affidavit of innocence.

N.C.G.S. § 15A-269 (2021) (emphases added). "The primary endeavor of courts in construing a statute is to give effect to legislative intent. . . . If 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, 614 S.E.2d 274, 276–77 (2005) (citations omitted).

¶ 66 A plain reading of N.C.G.S. § 15A-269 demonstrates that a defendant who pleads guilty cannot meet the conditions necessary to prevail on a motion to test DNA evidence. First, a defendant who enters a guilty plea cannot show that "[i]f the DNA testing being requested had been conducted on the evidence, there exists a reasonable probability that the verdict would have been more favorable to the defendant." N.C.G.S. § 15A-269(b)(2). In order for a trier of fact to reach a verdict in a criminal case, there must first be a trial. *See State v. Hemphill*, 273 N.C. 388, 389, 160 S.E.2d 53, 55 (1968) ("A verdict is the unanimous decision made by the jury and reported to the court."). As such, the occurrence of a trial is a prerequisite to prevailing on a motion to test DNA evidence under N.C.G.S. § 15A-269(b)(2). When a defendant pleads guilty, no trial occurs, and thus no verdict is ever reached. Therefore, a defendant who pleads guilty can never meet the condition outlined in N.C.G.S. § 15A-269(b)(2).

¶ 67 Second, a defendant who enters a guilty plea cannot show that the relevant biological evidence "[i]s material to [his] defense." N.C.G.S. § 15A-269(a)(1). The phrase "material to the defendant's defense" presupposes that the defendant making the motion presented a defense before the trial court. Since a sample of biological evidence cannot be material to a defense that never occurred, a defendant who did not

present a defense before the trial court cannot meet the condition outlined in N.C.G.S. § 15A-269(a)(1).

¶ 68 When a defendant pleads guilty, he fails to present a "defense" pursuant to N.C.G.S. § 15A-269(a)(1). In *State v. Sayre*, the "defendant pleaded guilty to fourteen counts of taking indecent liberties with a child, two counts of second[-]degree sexual offense, and two counts of felony child abuse." *State v. Sayre*, No. COA17-68, 2017 WL 3480951, at *1 (N.C. Ct. App. Aug. 15, 2017) (unpublished). The defendant later filed a motion to test DNA evidence which the trial court denied. *Id.* The Court of Appeals noted that the "defendant's bare assertion that testing the identified evidence would 'prove that [he] is not the perpetrator of the crimes' is not sufficiently specific to establish that the requested DNA testing would be material to his defense." *Id.* at *2 (alteration in original) (citing *State v. Cox*, 245 N.C. App. 307, 312, 781 S.E.2d 865, 868–69 (2016)). The Court of Appeals also stated that "by entering into a plea agreement with the State and pleading guilty, defendant presented no 'defense' pursuant to N.C.[G.S.] § 15A-269(a)(1)." *Id.* As such, the Court of Appeals held "the trial court did not err by summarily denying defendant's request for post-conviction DNA testing." *Id.* The defendant appealed to this Court based upon the dissenting opinion at the Court of Appeals, and we issued a per curiam opinion affirming the Court of Appeals' decision. *State v. Sayre*, 371 N.C. 468, 818 S.E.2d 101 (2018) (per curiam).[2]

¶ 69 The majority asserts that the term "defense" is not "limited to the specific arguments that the defendant advanced before the trial court prior to his or her conviction." According to the majority, a "defense" includes "any argument that might have been available to a defendant to preclude a conviction or establish guilt for a lesser offense." The majority's primary support for this position is that the New Oxford American Dictionary broadly defines "defense" as an "attempted justification or vindication of something." More specifically, however, Black's Law Dictionary defines "defense" as "[a] defendant's *stated reason* why the . . . prosecutor has no valid case; esp., a defendant's . . . plea <her defense *was* that she was 25 miles from the building at the time of the

2. The majority asserts that our per curiam opinion did not affirm the Court of Appeals' statement regarding the defendant's presentation of a "defense" because that issue was not on appeal. Notably, however, in his brief before this Court, the defendant in *Sayre* argued that his guilty plea should not preclude him from establishing materiality. In response, the State argued that based upon the plain language of the statute, it is impossible for a defendant who pleads guilty to show materiality. Nevertheless, even if our decision did not affirm the Court of Appeals' statement, the statement is still persuasive.

robbery>." *Defense*, *Black's Law Dictionary* (11th ed. 2019) (emphases added). This definition makes clear that a defendant's "defense" refers to the arguments that he actually made at trial. *See id.* Nonetheless, the majority adopts an overbroad definition of "defense" in an effort to expand the applicability of N.C.G.S. § 15A-269. The majority's interpretation effectively changes the statutory language from "material to the defendant's defense," N.C.G.S. § 15A-269(a)(1), to "material to any defense the defendant possibly could have presented, whether actually raised or not." Such an interpretation disregards this Court's duty to give "the words [of a statute] their plain and definite meaning." *Beck*, 359 N.C. at 614, 614 S.E.2d at 277.

¶ 70 Defendant here entered a guilty plea and indicated to the trial court that he was "in fact guilty." Due to defendant's guilty plea, a trier of fact did not reach a "verdict," and defendant never provided a "defense." Since defendant cannot meet the conditions outlined in N.C.G.S. § 15A-269(a)(1) and (b)(2), he is precluded from prevailing on his motion to test DNA evidence. Therefore, I concur in the result.

Justice BARRINGER joins in this concurring opinion.

Justice EARLS concurring in part and dissenting in part.

¶ 71 I concur fully in the portion of the majority opinion holding that defendants who enter a guilty plea are eligible to seek postconviction DNA testing under N.C.G.S. § 15A-269. In addition to the majority's careful and correct examination of the statutory text, the circumstances surrounding the statute's enactment, and the abundant evidence of legislative intent, the majority's description of the practical realities as experienced by criminal defendants faced with the choice between entering a guilty plea and going to trial illustrates why a statute titled "An Act to Assist an Innocent Person Charged With or Wrongly Convicted of a Criminal Offense in Establishing the Person's Innocence" cannot be read to categorically exclude defendants who have pleaded guilty. S.L. 2001-282, § 4, 2001 N.C. Sess. Laws 833, 837.

¶ 72 The majority notes that defendants " 'fear' that they will be treated more harshly if they insist upon pleading not guilty and going to trial." There is reason to believe defendants' fears are well-founded. *See*, *e.g.*, Brian D. Johnson, *Plea-Trial Differences in Federal Punishment: Research and Policy Implications*, 31 Fed. Sent. R. 256, 257 (2019) ("On average, trial conviction increases the odds of incarceration by two to six times and produces sentence lengths that are 20 to 60 percent longer.

. . . Federal defendants are typically two to three times more likely to go to prison and receive incarceration terms from one-sixth to two-thirds longer, even after adjusting for other relevant sentencing criteria. . . . [T]rial cases are twice as likely to result in imprisonment, with average sentences that are more than 50 percent longer." (citations omitted)); Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. Rev. 891, 923 (2004) ("At sentencing, trial judges are conditioned to punish defendants for claiming innocence (the logical extension of not accepting the prosecutor's plea bargain and sparing the State the expense of a jury trial) and for failing to express remorse or apologize for his wrongdoings."). Further, there is evidence that defendants who have experienced trauma or have been victimized themselves may be especially susceptible to pressure to plead guilty, even believing at the time that they are at fault despite there being legally cognizable defenses to exonerate them. *See* Andrew D. Leipold, *How the Pretrial Process Contributes to Wrongful Convictions*, 42 Am. Crim. L. Rev. 1123, 1125 n.8 (2005) ("Some defendants fail to assist in their defense or are willing to plead guilty because they are afraid, because they have no confidence in defense counsel, because they are trying to spare their loved ones the trauma of trial, or because they are mentally challenged."). As Justice Scalia observed, the plea-bargaining system "presents grave risks of prosecutorial overcharging that effectively compels an innocent defendant to avoid massive risk by pleading guilty to a lesser offense." *Lafler v. Cooper*, 566 U.S. 156, 185 (2012) (Scalia, J., dissenting). Thus, it should be no surprise that, for entirely rational and comprehensible reasons, actually innocent people plead guilty. *See*, *e.g.*, Brandon L. Garrett, *Convicting the Innocent: Where Criminal Prosecutions Go Wrong* 150–53 (2011) (noting that of the first 330 DNA exonerations, eight percent, or twenty-seven, had pleaded guilty).

¶ 73 Against this backdrop, it is fallacious to contend that allowing a defendant who has previously pleaded guilty to assert actual innocence would "make 'a mockery' of the General Assembly's postconviction DNA procedure." Our criminal justice system seeks finality, but it makes no pretenses to infallibility. Depriving defendants with credible actual innocence claims of an opportunity to demonstrate their innocence on the basis of a strained interpretation of a remedial statute is inconsistent with that statute and with the values our criminal justice system strives to uphold. Of course, the State has an interest in enforcing procedural mechanisms designed to filter out frivolous claims in order to promote the efficient administration of justice. But ultimately, the point is to administer *justice*, and there is no justice in consigning an actually

innocent defendant to a life in prison or worse. To imply that such a defendant deserves his fate because he was one of the overwhelming majority of criminal defendants who resolve their case through plea bargaining is willfully blind to reality and to the problems the General Assembly set out to address in enacting N.C.G.S. § 15A-269.

¶ 74 However, while I agree with the majority that defendants who plead guilty are not categorically ineligible for postconviction DNA testing under N.C.G.S. § 15A-269, I cannot join the majority in its conclusion that this defendant has failed to demonstrate materiality within the meaning of the statute. The majority is correct that N.C.G.S. § 15A-269(b) requires Alexander to demonstrate "a reasonable probability that the verdict would have been more favorable to the defendant" if the DNA evidence he seeks had been admitted at a trial. But the majority errs in its application of this standard in the present case.

¶ 75 Alexander did not, as the majority suggests, need to "provide sufficient evidence that he was not involved in the commission of second-degree murder in order to show materiality"—that is, the burden was not on Alexander to exculpate himself in order to establish his entitlement to DNA testing. At this stage of proceedings, under N.C.G.S. § 15A-269, a court is not deciding whether Alexander is actually innocent and should be released. The court is only deciding whether to allow postconviction DNA testing. Thus, in assessing materiality, the court considers the potential impact of the evidence had the evidence been available at the time Alexander entered his guilty plea, and at a subsequent trial where the burden would be on the State to prove his guilt beyond a reasonable doubt. If there is a reasonable probability that admission of the requested DNA evidence would cause Alexander not to plead guilty to second-degree murder and cause a jury not to find Alexander guilty of that crime, then he has satisfied his burden of proving materiality, regardless of whether or not he has brought forth affirmative evidence of his innocence at this time.

¶ 76 The majority correctly explains that " '[m]ateriality' as used in the statutory provisions governing postconviction DNA testing should be understood in the same way that 'materiality' is understood in *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny." Yet the majority's application of the materiality standard in this case imposes a significantly heavier burden on Alexander than what *Brady* and its progeny require. For example, in *Kyles v. Whitley*, the United States Supreme Court explained that evidence can be material within the meaning of *Brady* even if it does not establish that there is insufficient evidence to sustain a defendant's conviction. 514 U.S. 419, 434–35 (1995) ("[M]ateriality . . . is not

a sufficiency of evidence test. A defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict."). A defendant must demonstrate that the evidence creates "[t]he possibility of an acquittal on a criminal charge," not that there is "an insufficient evidentiary basis to convict." *Id.* at 435. Requiring defendants to prove their innocence at this stage of the proceedings is simply inconsistent with the materiality standard the majority purports to apply and its purpose, which is to weed out frivolous claims.

¶ 77 Applying the proper materiality standard, I would hold that Alexander has demonstrated a reasonable probability that he "would not have pleaded guilty and otherwise would not have been found guilty." *State v. Randall*, 259 N.C. App. 885, 887 (2018) (emphasis omitted). In assessing materiality, we assess the impact of the DNA evidence "in the context of the entire record." *State v. Lane*, 370 N.C. 508, 519 (2018) (quoting *State v. Howard*, 334 N.C. 602, 605 (1993)). Here, the "context of the entire record" makes clear that the presence of another person's fingerprints on shell casings and a bullet found at the scene of Carl Boyd's killing is material within the meaning of N.C.G.S. § 15A-269.

¶ 78 With respect to Alexander's guilty plea, a court "is obligated to consider the facts surrounding a defendant's decision to plead guilty in addition to other evidence, in the context of the entire record of the case, in order to determine whether the evidence is 'material.' " *Randall*, 259 N.C. App. at 887. In this case, it is salient that at the time he pleaded guilty, Alexander was facing the death penalty, had no insight into potential weaknesses in the State's case, had an alibi defense corroborated by witness testimony, and was under the impression that he would serve ten years in prison if he agreed to the plea bargain being offered. What Alexander lacked at the time he entered his plea was any physical evidence tending to detract from the State's theory of the case that he was the shooter. Absent such evidence, the pressure to plead guilty rather than face a capital trial was overwhelming, regardless of the strength or weakness of the State's case. With DNA evidence that would, at a minimum, provide some evidentiary basis for Alexander's assertion that someone other than him was the shooter, there is a significantly greater chance that he would have been willing to forego the plea bargain and take his chances at trial. Alternatively, evidence tending to detract from the State's theory of guilt might have caused prosecutors to offer a plea bargain presenting Alexander with more favorable terms on less serious charges.

¶ 79 Had Alexander proceeded to trial, DNA evidence demonstrating that another person handled shell casings and a projectile found at the

crime scene would likely have had a significant effect on the jury's deliberations. *See Lane*, 370 N.C. at 519 ("The determination of materiality . . . hinges upon whether the evidence would have affected the jury's deliberations."). Again, while the presence of third-party DNA on the shell casings and projectile would not exclude the possibility that Alexander shot Boyd, it could reasonably have caused the jury to doubt the State's account of how Alexander supposedly perpetrated the crime, especially if Alexander's DNA was also not found on the shell casings and projectile. The majority's rejoinder is that Alexander still could have been convicted on an acting in concert theory of guilt "even if he had never personally held the weapon from which the fatal shots were fired," but there is at present no evidence in the record indicating that Alexander joined with another person "in a purpose to commit a crime." *State v. Barnes*, 345 N.C. 184, 233 (1997) (quoting *State v. Erlewine*, 328 N.C. 626, 637 (1991)). The State may have ultimately been able to negate the impact of the DNA evidence and secure Alexander's conviction for second-degree murder on an acting in concert theory, but it should be obvious that physical evidence supporting the inference that someone other than Alexander pulled the trigger would be extremely relevant in Alexander's trial for second-degree murder.

¶ 80 The DNA evidence Alexander seeks would, if it shows what he believes it shows, provide evidentiary support for the reasonable determination that someone other than Alexander was the shooter. The evidence would not conclusively establish Alexander's innocence, but that is not the burden he must carry at this stage. Instead, he must only demonstrate that with the DNA evidence he seeks there would have been a reasonable probability that he would not have pleaded guilty to second-degree murder and would not have been convicted of the same had he proceeded to trial. Here, given that the State's case was not overwhelming, DNA testing "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Kyles*, 514 U.S. at 419. Accordingly, while I agree with the majority that Alexander and all defendants who plead guilty are eligible to seek DNA testing under N.C.G.S. § 15A-269, I would hold that evidence which could support the inference that a defendant convicted of second-degree murder was not the shooter is material within the meaning of that statute. Accordingly, I respectfully concur in part and dissent in part.

STATE v. OLDROYD

[380 N.C. 613, 2022-NCSC-27]

STATE OF NORTH CAROLINA
v.
MARC PETERSON OLDROYD

No. 260A20

Filed 11 March 2022

Indictment and Information—attempted armed robbery—victims not specifically named—pleading requirements

An indictment for attempted armed robbery was not fatally defective where it designated "employees of the Huddle House located at 1538 NC Highway 67 Jonesville, NC" as victims without specifically naming them. The indictment satisfied the criminal pleading requirements set forth in N.C.G.S. § 15A-924(a)(5) (requiring a plain and concise statement asserting facts supporting each element of the crime), and it did not fail to protect defendant from double jeopardy by omitting the victims' names, especially where the Criminal Procedure Act had relaxed the stricter common law pleading rules. In fact, the reference to a particular group of people protected defendant from any future prosecutions involving any individual from that group.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 271 N.C. App. 544 (2020), reversing a trial court order denying defendant's Motion for Appropriate Relief entered on 9 March 2017 by Judge Michael D. Duncan in Superior Court, Yadkin County, and vacating and remanding a consolidated judgment entered on 2 June 2014 by Judge William Z. Wood Jr. in Superior Court, Yadkin County. Heard in the Supreme Court on 31 August 2021.

Joshua H. Stein, *Attorney General*, *by Ryan Y. Park*, *Solicitor General*, *Sarah G. Boyce*, *Deputy Solicitor General*, *and Heyward Earnhardt*, *Solicitor General Fellow*, *for the State-appellant.*

Glenn Gerding, *Appellate Defender*, *by Emily Holmes Davis*, *Assistant Appellate Defender*, *for defendant-appellee.*

MORGAN, Justice.

¶ 1 A Yadkin County Grand Jury indicted defendant for first-degree murder, attempted robbery with a dangerous weapon, and conspiracy to

commit robbery with a dangerous weapon on 28 January 2013. Defendant pleaded guilty to the reduced charge of second-degree murder as well as the two robbery charges. Defendant filed a Motion for Appropriate Relief (MAR) and a Supplemental Motion for Appropriate Relief (Supplemental MAR), asserting that the indictment which charged him with the offense of attempted robbery with a dangerous weapon was fatally flawed because it did not include the name of a victim. Both motions were denied by the trial court. Defendant sought and obtained appellate review of these denials. He renewed his position in the Court of Appeals concerning the deficiencies of the charging instrument. A majority of the lower appellate court agreed with defendant in a divided decision, holding that the indictment's description of the victims of defendant's attempted robbery as the "employees of the Huddle House located at 1538 NC Highway 67, Jonesville, North Carolina" was insufficient because the indictment did not comply with the requirement that this Court enunciated in *State v. Scott*, 237 N.C. 432, 433 (1953) that the name of the person against whom the offense was directed be stated with exactitude. *State v. Oldroyd*, 271 N.C. App. 544, 551 (2020). Because the indictment at issue in the present case satisfies the dual purposes of (1) informing defendant of the specific crime that he was accused of committing in order to allow him to prepare a defense, and (2) protecting defendant from being twice put in jeopardy for the alleged commission of the same offense, we reverse the decision of the Court of Appeals.

I. Factual and Procedural Background

¶ 2 Defendant, Scott Sica, and Brian Whitaker devised a plan to conduct a 5 October 1996 robbery of the Huddle House restaurant in Jonesville. The plan called for the men to visit a car dealership and to ask to take one of the dealership's vehicles for a test drive. During this test drive, whomever among the three men operated the vehicle would switch a fake key for the vehicle's actual key. After returning to the dealership with the vehicle and having the driver to hand over the fake key as if it were the vehicle's real key, defendant and his two counterparts would then return to the car dealership after it had closed so that the men could ride away in the vehicle that had been used for the supposed test drive. Next in the plan, Sica and Whitaker would drive to the Huddle House establishment in the stolen vehicle to commit the robbery, while defendant would be positioned nearby in Whitaker's green Dodge pickup truck in order to immediately join Sica and Whitaker after the completion of the robbery. The trio would then abandon the vehicle stolen from the car dealership and complete their getaway in the green Dodge pickup truck.

¶ 3 On 1 October 1996, in accordance with the criminal plan, two of the men stole a red Dodge pickup truck from a car dealership in West Virginia. Defendant, Sica, and Whitaker proceeded to Jonesville on 5 October 1996. Sica and Whitaker went to the Huddle House to commit the robbery, while defendant waited in the green Dodge pickup truck at a nearby meeting place where Sica and Whitaker would abandon the stolen red Dodge pickup truck and then enter the green Dodge pickup truck to execute their escape. Sica and Whitaker arrived at the Huddle House as planned and parked behind the business, armed with a 9mm Beretta handgun and a .357 revolver. The two men observed an open door at the back of the restaurant, but a group of Huddle House employees soon exited the establishment and closed the door behind them. Sica got out of the red Dodge pickup truck and approached the rear door of the restaurant but discovered that it was locked. Sica then returned to the stolen truck to discuss the next steps with Whitaker, when the pair saw Sergeant Greg Martin of the Jonesville Police Department drive by the location. Sica and Whitaker decided to leave the Huddle House, but Sergeant Martin quickly initiated a traffic stop on the stolen red Dodge pickup truck and called for backup officers. Defendant, realizing that Sica and Whitaker had not returned to the rendezvous point within the planned time period, drove the green Dodge pickup truck toward the main thoroughfare and saw that law enforcement had interrupted Sica and Whitaker. Defendant continued to drive past the scene before doubling back to return to it.

¶ 4 Sergeant Martin asked Sica and Whitaker to exit the red Dodge pickup truck; the men complied. Sergeant Martin asked Sica and Whitaker for permission to search the vehicle; the men consented. Sica and Whitaker stood outside the vehicle while the law enforcement officer began to search a bag that contained the masks that the two men had planned to use in the robbery of the Huddle House. Sica drew a handgun and shot Sergeant Martin in the head six times, killing the law enforcement officer instantly. Sica and Whitaker fled the scene but could not find defendant; as a result, the two men detoured to a nearby business where they abandoned the stolen red Dodge pickup truck and replaced it by stealing a work van belonging to the business. Defendant, upon returning to the scene of the traffic stop, noticed that the red Dodge pickup truck in which Sica and Whitaker had been traveling had left and that four more law enforcement vehicles had arrived. Defendant overheard a police scanner announcement that an officer "was down." Defendant panicked and fled to his cousin's house in Gastonia, where he reunited with Sica and Whitaker later in the day and was informed

of the unexpected events that transpired. The three men traveled to a Home Depot business in the area to abandon the work van which had been taken.

¶ 5 The State's investigation of Sergeant Martin's murder stalled for a number of years. Eventually, investigators were able to discover the identities of the three men and their possible involvement with the murder as part of a failed robbery attempt. Law enforcement officers simultaneously approached defendant, Sica, and Whitaker on 2 October 2012. Defendant and Whitaker each provided full confessions to their roles in the wrongdoing; Sica denied any involvement.

¶ 6 After his arrest, defendant was indicted by a Yadkin County Grand Jury on 28 January 2013 on one count each of first-degree murder, attempted robbery with a dangerous weapon, and conspiracy to commit robbery with a dangerous weapon. Defendant's indictment for attempted robbery with a dangerous weapon alleged that, on 5 October 1996, defendant attempted

> to steal, take and carry away another's personal property, United States currency, from the person and presence of *employees of the Huddle House located at 1538 NC Highway 67, Jonesville, North Carolina*. The defendant committed this act by having in possession and with the use and threatened use of a firearm, a 9mm handgun, whereby the life of the Huddle House employees was threatened and endangered.

(Emphasis added.) Defendant's plea hearing took place on 2 June 2014, where Detective Ron Perry provided, without objection, the factual basis for defendant's charged offenses. Defendant pleaded guilty to one count each of second-degree murder, attempted robbery with a dangerous weapon, and conspiracy to commit robbery with a dangerous weapon. The trial court sentenced defendant to 120 to 153 months in prison.

¶ 7 On 9 June 2015, defendant filed a pro se motion for appropriate relief (MAR) in which he alleged, *inter alia*, that his indictment for attempted robbery with a dangerous weapon was "fatally flawed in that it does not name a victim." The trial court entered an order denying defendant's MAR on 9 March 2017, concluding as a matter of law that "there are no fatal defects in the indictments." Defendant then filed a Supplemental MAR on 16 January 2018, asserting many of the same claims for relief that he asserted in his original MAR. The trial court denied defendant's Supplemental MAR on 16 July 2018, concluding that defendant's claims were both meritless and procedurally barred either by defendant's

failure to raise the issues in his original MAR or by the fact that defendant had already raised the issues in his initial MAR. Defendant then petitioned the Court of Appeals for a Writ of Certiorari which was allowed by the lower appellate court on 28 November 2018 for the limited purpose of reviewing the trial court's conclusion that there were no fatal defects in defendant's indictments. On 19 May 2020, the Court of Appeals issued a divided decision which reversed the trial court's order denying defendant's MAR, with the majority holding that the indictment for robbery with a dangerous weapon "must have named a victim to be valid." *Oldroyd*, 271 N.C. App. at 552. The State filed a notice of appeal to this Court based upon the dissenting opinion filed in the Court of Appeals regarding the outcome of this case, with the dissent registering its disagreement with the majority's conclusion that the indictment at issue here was fatally defective.

II. Analysis

¶ 8 When a criminal defendant challenges the sufficiency of an indictment lodged against him, that challenge presents this Court with a question of law which we review de novo. *State v. White*, 372 N.C. 248, 250 (2019). An indictment need not conform to any "technical rules of pleading," *State v. Sturdivant*, 304 N.C. 293, 311 (1981), but instead must satisfy both the statutory strictures of N.C.G.S. § 15A-924 and the constitutional purposes which indictments are designed to satisfy; namely, to allow the defendant to identify the event or transaction against which he had been called to answer so that he may prepare a defense and to protect the defendant against being twice put in jeopardy for the same crime. *State v. Freeman*, 314 N.C. 432, 435 (1985). Subsection 15A-924(a)(5) is a codification of the common law rule that "an indictment must allege all of the essential elements of the offense charged," *id.*, and is satisfied if an indictment includes "[a] plain and concise factual statement in each count which, without allegations of an evidentiary nature, asserts facts supporting every element of a criminal offense and the defendant's commission thereof with sufficient precision clearly to apprise the defendant . . . of the conduct which is the subject of the accusation." N.C.G.S. § 15A-924(a)(5) (2021); *see also* N.C.G.S. § 15-153 (2021) ("Every criminal proceeding by warrant, indictment, information, or impeachment is sufficient in form for all intents and purposes if it express the charge against the defendant in a plain, intelligible, and explicit manner; and the same shall not be quashed, nor the judgment thereon stayed, by reason of any informality or refinement, if in the bill or proceeding, sufficient matter appears to enable the court to proceed to judgment."). Therefore, aside from the existence of any additional statutory requirements in specific situations, an indictment is sufficient if it asserts facts plainly,

concisely, and in a non-evidentiary manner which supports each of the elements of the charged crime with the exactitude necessary to allow the defendant to prepare a defense and to protect the defendant from double jeopardy.

¶ 9 Defendant's indictment at issue in the case at bar asserted facts supporting every element of the criminal offense of attempted robbery with a dangerous weapon by providing him with a plain and concise factual statement, without allegations of an evidentiary nature, but with the sufficient precision which is statutorily required to inform defendant of his alleged conduct which resulted in the accusation of his perpetration of the charged offense. A person is guilty of the offense of robbery with a dangerous weapon, or an attempt to commit the crime, if he or she (1) "takes or attempts to take personal property from another," (2) while possessing, using, or threatening to use a firearm or other dangerous weapon, (3) whereby "the life of a person is endangered or threatened." N.C.G.S. § 14-87(a) (1996); *see also State v. Murrell*, 370 N.C. 187, 194 (2017). The indictment in the instant case alleged (1) that defendant did "attempt to steal, take and carry away another's personal property, United States currency, from the person and presence of employees of the Huddle House located at 1538 NC Highway 67, Jonesville, North Carolina," (2) that defendant did so "by having in possession and with the use and threatened use of a firearm, a 9mm handgun," and that, as a result, (3) "the life of the Huddle House employees was threatened and endangered." A comparison of the essential elements of the crime of robbery with a dangerous weapon as set forth in N.C.G.S. § 14-87(a) with the fulsome content of the indictment at issue indicates that the State sufficiently satisfied all of the requirements of N.C.G.S. § 15A-924(a)(5) regarding the properness of the indictment as a criminal pleading. *See State v. Rambert*, 341 N.C. 173, 176 (1995) (holding that the relaxation of strict common law pleading requirements codified in N.C.G.S. § 15A-924 does not require that an indictment "describe in detail the specific events or evidence that would be used to prove each count," so long as the indictment "allege[s] the ultimate facts constituting each element of the criminal offense"). However, while compliance with N.C.G.S. § 15A-924 will generally satisfy the constitutional protections which are guaranteed to criminal defendants by the Double Jeopardy Clause, *Freeman*, 314 N.C. at 435, defendant argues that the indictment here violated his constitutional right to be protected from double jeopardy because the indictment failed to provide the legal name of a person against whom his alleged offense was directed.

¶ 10 Defendant asserts that "an indictment for a crime against the person must state with exactitude the name of a person against whom

the offense was committed, so the indictment protects defendant from double jeopardy[,] . . . gives defendant sufficient notice to prepare a defense[,] and allows the trial court to enter the right judgment if defendant is convicted." Defendant deduces this standard on the basis of several opinions of this Court which he cites and which predate the passage of the Criminal Procedure Act of 1975. In doing so, defendant relies on the application of strict and outdated common law pleading requirements as recounted in *State v. Angel*, 29 N.C. (7 Ired.) 27 (1846). Similarly, defendant construes *State v. Scott*, 237 N.C. 432 (1953), and *State v. Stokes*, 274 N.C. 409 (1968), to support his contention that, notwithstanding the disputed indictment's compliance with the statutory "plain and concise factual statement" standard of N.C.G.S. § 15A-924(a)(5), the indictment here must specifically name each of the alleged targets of his attempted robbery. Defendant's stance, however, does not take into account the relaxation of the erstwhile common law criminal pleadings and the codification of amendments to N.C.G.S. § 15A-924 by the pertinent portion of the Criminal Procedure Act of 1975 which statutorily modernizes the requirements of a valid indictment. *See State v. Williams*, 368 N.C. 620, 623 (2016) ("[W]e are no longer bound by the 'ancient strict pleading requirements of the common law[.]' " (quoting *Freeman*, 314 N.C. at 436)). After all, passage of the Criminal Procedure Act of 1975 signaled a shift "away from the technical rules of pleading" which defendant now asks us to resurrect. *State v. Mostafavi*, 370 N.C. 681, 685 (2018) (extraneity omitted).

¶ 11 Defendant's reliance on this Court's decisions in *Scott* and in *Stokes* is misplaced. In *Scott*, we held that an indictment which alleged that the defendant feloniously assaulted "George Rogers" with the intent to kill "George Sanders" was insufficient because "[a]t *common law* it is of vital importance that the name of the person against whom the offense was directed be stated with exactitude." *Scott*, 237 N.C. at 433 (emphasis added). In *Stokes*, the indictment returned against the defendant failed to allege the identity of the person with whom the defendant allegedly committed a crime against nature. *Stokes*, 274 N.C. at 414. As a result, *Stokes* involved the failure of the indictment to name any victim at all, while *Scott* involved an indictment that gave two different names for the alleged victim. Neither of these types of situations exist in this case. In addition, both of these cases were expressly decided on the basis of the common law rather than the Criminal Procedure Act of 1975 and the codification of much of the Act in N.C.G.S. § 15A-924(a)(5) which had the effect of relaxing the strict common law pleading rules upon which *Scott* and *Stokes* relied.

¶ 12 While defendant argues that his right to be protected from double jeopardy was imperiled by the lack of greater specificity in the description of the alleged victims of his alleged criminal offense, it is worthy of ironic note that it would appear that his protection from being twice put in jeopardy for the commission of the alleged crime is actually reinforced by the identification of a group of persons as the alleged victims here. Such a description of the allegedly wronged individuals would seem to serve to prevent the State from proceeding against defendant in a second prosecution by naming any individual within the "employees of the Huddle House" group as a separate alleged victim, while simultaneously affording defendant additional fortification against further prosecution in the event that any person employed by the establishment on 5 October 1996—whether on duty at the fateful time of day or not—comes forward as an alleged victim.

III. Conclusion

¶ 13 The indictment in the present case, as previously discussed, comports with the requirements of N.C.G.S. § 15A-924(a)(5) and the current status of the law related to the sufficiency of the details which were required to be contained in the indictment in order to provide defendant with a plain and concise factual statement which conveyed the exactitude necessary to place him on notice of the event or transaction against which he was expected to defend, to protect defendant from being placed in jeopardy twice for the same crime, and to guide the trial court in entering the correct judgment. Therefore, the trial court had the necessary jurisdiction to enter judgment against defendant pursuant to his plea of guilty to the charge of attempted robbery with a dangerous weapon. As a result, the Court of Appeals decision is reversed, and the judgment of the trial court is reinstated.

REVERSED.

STATE v. BENNER

[380 N.C. 621, 2022-NCSC-28]

STATE OF NORTH CAROLINA
v.
MATTHEW BENNER

No. 133PA21

Filed 11 March 2022

1. Homicide—first-degree murder—self-defense—jury instructions

In the first-degree murder prosecution for defendant's fatal shooting of an unarmed man in defendant's home, the trial court did not err when it declined to instruct the jury in accordance with North Carolina Pattern Jury Instruction (N.C.P.I.) - Crim. 308.10 where the trial court adequately conveyed the substance of defendant's requested instruction to the jury. The instructions delivered to the jury stated that defendant had no duty to retreat, and the N.C.P.I.'s language concerning defendant's right to "repel force with force regardless of the character of the assault" was not required under the circumstances. Further, defendant failed to establish a reasonable possibility that the outcome would have been different if the trial court had issued defendant's requested jury instructions.

2. Appeal and Error—preservation of issues—jury instructions—specific request

Defendant failed to properly preserve his challenge to the trial court's jury instructions in his trial for first-degree murder—that the trial court allegedly erred by not instructing that defendant was presumed to have had a reasonable fear of imminent death or great bodily injury—where defendant did not specifically request the instruction but rather simply requested that the trial court instruct the jury in accordance with N.C.P.I. - Crim. 308.10.

Justice HUDSON dissenting.

Justice EARLS joins in this dissenting opinion.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 276 N.C. App. 275 (2021), affirming judgments entered on 22 October 2018 by Judge Kevin M. Bridges in Superior Court, Davidson County. Heard in the Supreme Court on 8 November 2021.

Joshua H. Stein, Attorney General, by Joseph L. Hyde, Assistant Attorney General, for the State-appellee.

M. Gordon Widenhouse, Jr., for defendant-appellant.

ERVIN, Justice.

¶ 1 The issue before the Court in this case is whether the trial court completely and accurately instructed the jury concerning the extent to which defendant was entitled to exercise the right of self-defense at his trial for first-degree murder. In seeking relief before this Court, defendant contends that the trial court erred by (1) rejecting his request that the jury be instructed in accordance with N.C.P.I. – Crim. 308.10 and (2) failing to instruct the jury that defendant was "presumed to have held a reasonable fear of imminent death or serious bodily harm to himself" in light of the fact that defendant had been attacked in his own home. After careful consideration of defendant's challenges to the trial court's judgments in light of the applicable law, we affirm the decision of the Court of Appeals.

I. Factual Background

A. Substantive Facts

¶ 2 In January 2017, Samantha Wofford lived in a single-wide mobile home in Davidson County with her mother and fiancé, Russell Gwyn. Defendant resided in an adjacent mobile home, which featured a small deck from which a flight of steps led from the front door to the yard. On the evening of 6 January 2017, when it was snowing, Ms. Wofford and Mr. Gwyn were walking their two dogs when Ms. Wofford noticed an unfamiliar car parked outside defendant's mobile home. At approximately 10:00 p.m., Ms. Wofford reentered her residence with one of the dogs while Mr. Gwyn remained outside with the other.

¶ 3 As Mr. Gwyn walked from the back yard around the side of his residence, he heard loud bickering coming from defendant's mobile home and decided that it was time for him to go back inside. As he walked toward the front steps of his residence, Mr. Gwyn heard a gunshot, at which point he turned and saw a man fall backward from the bottom of the steps leading to defendant's mobile home before hitting the ground. At that point, Mr. Gwyn reentered his own mobile home and told Ms. Wofford to "[c]all 911. Somebody's been shot." After opening the front door and seeing a man lying in the front yard while defendant, who was holding a firearm, looked on, Ms. Wofford returned to her residence and called for emergency assistance.

¶ 4 At the time that Deputy Sheriffs Benjamin Schlemmer and Matthew Higgins of the Davidson County Sheriff's Office arrived at the scene, they observed a white male, who was later determined to be Damon Dry, lying on his back at the bottom of the flight of steps leading to defendant's mobile home. As they cautiously approached defendant's residence, Deputy Higgins struck the side of the structure with his flashlight and ordered any occupants to come outside. As he did so, Deputy Higgins heard loud noises emanating from the interior of the mobile home and noted that the steps leading into that structure were covered with blood and snow.

¶ 5 After Deputy Higgins had ordered the occupants of the mobile home to come outside approximately five times, defendant emerged from the front door with his hands in the air and walked down the steps. At that point, Deputy Higgins handcuffed defendant, walked defendant to his patrol vehicle, and secured defendant in the rear seat. As he did so, Deputy Higgins smelled the odor of alcohol on defendant's breath and observed that defendant had blood on his face, arms, and hands and had blood stains on the sweatpants that he was wearing.

¶ 6 Once defendant had been placed in Deputy Higgins' patrol vehicle, Deputies Schlemmer and Higgins conducted a security sweep of defendant's residence. In the course of determining that defendant's mobile home was unoccupied, the deputies discovered the presence of blood on the front door frame and the screen door. After surveying defendant's residence, Deputy Schlemmer began a crime scene log and secured the premises with security tape, while Deputy Higgins checked on Mr. Dry, who was not breathing, had fixed eyes, and was surrounded with blood and wearing a t-shirt that appeared to be stippled with shotgun pellets. A subsequent autopsy confirmed that Mr. Dry had died from gunshot wounds to the chest.

¶ 7 As the deputies took turns sitting in Deputy Higgins' patrol vehicle with defendant for the purpose of keeping warm, defendant began behaving in an erratic manner, becoming angry and kicking the patrol vehicle's window. In an effort to stop defendant from engaging in this sort of conduct, Deputy Schlemmer, with the assistance of Sergeant Christopher Stilwell, the supervisor of the patrol unit to which Deputies Schlemmer and Higgins belonged, opened the door of the compartment in which defendant was seated. As he did so, defendant said "You know I shot him. Take me to jail. Take these cuffs off me. Put them up front."

¶ 8 At a later time, investigating officers removed defendant from the patrol vehicle while Deputy Matthew Riddle of the Davidson County

Sheriff's Office swabbed defendant's hands for the purpose of determining whether gunshot residue was present. Although defendant was calm and compliant when this process began, he soon became agitated and belligerent, stating that he did not "know why we're doing this" since "I shot the m- - - - f - - - -." After swabbing defendant's hands, Deputy Riddle completed the necessary information sheet and secured the swabbings in his vehicle while defendant continued to scream and yell, "I shot the m- - - - - f- - - - -."

¶ 9 Once they had obtained the issuance of a search warrant authorizing them to enter the residence, investigating officers examined the interior of defendant's mobile home more thoroughly and observed the presence of blood on the steps, the railing, the ground in front of the steps, the screen door, and a stack of newspapers located just inside the front door. In addition, the investigating officers located a silver .38 caliber revolver that contained two spent shells and four live rounds in the kitchen sink, a second revolver in the master bedroom, and a third handgun and six long guns in a gun safe that was situated in the closet of a workout room at the far end of the mobile home.

¶ 10 At trial, defendant testified that he and his friend, William Tuller, had met Mr. Dry several years earlier and that they had discovered that all three of them shared a mutual interest in firearms. As a result, defendant had visited in Mr. Dry's home on several occasions for the purpose of examining Mr. Dry's rifle collection and had shown Mr. Dry how to properly load and shoot these weapons. Eventually, however, defendant lost contact with Mr. Tuller and claimed that he had not been in the physical presence of either Mr. Tuller or Mr. Dry for approximately five years prior to 6 January 2017, although he admitted that he had spoken with Mr. Dry, who had called to inquire if defendant's employer was hiring additional workers, approximately a year and half prior to the date of the shooting.

¶ 11 Defendant testified that he had left work just before noon on 6 January 2017, had completed several errands, and had purchased a bottle of vodka before returning home. After spreading newspapers on the floor adjacent to his front door to prevent the introduction of snow into his residence and sweeping off his front deck, defendant entered the kitchen and poured himself a drink. At approximately 8:00 p.m., defendant answered a knock on his front door and discovered that Mr. Dry had arrived. Although defendant claimed to have been surprised by Mr. Dry's visit given the lengthy period of time that had elapsed since they had last seen each other, defendant invited Mr. Dry to come in for a drink. According to defendant, Mr. Dry claimed that he had recently

lost his job and wanted to know whether defendant's employer had any openings. After defendant told Mr. Dry that his employer did not have any vacant positions at that time, the two men continued to converse and walked around defendant's mobile home, during which time defendant pointed out the workbench at which he built items for his home and reloaded ammunition for his firearms.

¶ 12 At approximately 9:30 p.m., after the two men had had a second drink, defendant "started dropping hints" that Mr. Dry should leave in light of the fact that defendant had not showered since getting off work. Although Mr. Dry repeated his earlier question about the possibility that he might find work with defendant's employer, defendant reiterated that there were no open positions at his place of work. Shortly before 10:00 p.m., defendant took Mr. Dry's cup, placed it in the kitchen sink, and told Mr. Dry that "[i]t's time to leave," at which point Mr. Dry "got kind of a wild eyed look on his face"; said "[m]an, I really need a job. I need a job. I need money"; and grabbed defendant's shirt before pushing defendant back against the sink. In response, defendant shoved Mr. Dry, opened the front door, and ordered Mr. Dry to leave. As Mr. Dry rushed at defendant and pushed defendant against the door jamb, he said, "I'm not leaving" and "I need money."

¶ 13 At some point during this altercation, defendant escaped to his bedroom, where he retrieved a revolver from his nightstand before returning to the living room, pointing the gun at Mr. Dry, and threatening to shoot Mr. Dry if he did not leave. After defendant made these comments, Mr. Dry stated that he was going to kill defendant and started moving toward him. As Mr. Dry was about to reach him, defendant fired two shots into Mr. Dry's chest, causing Mr. Dry to stand up and walk out the front door.

¶ 14 Upon making his way to the front door, defendant saw Mr. Dry, who appeared to be dead, lying on the ground outside. Although defendant went down the steps for the purpose of checking on Mr. Dry, he was unable to detect a pulse upon examining Mr. Dry's body. At that point, defendant washed his hands in the sink and called his mother, who told him to seek emergency assistance and to wait for law enforcement officers and other emergency personnel to arrive. In spite of the fact that defendant did not recall having heard anyone knocking on the exterior of his mobile home, he stepped outside and surrendered when he observed shadows moving around in the yard.

B. Procedural History

¶ 15 On 13 March 2017, the Davidson County grand jury returned bills of indictment charging defendant with first-degree murder and possession

of a firearm by a felon. The charges against defendant came on for trial before the trial court and a jury at the 10 October 2018 session of Superior Court, Davidson County. At trial, the State elicited evidence tending to show that defendant had been previously convicted of breaking or entering a motor vehicle in Guilford County. Although defendant did not deny the existence of this previous felony conviction or that he had kept firearms in his residence, he claimed to have been unaware that it was unlawful for him to possess a firearm given his belief that he "had all [his] rights restored to [him] over 20 years ago, including the right to keep and bear arms."

¶ 16 At the jury instruction conference, the trial court proposed, with the concurrence of the prosecutor, to instruct the jury in accordance with N.C.P.I. – Crim. 206.10, which encompasses the law of first-degree murder involving the use of a deadly weapon and the effect of a defendant's claim to have exercised the right of self-defense. N.C.P.I. – Crim. 206.10. Although defendant requested the trial court to instruct the jury in accordance with N.C.P.I. – Crim. 308.10, which informs the jury that a defendant who is situated in his own home and is not the initial aggressor can "stand the defendant's ground and repel force with force regardless of the character of the assault being made upon the defendant," the State objected to defendant's request on the grounds that, while N.C.P.I. – Crim. 308.10 reflected the provisions of N.C.G.S. §§ 14-51.2 and 14-51.3, which provide for a statutory right of self-defense, the justification described in those provisions is not available to a person who "[w]as attempting to commit, committing, or escaping after the commission of a felony." N.C.G.S. § 14-51.4(1). According to the State, since "defendant was in the commission of and was continually committing the felony of possession of a firearm by a felon," the "plain language" of N.C.G.S. § 14-51.4(1) deprived him of his statutory right of self-defense. After arguing that the limitation upon the right of self-defense upon which the State relied should not apply given the absence of any "causal connection" between defendant's possession of a firearm and his need to use that firearm in self-defense, defendant acknowledged that the Court of Appeals had rejected a similar argument in *State v. Crump*, 259 N.C. App. 144, 150 (2018), *overruled by State v. McLymore*, 2022-NCSC-12, while contending that the relevant portion of *Crump* was dicta and that adhering to the interpretation adopted in *Crump* would create the "absurd result" that a defendant attacked in his own home would be prohibited from defending himself based solely upon his status as a convicted felon.[1] At the conclusion of the jury instruction conference, the trial

1. After the conclusion of defendant's trial, this Court reversed the Court of Appeals' decision in *Crump* on other grounds without reaching the self-defense issue that was

court declined to instruct the jury in accordance with N.C.P.I. – Crim. 308.10 on the grounds that a contrary action would require it to ignore the plain language of N.C.G.S. § 14-51.4.

¶ 17 On 19 October 2018, the jury returned a verdict finding defendant guilty of possession of a firearm by a felon. On 22 October 2018, the jury returned a verdict convicting defendant of first-degree murder. After accepting the jury's verdicts, the trial court entered judgments sentencing defendant to a term of life imprisonment without the possibility of parole based upon his conviction for first-degree murder and to a concurrent term of fourteen to twenty-six months imprisonment based upon his conviction for possession of a firearm by a felon. Defendant noted an appeal to the Court of Appeals from the trial court's judgments.

C. Court of Appeals Decision

¶ 18 In seeking relief from the trial court's judgments before the Court of Appeals, defendant argued that the trial court had (1) erred by rejecting his request that the jury be instructed in accordance with N.C.P.I. – Crim. 308.10 and that the jury should presume that he had a reasonable fear of death or great bodily injury in light of the fact that he had been attacked in his own home; (2) committed plain error by failing to instruct the jury concerning defendant's "mistake of fact" in believing that his right to possess a firearm had been restored; and (3) erred by requiring defendant to pay restitution in the amount of $1,874.49 in light of the fact that the record developed at the sentencing hearing did not support that award.[2] In support of the first of these three contentions, defendant argued that he was entitled to a "proper, complete instruction on self-defense, including the right to 'stand his ground' in his own home and have the jury presume his fear of death was reasonable," and asserted, without making any reference to *Crump*, that a literal reading of N.C.G.S. § 14-51.4(1) that had the effect of precluding him from taking advantage of the right of self-defense made available by N.C.G.S.

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before us in that case. *See State v. Crump*, 376 N.C. 375 (2020). Subsequently, however, we held in *McLymore* that, in order for a defendant to be precluded from exercising the right of self-defense on the basis of the felony disqualifier set out in N.C.G.S. § 14-51.4(1), "the State must prove the existence of an immediate causal nexus between the defendant's disqualifying conduct and the confrontation during which the defendant used force," effectively overruling the aspect of the Court of Appeals' decision in *Crump* upon which the trial court relied in this case. *McLymore*, ¶¶ 14, 30.

2. In view of the fact that the second and third of the three challenges that defendant advanced in opposition to the trial court's judgments before the Court of Appeals have not been brought forward for our consideration, we will refrain from discussing them any further in this opinion.

§§ 14-51.2 and 14-51.3 for the sole reason that he was, as a convicted felon, prohibited from possessing a firearm would produce "absurd results."

¶ 19 In rejecting defendant's initial challenge to the trial court's judgments, the Court of Appeals concluded that, to the extent that defendant was seeking relief on the basis of the trial court's failure to instruct the jury that he was "presumed to have held a reasonable fear of imminent death or serious bodily harm to himself" at the time that he had been attacked by Mr. Dry, defendant had failed to preserve this issue for purposes of appellate review given that he had not requested the trial court to instruct the jury in accordance with N.C.P.I. – Crim. 308.80 (June 2021), which addresses a defendant's right to defend his or her home. *State v. Benner*, 276 N.C. App. 275, 2021-NCCOA-79, ¶ 21 (unpublished). In upholding the trial court's refusal to instruct the jury in accordance with N.C.P.I. – Crim. 308.10, the Court of Appeals determined that it was bound by its prior decision in *Crump*, which held that the disqualification provision set out in N.C.G.S. § 14-51.4(1) did not require the existence of a "causal nexus" between the disqualifying felony and the circumstances giving rise to the defendant's perceived need to use defensive force. *Id.*, ¶ 27 (citing *In re Civil Penalty*, 324 N.C. 373, 384 (1989)). As a result, the Court of Appeals found no error in defendant's first-degree murder conviction. *Id.*, ¶ 39. On 9 June 2021, this Court allowed defendant's petition for discretionary review of the Court of Appeals' decision.

II. Substantive Legal Analysis

A. Standard of Review

¶ 20 This Court reviews decisions of the Court of Appeals for errors of law. N.C. R. App. P. 16(a); *State v. Melton*, 371 N.C. 750, 756 (2018). "In determining the propriety of the trial judge's charge to the jury, the reviewing court must consider the instructions in their entirety, and not in detached fragments." *State v. Holden*, 346 N.C. 404, 438–39 (1997) (cleaned up). The trial court is required to give a requested instruction "only if the proposed charge is a correct statement of the law and is supported by the evidence." *State v. Bell*, 338 N.C. 363, 391 (1994) (citation omitted). In evaluating the extent to which a trial court did or did not err in refusing to instruct the jury in accordance with a defendant's request, we interpret the facts in the light most favorable to the defendant. *State v. McCray*, 312 N.C. 519, 529 (1985) (citation omitted). A trial court's erroneous refusal to instruct the jury in accordance with a criminal defendant's request will not result in a reversal of the trial court's judgment unless the error in question has prejudiced the defendant, with such prejudice having occurred in the event that the

defendant shows that there is a "reasonable possibility that, had the trial court given the [required instruction], a different result would have been reached at trial." *State v. Lee*, 370 N.C. 671, 672 (2018); *see also* N.C.G.S. §§ 15A-1442(4)(d), -1443(a) (2021).

B. Duty to Retreat Instruction

¶ 21 **[1]** In seeking to persuade us to overturn the Court of Appeals' decision, defendant begins by arguing that, in rejecting his request that the trial court instruct the jury in accordance with N.C.P.I. – Crim. 308.10, the trial court had deprived him of the right to a "complete self-defense instruction," so that he was entitled to a new trial. *State v. Bass*, 371 N.C. 535, 542 (2018); *State v. Coley*, 375 N.C. 156, 159, 164 (2020). According to N.C.P.I. – Crim. 308.10:

> If the defendant was not the aggressor and the defendant was [in the defendant's own home] [on the defendant's own premises] [in the defendant's place of residence] [at the defendant's workplace] [in the defendant's motor vehicle] [at a place the defendant had a lawful right to be], the defendant could stand the defendant's ground and repel force with force regardless of the character of the assault being made upon the defendant. However, the defendant would not be excused if the defendant used excessive force.

N.C.P.I. – Crim. 308.10 (footnotes omitted). N.C.P.I. – Crim. 308.10 is derived in part from N.C.G.S. §§ 14-51.2 and 14-51.3, which, by statute, authorize the exercise of the right to self-defense under certain circumstances. *See Bass*, 371 N.C. at 540–41. According to N.C.G.S. § 14-51.2(b), "[t]he lawful occupant of a home . . . is presumed to have held a reasonable fear of imminent death or serious bodily harm to himself or herself or another when using defensive force that is intended or likely to cause death or serious bodily harm" in the event that the person against whom the defendant was using defensive force was attempting to "unlawfully and forcefully" enter the defendant's home, while N.C.G.S. § 14-51.2(f) provides that "[a] lawful occupant within his or her home . . . does not have a duty to retreat from an intruder in the circumstances described in this section" and N.C.G.S. § 14-51.2(g) clarifies that "[t]his section is not intended to repeal or limit any other defense that may exist under the common law."

¶ 22 According to defendant, N.C.P.I – Crim. 308.10, "particularly the language that a person in his home could 'repel force with force regardless of the character of the assault being made upon' him, describe[s] his

common law right to use force, even deadly force, when defending himself in his own home."[3] According to defendant, the trial court and the Court of Appeals both erred in relying upon the disqualification provision set out in N.C.G.S. § 14-51.4(1) to justify the rejection of his request that the jury be instructed in accordance with N.C.P.I. – Crim. 308.10 by ignoring the fact that N.C.G.S. § 14-51.2(g) precludes the use of N.C.G.S. § 14-51.4(1) "to repeal or limit" common law defenses. As a result, defendant contends that the trial court's instructions to the jury were incomplete given that "a defendant entitled to *any* self-defense instruction is entitled to a *complete* self-defense instruction, which includes the relevant stand-your-ground provision," *Bass*, 371 N.C. at 542 (emphasis in original), and that a complete self-defense instruction would have informed the jury that defendant was entitled to "repel force with force regardless of the character of the assault being made upon [him]," N.C.P.I. – Crim. 308.10.

¶ 23 In defendant's view, he was clearly prejudiced by the trial court's erroneous refusal to instruct the jury in accordance with N.C.P.I. – Crim. 308.10 on the grounds that the record contained ample evidence tending to show that Mr. Dry had attacked him in his own home. Defendant contends that, "[u]nder the facts, taken in the light most favorable to him, [defendant] was entitled to have the jury properly instructed on his common law and statutory right to use deadly force to defend himself in his home" "regardless of the character of the assault" given that the delivery of such an instruction would have "inform[ed] the [jury's] determination of whether [defendant's] actions were reasonable under the circumstances, which is a critical component of self-defense." *See Lee*, 370 N.C. at 673–75. After acknowledging that the jury knew that defendant had shot Mr. Dry when Mr. Dry was unarmed and that the jury had been told that defendant would not be entitled to have acted in self-defense in the event that he had used excessive force, defendant points out that "the jury was never told that he could use deadly force to repel non-deadly force in his own home." As a result, defendant contends that "the [S]tate cannot show this constitutional error was harmless beyond a reasonable doubt."

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3. According to the State, this aspect of defendant's challenge to the Court of Appeals' decision is not properly before us given that, "[b]eyond quoting N.C.P.I. – Crim. 308.10, [d]efendant made no argument to the Court of Appeals that he was not entitled to an instruction that he could repel force with force in his own home 'regardless of the character of the assault' " and given that "[q]uestions not presented to the Court of Appeals are not properly before [the Supreme Court]." *See State v. Hurst*, 304 N.C. 709, 713 (1982) (per curium). A careful review of the record persuades us, however, that defendant has argued at every stage of this case that the trial court erred by refusing to instruct the jury in accordance with N.C.P.I. – Crim. 308.10.

¶ 24 In seeking to persuade us to uphold the Court of Appeals' decision with respect to this issue, the State begins by arguing that the trial court did not err in instructing the jury in accordance with N.C.P.I. – Crim. 308.10 on the grounds that, even if defendant was entitled to the delivery of an instruction like that set out in N.C.P.I. – Crim. 308.10, "the trial court adequately convey[ed] the substance of [defendant's] request" to the jury, citing *State v. Godwin*, 369 N.C. 604, 613 (2017) (holding that, "[w]hen a defendant requests a special jury instruction that is correct in law and supported by the evidence, the court must give the instruction in substance" but that "the court is not required to give [the instruction] verbatim"), and *State v. Trull*, 349 N.C. 428, 455–56 (1998) (noting that "jury instructions should be as clear as practicable, without needless repetition"). After pointing out that the trial court had informed the jury that defendant would not be guilty of first-degree murder in the event that he acted in self-defense and that he had no duty to retreat in his own home, the State contends that, "[w]hen the use of defensive force is authorized, there is no meaningful difference between a stand-your-ground instruction and a no-duty-to-retreat instruction." According to the State, the reference to "regardless of the character of the assault" contained in N.C.P.I. – Crim. 308.10 "is intended to erase the distinction between simple and felonious assaults, vis-à-vis the duty to retreat, when a person is attacked in his home" and that, because the trial court in this case did not tell the jury that defendant had a duty to retreat from a simple assault, there was no need to qualify that instruction with respect to defendant's right to self-defense in his own home. Finally, the State contends that, because the trial court instructed the jury that defendant could use deadly force in self-defense and that he had no duty to retreat in his own home, defendant "fails to explain how the omitted instruction would have added any substantive principle on which he could have been acquitted," so that defendant had failed to show that there was a "reasonable possibility" that the jury would have reached a different outcome had defendant's requested instruction been delivered.

¶ 25 The initial issue that we are required to address in evaluating the validity of defendant's challenge to the Court of Appeals' decision is whether defendant's proposed instruction rested upon a correct statement of the applicable law. *Bell*, 338 N.C. at 391. At the outset, we acknowledge that differences exist between the language in which N.C.P.I – Crim. 308.10 and N.C.G.S. §§ 14-51.2 and 14-51.3 are couched. Although N.C.P.I. – Crim. 308.10 cites N.C.G.S. §§ 14-51.2(f) and 14-51.3(a), the language used in this instruction antedates the enactment of these statutory provisions. In *State v. Morgan*, we quoted the 1983 edition of N.C.P.I. – Crim. 308.10, which provided that:

> If the defendant was not the aggressor and he was [in his own home] [on his own premises] [at his place of business] he could stand his ground and repel force with force regardless of the character of the assault being made upon him. However, the defendant would not be excused if he used excessive force.

315 N.C. 626, 643 (1986). The only difference between the 1983 and 2019 versions of N.C.P.I. – Crim. 308.10 is the addition of "the defendant's motor vehicle" and "a place the defendant had a lawful right to be" to the list of places in which a defendant was entitled to stand his or her ground, additions that clearly reflect the enactment of N.C.G.S. §§ 14-51.2(b) and 14-51.3(a). The 1983 instruction quoted in *Morgan*, in turn, appears to have been derived from our decision in *State v. Johnson*, which declares that,

> [o]rdinarily, when a person who is free from fault in bringing on a difficulty, is attacked in his own home or on his own premises, the law imposes on him no duty to retreat before he can justify his fighting in self defense, *regardless of the character of the assault*, but is entitled to stand his ground, *to repel force with force*, and to increase his force, so as not only to resist, but also to overcome the assault and secure himself from all harm. This, of course, *would not excuse the defendant if he used excessive force* in repelling the attack and overcoming his adversary.

261 N.C. 727, 729–30 (1964) (per curium) (citations omitted) (emphasis added). Thus, defendant's contention that the portion of N.C.P.I. – Crim. 308.10 allowing him to "repel force with force regardless of the character of the assault being made upon [him]" appears rooted in common, rather than statutory, law. As a result, the remaining issue that we must address is whether defendant was entitled to the delivery of the requested instruction in light of the facts of this case.

¶ 26 Despite the fact that, while the enactment of N.C.G.S. § 14-51.2 was not "intended to repeal or limit any other defense that may exist under the common law," N.C.G.S. § 14-51.2(g), we have held that the enactment of N.C.G.S. § 14-51.3 has supplanted the common law right to perfect self-defense to the extent that it addresses a particular issue, a fact that renders the disqualification provision set out in N.C.G.S. § 14-51.4 potentially relevant to this case, assuming that the factual predicate necessary for the invocation of this disqualification exists. *See McLymore*,

¶ 12. According to the trial court and the Court of Appeals, the fact that defendant fatally wounded Mr. Dry while possessing a firearm after having been convicted of a felony compelled the conclusion that the justifications afforded by N.C.G.S. §§ 14-51.2 and 14-51.3 as reflected in N.C.P.I. – Crim. 308.10 were not available to him. Although this conclusion may be inconsistent with N.C.G.S. § 14-51.2(g), which upholds the continued validity of the common law with respect to the exercise of one's right to defend one's habitation, as well as our decision in *McLymore*, we need not reconcile any such inconsistency or address the manner in which the disqualification provision contained in N.C.G.S. § 14-51.4(1) should be applied in this case given that, as the State has argued, the trial court included the substance of the instruction upon which defendant's challenge to the Court of Appeals' decision rests in the remainder of its instructions to the jury.[4]

¶ 27 Even if a litigant is otherwise entitled to the delivery of a particular instruction, "the court is not required to give [it] verbatim"; instead, "it is sufficient if [the instruction is] given in substance." *Godwin*, 369 N.C. at 613. In other words, "[i]f the instructions given by the trial court adequately convey the substance of defendant's proper request, no further instructions are necessary," *id.* (cleaned up), with this being true even if the trial court relied upon an impermissible reason for refusing to deliver the requested instruction. At trial, the trial court instructed the jury in accordance with N.C.P.I – Crim. 206.10 that:

> The defendant would be excused of first degree murder and second degree murder on the grounds of self defense if, first, the defendant believed it was necessary to kill the alleged victim in order to save the defendant from death or great bodily harm and,

4. Aside from the arguments addressed in the text of this opinion, the State contends that the trial court did not err by denying defendant's request that the jury be instructed in accordance with N.C.P.I. – Crim. 308.10 on the theory that defendant's requested instruction lacked sufficient evidentiary support. In the State's view, defendant "did not stand his ground when [Mr.] Dry attacked him in the kitchen" and, instead, "withdrew to the bedroom to retrieve a firearm." Aside from the fact that the evidence, when viewed in the light most favorable to defendant, would support an inference that Mr. Dry advanced upon defendant at a time when he was in his own residence and after defendant had retrieved a firearm, defendant is not required to have a weapon in his possession at all times in order to avoid the necessity of retreating when called upon to defend himself or herself in his or her own home. *Cf. State v. Miller*, 267 N.C. 409, 411 (1966) (stating that, when a homeowner fears that an intruder may attempt to inflict serious injury upon him or his family, "the law does not require such householder to flee or to remain in his house until assailant is upon him, but he may open his door and shoot his assailant, if such course is apparently necessary for the protection of himself or family") (cleaned up).

> second, the circumstances as they appeared to the defendant at the time were sufficient to create such a belief in the mind of a person of ordinary firmness.
>
> In determining the reasonableness of defendant's belief, you should consider the circumstances as you find them to have existed from the evidence, including the size, age and strength of the defendant as compared to the alleged victim, the fierceness of the assault, if any, upon the defendant, and whether the alleged victim had a weapon in the alleged victim's possession.
>
> The defendant would not be guilty of any murder or manslaughter if the defendant acted in self defense and if the defendant did not use excessive force under the circumstances.
>
> A defendant does not have the right to use excessive force. A defendant uses excessive force if a defendant uses more force than reasonably appeared to the defendant to be necessary at the time of the killing. It is for you, the jury, to determine the reasonableness of the force used by the defendant under all of the circumstances as they appeared to the defendant at the time.
>
> Furthermore, the defendant has no duty to retreat in a place where the defendant has a lawful right to be. The defendant would have a lawful right to be in the defendant's home. Therefore, in order for you to find the defendant guilty of first degree murder or second degree murder, the State must prove beyond a reasonable doubt, among other things, that the defendant did not act in self defense.

Thus, the trial court clearly informed the jury that defendant had no duty to retreat before exercising the right to defend himself in his own home, with there being no material difference that we can see between an instruction that "defendant could stand the defendant's ground" and an instruction that defendant "has no duty to retreat." *See McCray*, 312 N.C. at 532. In addition, the trial court instructed the jury that defendant was entitled to exercise the right of self-defense in the event that he "believed it was necessary to kill [Mr. Dry] . . . to save [himself] from death or great bodily harm" and that his belief to that effect was reasonable

in light of "the circumstances as they appeared to the defendant at the time," with this instruction being materially the same as an instruction that defendant had the right to "repel [deadly] force with [deadly] force." *See* N.C.P.I – Crim. 308.10. As a result, given that the instructions that the trial court delivered to the jury included the substance of defendant's requested instruction, the trial court did not err by failing to instruct the jury using the exact language in which N.C.P.I. – Crim. 308.10 is couched. *See Godwin*, 369 N.C. at 613.

¶ 28 In defendant's view, however, the instructions that the trial court actually delivered did not suffice to obviate the necessity for overturning defendant's first-degree murder conviction because those instructions did not include any language concerning defendant's right to "repel force with force regardless of the character of the assault." In support of this argument, defendant directs our attention to *State v. Francis*, in which we held that the trial court erred by instructing the jury that "a person can't fight somebody with a pistol who is making what is called a simple assault on him, that is an assault in which no weapon is being used, such as a deadly weapon or a knife or a pistol," on the grounds that, "[o]rdinarily, when a person, who is free from fault in bringing on a difficulty, is attacked in his own dwelling, or home . . . , the law imposes upon him no duty to retreat before he can justify his fighting in self-defense, —*regardless of the character of the assault*." 252 N.C. 57, 58–59 (1960) (emphasis added) (quoting *State v. Pennell*, 231 N.C. 651, 654 (1950)). We also noted in *Francis* that, in the event that a defendant was in his own home and was acting in defense of himself or his habitation, he "was not required to retreat in the face of a threatened assault, *regardless of its character*, but was entitled to stand his ground, to repel force with force, and to increase his force, so as not only to resist, but also to overcome the assault." *Id.* at 59–60 (emphasis added) (internal citations omitted). In our opinion, defendant's reliance upon *Francis* is misplaced.

¶ 29 The essential defect that led us to grant the defendant a new trial in *Francis* was that the trial court's erroneous instruction "virtually eliminate[d] the defendant's right of self-defense since he used a pistol in connection with defending himself against a *simple assault*." *Id.* at 59 (emphasis added). Although we did use the expression "regardless of the character of the assault" in discussing the defendant's right to defend himself, the State is correct that our use of that language was intended to make it clear that there was no distinction between a simple and a felonious assault in determining whether a defendant had a duty to retreat before exercising the right of self-defense in his own home. On the

other hand, *Francis* reiterates the well-established legal principle that, even though a defendant attacked in his own home is " 'entitled to stand his ground, to repel force with force, and to increase his force, so as not only to resist, but also to overcome the assault,' " such an entitlement " 'would not excuse the defendant if he used excessive force in repelling the assault,' " *Francis*, 252 N.C. at 758 (quoting *State v. Sally*, 233 N.C. 225, 226 (1951) (citations omitted)), a statement that indicates that the proportionality rule inherent in the requirement that the defendant not use excessive force continues to exist even in instances in which a defendant is entitled to stand his or her ground. For that reason, a trial court need not use the expression "regardless of the character of the assault" in the absence of a concern that the jury would believe that the nature of the assault that the victim had made upon the defendant had some bearing upon the extent to which a defendant attacked in his own home has a duty to retreat before exercising the right of self-defense. *See also State v. Pearson*, 288 N.C. 34, 39–40 (1975); *State v. Frizzelle*, 243 N.C. 49, 50–51 (1955). In view of the fact that the trial court in this case made no distinction between a simple and a felonious assault in its instructions to the jury concerning the extent to which defendant was entitled to exercise the right of self-defense without making an effort to retreat and did not tell the jury that defendant was not entitled to use a firearm or any other form of deadly force in the course of defending himself from Mr. Dry's attack as long as he actually and reasonably believed that he needed to use deadly force to protect himself from death or great bodily injury, the trial court did not need to further clarify that defendant was entitled to exercise the right of self-defense "regardless of the character of the assault." *See Holden*, 346 N.C. at 439 (stating that "the reviewing court must consider [jury] instructions in their entirety, and not in detached fragments") (cleaned up).

¶ 30 Finally, we conclude that, even if the trial court erred by rejecting defendant's request that the jury be instructed in accordance with N.C.P.I. – Crim. 308.10, defendant has failed to establish that "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)–(b);[5] *see also Lee*, 370 N.C. at 671 (concluding that the

5. Although defendant asserts that the trial court's alleged error was of a constitutional dimension, defendant did not object to the trial court's instructions on constitutional grounds prior to the beginning of the jury's deliberations and has failed to explain how the trial court's instructions violated any of his constitutional rights. As a result, the prejudicial effect of any instructional error that the trial court might have committed should be evaluated on the basis of the test set out in N.C.G.S § 15A-1443(a) rather than on the basis of the prejudice test applicable to constitutional errors set out in N.C.G.S. § 15A-1443(b).

defendant had "shown a reasonable possibility" that a different result would have been reached at trial had the trial court given the requested stand-your-ground instruction). As we have already noted, the trial court instructed the jury in such a manner as to effectively inform it that defendant had the right to stand his ground in the event that he was attacked within his own residence and did not distinguish between attacks made upon him using deadly, as compared to non-deadly, force in those instructions. As we have already noted, in this case, unlike in *Lee*, the jury *was* told that defendant had no duty to retreat after having been attacked in his own home. Finally, the record contains more than sufficient evidence from which a reasonable jury could have determined that defendant used excessive force when he killed Mr. Dry. Thus, for all of these reasons, we hold that the trial court did not err by declining to instruct the jury in accordance with N.C.P.I. – Crim. 308.10 and that there is no reasonable possibility that the outcome would have been different had the trial court instructed the jury consistently with defendant's request. As a result, defendant is not entitled to any relief from the Court of Appeals' decision based upon the first of the two challenges that he has advanced in opposition to that decision before this Court.

C. Presumption of Reasonable Fear Instruction

¶ 31 **[2]** In the second of the two challenges to the Court of Appeals' decision that defendant has advanced before this Court, defendant contends that the Court of Appeals erroneously upheld the trial court's failure to afford him the benefit of a "complete self-defense instruction" by refusing to instruct the jury that he was "presumed to have held a reasonable fear of imminent death or serious bodily harm to himself" in light of the fact that he had been attacked in his own home. In defendant's view, he was entitled to the delivery of this instruction notwithstanding the trial court's invocation of the disqualifier contained in N.C.G.S. § 14-51.4(1). As the Court of Appeals correctly held, however, defendant failed to properly preserve his challenge to the trial court's alleged instructional error for purposes of appellate review.

¶ 32 "A party may not make any portion of the jury charge or omission therefrom the basis of an issue presented on appeal unless the party objects thereto before the jury retires to consider its verdict . . . ." N.C. R. App. P. 10(a)(2). According to well-established North Carolina law, a party's decision to request the delivery of a particular instruction during the jury instruction conference suffices to preserve a challenge to the trial court's refusal to deliver that instruction to the jury for further consideration by the appellate courts regardless of the extent to which the relevant party does or does not lodge a subsequent objection.

State v. Hood, 332 N.C. 611, 616–17 (1992). *But see State v. Gay*, 334 N.C. 467, 486 (1993) (observing that "defendant has waived her right to review of this issue by failing to object to the trial court's omission of the requested instruction"). In addition, in the event that "the judicial action questioned is specifically and distinctly contended to amount to plain error," the extent to which the judicial action or inaction constitutes plain error may be argued before a reviewing court. N.C. R. App. P. 10(a)(4). On the other hand, if a party neither lodges a timely objection nor asserts that the trial court's action or inaction constituted plain error, all review of that alleged error, including plain error, has been waived. *State v. Bell*, 359 N.C. 1, 27 (2004).

¶ 33 In seeking to persuade us that the Court of Appeals erred by holding that he had failed to preserve for appellate review his challenge to the trial court's failure to instruct the jury that defendant had a reasonable fear that he was at imminent risk of death or great bodily harm in view of the fact that he had been assaulted in his own home, defendant states that, during the jury instruction conference, counsel for both parties discussed the extent to which defendant was entitled to the protections of N.C.G.S. §§ 14-51.2 and 14-51.3, "which include[ ] a presumption that his belief [in the need to use deadly force] was reasonable if he was attacked in his own home." According to defendant, the existence of this discussion sufficed to preserve his challenge to the trial court's failure to deliver the relevant instruction to the jury, with the Court of Appeals having "muddled this point by noting that [defendant] did not request [N.C.P.I. – Crim.] 308.80, which concerns the defense of habitation" despite the fact that defendant had refrained from requesting the delivery of this instruction in light of the fact that he did not claim to have been defending his habitation. In addition, defendant contends that the Court of Appeals erroneously concluded that he was not entitled to the protections made available pursuant to N.C.G.S. §§ 14-51.2 and 14-51.3 based upon *Crump* and that "[r]eview of this issue would necessarily include the propriety of the trial court's instructions on self-defense that did not include statutory language about the presumption that [defendant's] fear of death or great bodily harm was reasonable."

¶ 34 The State, on the other hand, argues that the second of the two issues that defendant seeks to present for our consideration was not properly before the Court because this issue "was not stated in the [discretionary review] petition at all," with defendant having "never suggested . . . that the Court of Appeals erred by approving the omission of an instruction on the presumption established by" N.C.G.S. § 14-51.2(b). In addition, the State contends that "[d]efendant did not request any instruction that

the jury should presume his fear of death or bodily harm was reasonable" or argue "that the trial court plainly erred by omitting that instruction." As far as the merits of the second of defendant's two claims is concerned, the State contends that "the justification described in Sections 14-51.2 and 14-51.3 is not available to a person who used defensive force and who was committing a felony," citing N.C.G.S. § 14-51.4 (2019). Finally, the State asserts that defendant had "fail[ed] to explain how the omission of an instruction the jury should presume he had a reasonable fear of death or great bodily harm affected the result." As a result, for all of these reasons, the State urges us to refrain from granting any relief from the trial court's judgments on the basis of the second of defendant's instructional arguments.

¶ 35 The language that defendant believes that the trial court erroneously failed to include in its jury instructions, which refers to the fact that defendant was "presumed to have held a reasonable fear of imminent death or serious bodily harm" when assaulted in this own home, is taken verbatim from N.C.P.I. – Crim. 308.80. For that reason, instead of "muddling" defendant's argument, the Court of Appeals did nothing more than make reference to the source from which defendant derived his requested jury instruction. Moreover, as the Court of Appeals indicated, the transcript of the jury instruction conference shows that defendant never requested the trial court to instruct the jury that he was presumed to have a reasonable fear of imminent death or great bodily injury as a result of the fact that he had been assaulted in his home. Instead, defendant simply requested, as we have already discussed, that the trial court instruct the jury in accordance with N.C.P.I – Crim. 308.10 before engaging in a colloquy with the prosecutor and the trial court concerning the extent to which defendant's status as a felon in possession of a firearm precluded the delivery of an instruction like that contained in N.C.P.I. – Crim. 308.10.

¶ 36 A careful review of the record satisfies us that, contrary to defendant's contention, a request to be afforded the protections made available by N.C.G.S. §§ 14-51.2 and 14-51.3 does not preserve his right to complain about the trial court's failure to instruct the jury in accordance with every sentence or clause contained in those statutory provisions. Instead, North Carolina Rule of Appellate Procedure 10(a)(2) requires that a party seeking to challenge an alleged instructional error on appeal must either specifically request an instruction that the trial court fails to deliver or object to the trial court's failure to deliver the relevant instruction in a timely manner. Defendant did not take either of these steps. As a result, since defendant failed to lodge an adequate objection to the

trial court's failure to instruct the jury that defendant was presumed to have had a reasonable fear of imminent death or great bodily injury as required by Appellate Rule 10(a)(2) and since defendant failed to argue that the omission of the relevant instruction constituted plain error, *Bell*, 359 N.C. at 27, we will refrain from addressing this aspect of defendant's challenge to the trial court's instructions on the merits and decline to disturb the trial court's judgments on the basis of the second of the two contentions that defendant has advanced before this Court.

III. Conclusion

¶ 37 Thus, for the reasons set forth above, we hold that the trial court did not err by declining to instruct the jury in accordance with N.C.P.I. – Crim. 308.10 and that defendant has not preserved for any type of appellate review his challenge to the trial court's decision not to instruct the jury in accordance with N.C.P.I. – Crim. 308.80 that he was "presumed to have held a reasonable fear of imminent death or serious bodily harm to himself" in light of the fact that he had been attacked in his own home. As a result, we affirm the decision of the Court of Appeals.

AFFIRMED.

Justice HUDSON dissenting.

¶ 38 There is a significant difference between a person who, when unilaterally attacked in his own home, has the right to defend himself or herself with deadly force "regardless of the character of the assault," and a person who has the right to defend himself or herself with deadly force only if he or she has a reasonable belief that such force is "necessary . . . to save [himself or herself] from death or great bodily harm." In my view, that difference should be dispositive here. Because defendant was entitled to jury instructions that clearly established his right to self-defense "regardless of the character of the assault," I would hold that the trial court prejudicially erred in ruling otherwise. Accordingly, I respectfully dissent.

¶ 39 The key facts are clear and undisputed. After initially welcoming Damon Dry into his home, defendant told Dry to leave. Dry refused and instead pushed defendant against the sink and demanded money. Defendant pushed Dry off of him, opened the door, and again told him to leave. Dry pushed defendant into the door, again demanding money. A fight ensued. Defendant ran to his bedroom, retrieved his handgun, pointed it at Dry, and again told him to leave. When Dry subsequently charged at defendant, defendant shot Dry twice in the chest. Dry died

from the wounds. In light of these undisputed facts, defendant's trial largely revolved around a single issue: whether defendant's killing of Dry was justified under his right to self-defense.

¶ 40 At trial, defendant requested that the trial court instruct the jury regarding his right to self-defense using N.C.P.I. – Crim. 308.10. In pertinent part, this instruction informs the jury that:

> If the defendant was not the aggressor and the defendant was [in the defendants own home][,] . . . the defendant could stand the defendant's ground and repel force with force *regardless of the character of the assault being made upon the defendant*.

N.C.P.I. – Crim. 308.10 (emphasis added). However, the trial court determined that defendant was not eligible for this instruction because: (1) N.C.G.S. § 14-51.4(1), one of the statutes from which defendant's requested jury instruction is derived, states that "th[is] justification . . . is not available to a person who . . . [w]as attempting to commit, committing, or escaping after the commission of a felony"; and (2) defendant, at the time of the shooting, was "committing" the felony of being a felon in possession of a firearm. Instead of the requested instruction, the trial court instructed the jury in accordance with N.C.P.I. – Crim. 206.10. The trial court instructed:

> The defendant would be excused of first degree murder and second degree murder on the grounds of self defense if, first, the defendant *believed it was necessary to kill the alleged victim in order to save the defendant from death or great bodily harm* and, second, the circumstances as they appeared to the defendant at the time were sufficient to create such a belief in the mind of a person of ordinary firmness.
>
> In determining the reasonableness of defendant's belief, you should *consider the circumstances as you find them to have existed from the evidence, including the size, age and strength of the defendant as compared to the alleged victim, the fierceness of the assault, if any, upon the defendant, and whether the alleged victim had a weapon in the alleged victim's possession.*
>
> The defendant would not be guilty of any murder or manslaughter if the defendant acted in self defense

> and the defendant did not use excessive force under the circumstances.
>
> A defendant does not have the right to use excessive force. A defendant uses excessive force if a defendant uses more force than reasonably appeared to the defendant to be necessary at the time of the killing. It is for you, the jury, to determine the reasonableness of the force used by the defendant under all of the circumstances as they appeared to the defendant at the time.
>
> Furthermore, the defendant has no duty to retreat in a place where the defendant has a lawful right to be. The defendant would have a lawful right to be in the defendant's home. Therefore, in order for you to find the defendant guilty of first degree murder or second degree murder, the State must prove beyond a reasonable doubt, among other things, that the defendant did not act in self defense.

(Emphases added). Based on this instruction, the jury found defendant guilty.

¶ 41 On defendant's subsequent appeal, the Court of Appeals agreed with the trial court that defendant's ongoing felony—possessing a firearm as a felon—disqualified him from receiving jury instructions under N.C.P.I. – Crim. 308.10. *State v. Benner*, No. COA19-879, 2021 WL 978796 (N.C. Ct. App. Mar. 16, 2021) (unpublished). Specifically, the Court of Appeals relied on its previous decision in *State v. Crump*, 259 N.C. App. 144 (2018), *rev'd on other grounds*, 376 N.C. 375 (2020), that "the absence of a plain and explicit causal nexus [between the felony and the subsequent self-defense claim] enunciated in section 14-51.4(1) makes manifest that the General Assembly omitted it purposefully and intended to limit the invocation of self-defense in this instance solely to the law-abiding." *Id.* at 151. Noting that it was "bound by *Crump*," the Court of Appeals ruled that the trial court did not err by declining to instruct the jury under N.C.P.I. – Crim. 308.10. *Benner*, 2021 WL 978796, at *4.

¶ 42 Notably, though, in the time since the Court of Appeals ruled on this case below, this Court in *State v. McLymore* explicitly overruled *Crump*'s holding that the felony disqualifier within N.C.G.S. § 14-51.4(1) does not require a causal nexus. 2022-NCSC-12, ¶ 14. Rather, we held that N.C.G.S. § 14-51.4(1) "requires the State to prove an immediate causal nexus between a defendant's attempt to commit, commission

of, or escape after the commission of a felony and the circumstances giving rise to the defendant's perceived need to use force." *Id.* ¶ 1.

¶ 43 In light of *McLymore*, and because there is no causal nexus between defendant's possession of a firearm as a felon and the events giving rise to his need to exercise self-defense, it is clear that contrary to the rulings of the trial court and the Court of Appeals, defendant was *not* disqualified by N.C.G.S. § 14-51.4(1) from the justifications for defensive force enacted under N.C.G.S. §§ 14-51.2 and 14-51.3. Furthermore, the only reason that the trial court and the Court of Appeals provided for refusing to give defendant's requested instruction was that he was disqualified by N.C.G.S. § 14-51.4(1). In my view, defendant's request for a jury instruction reflecting those rights under N.C.P.I. – Crim. 308.10 was proper and should have been granted. Accordingly, the critical question here is whether "the instructions given by the trial court adequately convey the substance of defendant's proper request." *State v. Godwin*, 369 N.C. 604, 613 (2017) (cleaned up) (quoting *State v. Green*, 305 N.C. 463, 477 (1982)).

¶ 44 The majority answers this question in the affirmative: "the trial court included the substance of the instruction upon which defendant's challenge to the Court of Appeals' decision rests in the remainder of its instructions to the jury." Specifically, although the trial court plainly did not instruct the jury on defendant's right to repel force with force "regardless of the character of the assault[,]" the majority interprets this Court's use of that expression in *State v. Francis*, 252 N.C. 57 (1960), as "intend[ing] to make it clear that there was no distinction between a simple and felonious assault in determining whether a defendant in his own home had a duty to retreat before exercising the right of self-defense in his own home."[1] "For that reason," the majority continues, "a trial court need not use [that] expression . . . in the absence of a concern that the jury would believe that the nature of the assault that the victim had made upon the defendant had some bearing upon the extent to which a defendant attacked in his own home has a duty to retreat before exercising the right of self-defense." Accordingly, because "the trial court [here] clearly informed the jury that defendant had no duty to retreat before exercising the right to defend himself in his own home," the majority concludes that the trial court "did not need to further clarify that defendant was entitled to exercise the right of self-defense 'regardless of the character of the assault.' "

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1. Notably, neither the trial court nor the Court of Appeals relied upon or even mentioned *State v. Francis*, 252 N.C. 57 (1960), in their reasoning supporting the denial of defendant's jury instruction request; they relied only upon the felony disqualifier under N.C.G.S. § 14-51.4(1) which, for the reasons noted above, is now inapplicable here.

¶ 45 I understand *Francis* differently and accordingly would reach a different conclusion. In *Francis*, the trial court instructed the jury that

> in determining the degree of force one may use [in self-defense], the law permits a person to use such force as reasonably necessary to protect himself, and he can even go to the extent of taking human life where it is necessary to save himself from death or great bodily harm, but if he uses more force than is reasonably necessary he is answerable to the law.

252 N.C. at 59. This instruction essentially recognized a right to proportional self-defense: the defendant would be justified in using deadly force in his home or place of business only if facing potentially deadly force himself.

¶ 46 On appeal, this Court determined that this portion of the jury instruction was erroneous because it "virtually eliminates the defendant's right of self-defense since he used a pistol in connection with defending himself against a simple assault." *Id.* "Ordinarily," we reasoned, "when a person[ ] who is free from fault in bringing on a difficulty[ ] is attacked in his own dwelling, . . . the law imposes upon him no duty to retreat before he can justify his fighting in self-defense,—*regardless of the character of the assault*." *Id.* (quoting *State v. Pennell*, 231 N.C. 651, 654 (1950)).

¶ 47 Where the majority above narrowly interprets this reasoning to indicate that the emphasized language was only "intended to make it clear that there was no distinction between a simple and felonious assault in determining whether a defendant had a duty to retreat in his own home[,]" I understand it to more broadly emphasize a defendant's right to engage in nonproportional self-defense within his home—that is, "he can justify his fighting in self-defense . . . *regardless of the character of the assault*." *Francis*, 252 N.C. at 59. Under this interpretation, instructing a jury that a defendant has no duty to retreat, which the trial court functionally did here, is plainly not the same as instructing a jury that a defendant may use force of a character different from that used by an attacker in repelling an attack in his home, which it did not.

¶ 48 Instead, the trial court here made the same misstep that the *Francis* Court ruled erroneous: it instructed the jury that the defendant's right to use deadly force in self-defense was contingent upon a reasonable belief that such force was necessary "in order to save the defendant from death or great bodily harm." It further instructed that the reasonableness of this belief depended on the essential proportionality of defendant's response in light of "circumstances . . . from the evidence, including the

size, age and strength of the defendant as compared to the alleged victim, the fierceness of the assault, if any, upon the defendant, and whether the alleged victim had a weapon in [his] possession." In doing so, just as in *Francis*, the trial court's "instruction virtually eliminate[d] the defendant's right of self-defense since he used a pistol in connection with defending himself against a simple assault." *Id.* I would hold that this constituted error.

¶ 49 Ultimately, though, while *Francis* helps inform the outcome here, it is not dispositive. Indeed, neither the trial court nor the Court of Appeals mentioned *Francis* in their analysis supporting the denial of defendant's requested jury instruction; they relied exclusively on the no longer viable reading of N.C.G.S. § 14-51.4(1)'s felony disqualifier as discussed by the Court of Appeals in *Crump*. *See McLymore*, 2022-NCSC-12, ¶ 14 (overruling *Crump*'s interpretation of the felony disqualifier and requiring a causal nexus). Instead, the critical question here is simply whether or not the given instructions "adequately convey[ed] the substance of defendant's proper [jury instruction] request." *Godwin*, 369 N.C. at 613 (quoting *Green*, 305 N.C. at 477). To answer this question, we need only compare the substance of the requested instruction—which, as noted above, defendant was entitled to in light of *McLymore*—with that of the given instruction.

¶ 50 Here, the given instruction omitted a key justification for defensive force enacted under N.C.G.S. §§ 14-51.2 and 14-51.3 as integrated into the requested instruction: that "defendant could stand [his] ground and repel force with force *regardless of the character of the assault being made upon* [*him*]." N.C.P.I. – Crim. 308.10 (emphasis added). Although we agree with the majority that the trial court's instruction that defendant had "no duty to retreat" is functionally the same as an instruction that defendant "could stand [his] ground," the given instruction still excludes a key element from N.C.P.I. – Crim. 308.10: instructing the jury that defendant's right to self-defense in his home operated "regardless of the character of the assault." Because the inclusion or omission of this phrase unilaterally determines whether or not defendant was justified in using a handgun to defend himself against Dry's physical attack on him, its omission by the trial court constitutes a meaningful substantive difference between the requested and given instructions. Accordingly, I would hold that the trial court and Court of Appeals erred below.

¶ 51 Further, I disagree with the majority that defendant has failed to establish that this error was prejudicial. Because defendant admitted that he shot Dry, the only question for the jury to resolve here was

whether defendant's actions were justified. By failing to give the defendant's requested instruction, the trial court's error bore on the only issue that the jury had to decide. Specifically, the jury instruction that was given limited the scope of what the jury could consider in determining whether defendant had the right to use deadly force even if it had not been wielded against him. In determining whether defendant's use of deadly force was justified, under the proper instruction, the jury would not necessarily need to consider whether Dry used a weapon, the nature of his assault on defendant, or his age, strength, or size. These factors directly speak to "the character of the assault being made upon defendant," which, under the proper instruction, would be irrelevant. Because the two instructions are clearly distinct, I would hold that the error was clearly prejudicial.

¶ 52 Finally, because I would find that the prejudicial error noted above independently requires reversal and remand, I would not reach the second issue regarding defendant's preservation of the instruction on the presumption of reasonable fear.

¶ 53 Accordingly, I respectfully dissent.

Justice EARLS joins in this dissenting opinion.

STATE OF NORTH CAROLINA
v.
UTARIS MANDRELL REID

No. 20PA19-2

Filed 11 March 2022

Criminal Law—post-conviction motions—newly discovered evidence—Beaver factors—satisfied

The trial court did not abuse its discretion by granting defendant, who had been convicted of first-degree murder more than twenty years earlier, a new trial on the grounds of newly discovered evidence pursuant to N.C.G.S. § 15A-1415(c), where defendant satisfied the factors set forth in *State v. Beaver*, 291 N.C. 137 (1976). Despite some internal inconsistencies in the newly discovered testimony, the court properly found that the testimony was "probably true;" defendant's lawyer exercised due diligence in procuring the testimony—that is, the diligence reasonably expected from someone with limited information about the testimony—by hiring

an investigator to track down the witness; the testimony constituted material, competent, and relevant evidence where the State did not object to it and where it was admissible under the residual exception to the hearsay rule (Evidence Rule 803(24)); and the testimony—revealing another person's confession to committing the murder—was of a nature that a different result would probably be reached at a new trial.

Chief Justice NEWBY dissenting.

Justice BARRINGER joins in this dissenting opinion.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 274 N.C. App. 100 (2020), reversing an order entered on 7 December 2018 by Judge C. Winston Gilchrist in Superior Court, Lee County. Heard in the Supreme Court on 5 January 2022.

Joshua H. Stein, *Attorney General*, *by Mary Carla Babb*, *Special Deputy Attorney General*, *for the State-appellee.*

Lauren E. Miller for defendant-appellant.

EARLS, Justice.

¶ 1 This case requires us to decide whether the Court of Appeals correctly held that the Superior Court, Lee County (MAR court) abused its discretion and committed legal error in granting defendant Utaris Mandrell Reid's motion for appropriate relief (MAR) and awarding him a new trial. Reid, who was fourteen years old when he was indicted for assaulting and robbing a cab driver who later died, was convicted of first-degree murder largely on the basis of a confession he made while being interrogated by a Sanford Police Department detective outside the presence of a parent or guardian. Years later, Reid's postconviction counsel located a man who claimed that on the night of the crime, another person came to his home and confessed to assaulting the cab driver, exculpating Reid. Based on what it deemed to be this man's "credible and truthful testimony," the MAR court allowed Reid's MAR based on newly discovered evidence, vacated his conviction, and ordered a new trial. The Court of Appeals reversed the MAR court's order. *State v. Reid*, 274 N.C. App. 100, 133 (2020). Because we conclude that the MAR court neither abused its discretion nor committed legal error in granting Reid a

new trial, we reverse the decision of the Court of Appeals, vacate Reid's conviction, and remand for a new trial.

I. Background

¶ 2 On the evening of 21 October 1995, John Graham was working as a driver for a taxicab company when he was assaulted and robbed. A police officer who arrived at the scene found Graham on the ground with severe head trauma. Graham was taken to the emergency room and remained hospitalized until he died from his injuries that December.

¶ 3 Two months after Graham was assaulted and robbed, an officer from the Sanford Police Department, Detective Jim Eads, interviewed fourteen-year-old Reid at the police station. Reid was read his *Miranda* rights and signed a waiver of his rights. The interview was not recorded, and no other person besides Detective Eads was present. According to Detective Eads, after he informed Reid that he was interviewing him in connection with Graham's death, Reid replied, "I am not going down for this by myself" and, in a rambling confession, admitted to assaulting Graham with three other boys—Elliot McCormick, Duriel Shaw, and Anthony Reid. Detective Eads transcribed defendant Reid's statement, which Reid signed. Reid was subsequently indicted for first-degree murder and robbery with a dangerous weapon. The three juveniles named by Reid were also charged with murder, but all charges against them were ultimately dismissed.

¶ 4 Reid was initially tried in October 1996. At trial, Detective Eads testified that officers interviewed Graham in the emergency room after the assault, where Graham indicated that he had been assaulted by two black males between the ages of sixteen and nineteen. The State did not present any blood, fingerprint, or DNA evidence or any eyewitness testimony, and no weapon was ever recovered. The trial ended in a mistrial due to a hung jury.

¶ 5 On 21 July 1997, Reid was tried for a second time. At this trial, the State again presented Reid's transcribed confession. The State also again presented testimony from Detective Eads, who clarified that while Graham could not communicate "verbally" with officers when he was interviewed at the hospital, he did "attempt to shake his head, yes or no," which Detective Eads "took . . . as a response" "[i]n a fashion." Finally, the State presented testimony from John Love, one of Graham's coworkers, who stated that he came to the crime scene after hearing Graham radio for help. According to Love, while Graham was lying injured, Love asked Graham who the perpetrators were, and Graham responded "L.L., McCormick, and Reid." Love explained that he did not report this

information to officers who interviewed him at the crime scene because he "didn't put together" what Graham was talking about until after Reid's first trial.

¶ 6 Reid presented an alibi defense supported by testimony from family members who claimed he had spent the day the crime occurred in their presence. He also presented testimony from a neuropsychologist who examined Reid's transcribed confession and opined that it was written at a higher grade level than Reid functioned at. In addition, Reid filed a motion to suppress the transcribed confession. The trial court denied the motion, concluding that Reid "knowingly, willingly and understandingly" waived his rights and signed the confession prepared by Detective Eads.

¶ 7 Ultimately, Reid was convicted of first-degree murder and common law robbery. He was sentenced to life imprisonment without parole. On direct appeal, Reid argued that the trial court erred in denying his motion to suppress his confession. The Court of Appeals found no error, holding that "[w]hile a defendant's subnormal mental capacity is a factor to be considered in determining whether the defendant's waiver of rights is intelligent, knowing and voluntary, such lack of intelligence, standing alone, is insufficient to render a statement involuntary if the circumstances otherwise indicate that the statement is voluntarily and intelligently made." *State v. Reid*, No. COA98-1392, slip op. at 4 (N.C. Ct. App. Oct. 19, 1999) (unpublished).

A. The motion for appropriate relief.

¶ 8 On 6 May 2011, Reid filed a MAR and motion for postconviction discovery asserting that his sentence of life imprisonment without parole was unconstitutional under the Eighth Amendment as interpreted by the United States Supreme Court in *Graham v. Florida*, 560 U.S. 48 (2010). His motion was summarily denied based on the determination that Reid had failed to allege a factual or legal basis upon which the MAR court could grant relief.

¶ 9 On 11 August 2011, Reid filed a motion for reconsideration of the trial court's order denying his MAR and motion for postconviction discovery. In support of this motion, Reid submitted an affidavit from William McCormick, a childhood friend of Reid's and the brother of Elliot McCormick, one of the juveniles Reid implicated in his confession, stating that: (1) on the night of the assault, William McCormick was at his mother's house with Reid; (2) Robert Shaw, Norman Cox, and Antonio Bristow came to McCormick's home "sweating and out of breath"; and (3) the next day, Shaw confessed to William McCormick

that he, Cox, and Bristow had robbed and assaulted Graham. William McCormick stated that he "was not interviewed by the police or any attorneys involved in . . . Reid's case." On 8 February 2012, the MAR court granted Reid's motion for postconviction discovery, noting that "[a]n evidentiary hearing on Defendant's Motion for Appropriate Relief and subsequent amendments may be held on a later date to be determined by the presiding judge."

¶ 10 On 5 April 2013, Reid filed another MAR again alleging that he was entitled to relief based on the newly discovered evidence of William McCormick's testimony. The MAR court held evidentiary hearings on this MAR on 20 July, 4 October, and 30 November 2017. At the hearings, the MAR court heard testimony from William McCormick, who conveyed his recollection of Shaw's confession. McCormick also explained that he refused to talk to anyone about Shaw's confession at the time of Reid's trial because he had been living by a "street code."

¶ 11 The MAR court also heard testimony from Reid's trial counsel, Fred Webb, who stated that as part of his initial investigation, "people that [he] knew in the street" mentioned William McCormick as a person who had information regarding Graham's death. Webb testified that based on this information, he moved for and obtained funds for an investigator to "[l]ocate and interview the brother and mother of . . . Elliot McCormick, and any other witness who may have heard or seen anything concerning the night of October 21, 1995." However, Webb explained that the investigator was ultimately unable to "get to [the McCormick brothers] in order to get a statement from them about what happened."

¶ 12 On 7 December 2018, the MAR court entered an order containing sixty-seven findings of fact and eighteen conclusions of law granting Reid's MAR, vacating his conviction for first-degree murder, and ordering a new trial. The MAR court explained that having

> listened to the testimony and observed the demeanor of these witnesses, [it] finds that each gave credible and truthful testimony on every issue that was material to the findings of fact and conclusions of law which are necessary to reach a ruling on the issues raised in the instant matter. William McCormick was emotional during his testimony. His demeanor gave convincing force to his testimony.

Specifically, the MAR court found "[William] McCormick's testimony to be credible" because, among other reasons, "McCormick in fact has no motive to testify for Defendant other than to disclose the true facts

known to him." With respect to the credibility of McCormick's testimony, the MAR court noted its "emotional impact and persuasive effect." With respect to the likely impact of William McCormick's testimony on a jury, the MAR court found that this was "an extremely close case, tried once to a hung jury, finally resulting in a conviction based largely on the purported confession of the fourteen[-]year[-]old, mentally disabled Defendant."

¶ 13 On the basis of Reid's evidence and the testimony presented at the hearings, the MAR court concluded that Reid had proven by a preponderance of the evidence that William McCormick's testimony was "newly discovered evidence as defined by law" because: (1) the evidence could not have been discovered or made available at the time of Reid's trial despite counsel's "due diligence"; (2) the evidence had "a direct and material bearing upon [Reid's] guilt or innocence"; (3) the evidence was "probably true"; (4) the evidence was "competent, material[,] and relevant"; and (5) the evidence was likely to be admissible at trial under N.C.G.S. § 8C-1, Rules 803(24) and 804(b)(3). The State appealed pursuant to N.C.G.S. § 15A-1445(a)(2).[1]

B. The Court of Appeals opinion.

¶ 14 On appeal, the Court of Appeals reversed the MAR court's order. *State v. Reid*, 274 N.C. App. 100, 133 (2020). According to the Court of Appeals, the MAR court erred in concluding that Reid had proven by a preponderance of the evidence that McCormick's testimony was newly discovered evidence within the meaning of N.C.G.S. § 15A-1415(c). *Id.* at 128. In addressing this question, the Court of Appeals applied the seven-part test articulated by this Court in *State v. Beaver*:

> In order for a new trial to be granted on the ground of newly discovered evidence, it must appear by affidavit that (1) the witness or witnesses will give newly discovered evidence; (2) the newly discovered evidence is probably true; (3) the evidence is material, competent and relevant; (4) due diligence was used and proper means were employed to procure the testimony at trial; (5) the newly discovered evidence is not merely cumulative or corroborative; (6) the new evidence does not merely tend to contradict, impeach or discredit the testimony of a former witness; and

1. N.C.G.S. § 15A-1445(a)(2) provides that "the State may appeal from the superior court . . . [u]pon the granting of a motion for a new trial on the ground of newly discovered or newly available evidence *but only on questions of law*." N.C.G.S. § 15A-1445(a) (2021) (emphasis added).

> (7) the evidence is of such a nature that a different result will probably be reached at a new trial.

Id. at 124 (quoting *State v. Beaver*, 291 N.C. 137, 143 (1976)). According to the Court of Appeals, Reid failed on multiple prongs of the *Beaver* test. *Id.* at 133.

¶ 15 First, the Court of Appeals held that Reid had failed to establish that William McCormick's recollection of Shaw's confession was probably true. *Id.* at 126. According to the Court of Appeals, there were numerous inconsistencies within William McCormick's affidavit and between the affidavit and his later testimony—such as William McCormick's conflicting accounts regarding when Shaw first told him about assaulting Graham, the time of night Shaw arrived at his home, and whether his mother was home or at work when Shaw arrived—that were "impossible to reconcile." *Id.* at 125–26. Thus, "[i]n light of McCormick's conflicting affidavit and inconsistent testimony, [Reid] failed to demonstrate by a preponderance of the evidence that the information provided by McCormick is probably true." *Id.* at 126.

¶ 16 Second, the Court of Appeals held that McCormick's testimony was not "unknown or unavailable to" Reid at the time of trial. *Id.* at 128 (quoting *State v. Wiggins*, 334 N.C. 18, 38 (1993)). The court reasoned that despite being aware William McCormick may have possessed information about Graham's death at the time of Reid's trial, Webb failed "to utilize available procedures to secure McCormick's statement or testimony," such as "(1) issu[ing] a subpoena, (2) request[ing] a material witness order, (3) request[ing] a recess, (4) mak[ing] a motion to continue, (5) alert[ing] the trial court to the existence of this information, or (6) otherwise preserv[ing] this information in the record at trial." *Id.* at 127 (citing *State v. Smith*, 130 N.C. App. 71, 77 (1998)). Further, according to the Court of Appeals, William McCormick was "actually present at [Reid's] trial," but Webb "failed to speak with McCormick despite knowing that [he] may have information concerning Graham's death." *Id.* Therefore, the Court of Appeals concluded that Reid "failed to exercise due diligence in procuring McCormick's testimony" at trial. *Id.* at 129.

¶ 17 Third, the Court of Appeals held that the MAR court abused its discretion in concluding that McCormick's testimony was "competent, material[,] and relevant." *Id.* The Court of Appeals explained that under Rule 803(24), a party must give proper notice before offering hearsay testimony as evidence. *Id.* at 131. However, "there is no evidence in the record that [Reid] filed a proper notice of intent to offer hearsay evidence pursuant to Rule 803(24) prior to hearing the motion for appropriate

relief." *Id.* at 132. Accordingly, the Court of Appeals concluded that "the [MAR] court abused its discretion when it concluded the written notice requirement had been satisfied." *Id.*

¶ 18 Finally, the Court of Appeals held that the MAR court erred in concluding that Reid's "due process rights would be violated if he were not allowed to present McCormick's testimony at a new trial." *Id.* According to the Court of Appeals, the proper way to decide whether due process requires the court to allow a defendant to present new evidence is by applying the *Beaver* test "to determine whether to grant a new trial." *Id.* at 133. Based on its conclusion that Reid "has failed to satisfy the *Beaver* factors discussed above," the Court of Appeals held that "the [MAR] court erred in concluding that Defendant's constitutional rights would be violated if he did not have the opportunity to present the purported newly discovered evidence." *Id.*

¶ 19 In a brief concurring opinion, Judge Dietz agreed with the majority that Reid's trial counsel was aware "that William McCormick had information that implicated other people, but not Reid, in the crime" and that counsel's failure to exercise any of the "many options . . . in this situation to secure the testimony of [an] evasive witness" meant that McCormick's testimony was not, "when it finally came to light, newly discovered evidence under our post-conviction jurisprudence." *Id.* at 134 (Dietz, J., concurring). However, Judge Dietz expressed his view that "the failure to secure this testimony at the time of trial implicates Reid's constitutional right to the effective assistance of counsel," noting that the Court of Appeals' resolution of the case "does not bar Reid from seeking post-conviction relief on other grounds." *Id.* (Dietz, J., concurring).

¶ 20 Reid filed a petition for discretionary review, which was allowed by order of this Court in conference on 14 April 2021.

II. Standard of Review

¶ 21 Upon filing a MAR, the burden is on the moving party to prove "by a preponderance of the evidence every fact essential to support the motion." *State v. Eason*, 328 N.C. 409, 434 (1991). "[A] new trial for newly discovered evidence should be granted with the utmost caution and only in a clear case, lest the courts should thereby encourage negligence or minister to the litigious passions of men." *State v. Davis*, 203 N.C. 316, 323 (cleaned up), *cert. denied*, 287 U.S. 668 (1932).

¶ 22 However, "[t]he decision of whether to grant a new trial in a criminal case on the ground of newly discovered evidence is within the trial

court's discretion and is not subject to review absent a showing of an abuse of discretion." *State v. Rhodes*, 366 N.C. 532, 535 (2013) (quoting *Wiggins*, 334 N.C. at 38). In general, "[a]ppellate courts review trial court orders deciding motions for appropriate relief '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. Hyman*, 371 N.C. 363, 382 (2018) (quoting *State v. Frogge*, 359 N.C. 228, 240 (2005)). "[T]he trial court's findings of fact 'are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting.' " *Id.* (alteration in original) (quoting *State v. Buchanan*, 353 N.C. 332, 336 (2001)). A MAR court abuses its discretion only if its ruling was "so arbitrary that it could not have been the result of a reasoned decision." *White v. White*, 312 N.C. 770, 777 (1985).

III. Analysis

¶ 23 Both parties agree that, as a general matter, the *Beaver* test governs when assessing whether a defendant is entitled to a new trial on the basis of newly discovered evidence. The parties disagree as to whether the Court of Appeals properly applied the test in this case.

¶ 24 Reid contends that the Court of Appeals usurped the role of the MAR court when it "looked beyond the [MAR] court's supported [factual] findings" and reweighed the evidence based on its own assessment of the relative credibility of the witnesses who testified at the evidentiary hearing. According to Reid, the MAR court's threshold determination that William McCormick's account of Shaw's confession was "probably true" is a "factual determination" that is binding on appeal because it was supported by "ample" evidence in the record. Further, Reid argues that the Court of Appeals erred in concluding that his trial counsel did not exercise due diligence in attempting to elicit William McCormick's testimony and in concluding that this evidence was not "competent" because it was inadmissible.

¶ 25 In response, the State contends that the Court of Appeals appropriately concluded Reid failed to satisfy the "rigorous" and "difficult-to-meet" *Beaver* test. In the State's view, the MAR court's determination that William McCormick's affidavit and testimony were probably true "is a conclusion of law, or at the very least, a mixed finding of fact and conclusion of law, reviewable de novo on appeal." Further, the State argues that the Court of Appeals correctly concluded that Reid did not "carry [the] very heavy burden . . . [of] establishing the exercise of due diligence" in seeking William McCormick's testimony at trial and that the

MAR court abused its discretion in concluding that his testimony was material, competent, and relevant.

¶ 26 We agree with Reid that the Court of Appeals overstepped in displacing the MAR court's finding that William McCormick's recollection of Shaw's confession was probably true, a factual determination that was supported by evidence in the record. In addition, the MAR court did not commit any error of law in its application of the *Beaver* test and did not abuse its discretion in concluding that Reid was entitled to a new trial on the basis of newly discovered evidence. Accordingly, we reverse the decision of the Court of Appeals.

A. What is probably true is a question of fact.

¶ 27 In order to demonstrate that he was entitled to a new trial, Reid was required to establish that William McCormick's recollection of Shaw's confession was "probably true." *Beaver*, 291 N.C. at 143. To determine if McCormick's testimony was probably true, the MAR court needed to "weigh evidence, assess witness credibility, assign probative value to the evidence and testimony, and determine what the evidence proves or fails to prove." *State v. Moore*, 366 N.C. 100, 108 (2012). These are all tasks that can only be performed by the factfinder, who "sees the witnesses, observes their demeanor as they testify and . . . is given the responsibility of discovering the truth." *State v. Cooke*, 306 N.C. 132, 135 (1982) (quoting *State v. Smith*, 278 N.C. 36, 41 (1971)). Determining whether evidence is probably true requires the factfinder to perform its quintessential functions to "discover[ ] the truth," *id.*; thus, determining whether evidence is probably true is a factual question to be resolved by the MAR court.

¶ 28 The Court of Appeals held that the MAR court erred in determining that Reid's evidence was probably true because there were some inconsistencies internal to William McCormick's affidavit and discrepancies between his affidavit and subsequent testimony at the evidentiary hearing. But, as the State correctly acknowledges, "inconsistencies and conflicts in the evidence do not render a trial court's findings of fact unsupported by evidence and reviewable on appeal." Rather, as we have repeatedly emphasized, the fact that evidence presented to a MAR court is conflicting or contains discrepancies is not a reason for an appellate court to disregard the MAR court's factual findings based on that evidence. *See*, *e.g.*, *State v. Allen*, 378 N.C. 286, 2021-NCSC-88, ¶ 24 ("The MAR court's factual findings are binding . . . if they are supported by evidence, even if the evidence is conflicting." (cleaned up)). Indeed, the factfinder's function is to "resolve" any "[c]ontradictions and discrepancies" appearing in the evidence. *State v. McDaniel*, 372 N.C. 594, 603

(2019). On appeal, the reviewing court's only role, "even [if] the evidence is conflicting," is to "determine whether the findings of fact are supported by evidence." *State v. Stevens*, 305 N.C. 712, 720 (1982). Whatever inconsistencies there might be in Reid's evidence did not give the Court of Appeals license to replace the MAR court's facts with its own.

¶ 29 In order for the MAR court to determine that it was probably true Shaw had confessed to William McCormick, the court needed to find that McCormick was credible. That is precisely what the MAR court did: it entered numerous findings of fact specifically detailing the basis for its determination that McCormick was a credible witness, which included its own observations of McCormick's demeanor, his reasons for not coming forward near the time of Graham's death, his lack of any motivation to lie, and his maturation since his brother was murdered in 2000. A different factfinder might have assessed McCormick's credibility differently, but we cannot say that the MAR court's findings concerning McCormick's credibility were unsupported by the evidence. Thus, the MAR court's determination that McCormick was credible could not be displaced on appeal.

¶ 30 Reid bore the burden of proving by a preponderance of the evidence that McCormick's affidavit and testimony were probably true. Notwithstanding the Court of Appeals' suggestion to the contrary, this burden did not require him to "reconcile the discrepancies in the information provided by McCormick." *Reid*, 274 N.C. App. at 126. A trial court is entitled to "believe all that a witness testified to, or to believe nothing that a witness testified to, or to believe part of the testimony and to disbelieve part of it." *Brown v. Brown*, 264 N.C. 485, 488 (1965). Evidence that contains inconsistencies can still support a factual finding based upon the factfinder's assessment of the evidence and the credibility of its proponents. If it were otherwise—if only evidence without any discrepancies or inconsistencies could support a trial court's factual findings—our precedents instructing appellate courts to defer to the trial court's findings when the evidence is conflicting would be nonsensical.

¶ 31 Rather than defer to the MAR court's factual findings which were supported by evidence in the record, "the Court of Appeals engaged in the prohibited exercises of reweighing evidence and making witness credibility determinations, essentially making its own findings of fact in several areas where evidence presented to the [MAR court] was conflicting." *Brackett v. Thomas*, 371 N.C. 121, 127 (2018). Accordingly, the Court of Appeals erred in overruling the MAR court's determination that Reid had proven by a preponderance of the evidence that William McCormick's account of Shaw's confession was probably true.

B. The exercise of due diligence at trial.

¶ 32 The Court of Appeals also held that the MAR court abused its discretion in granting Reid a new trial because Reid had failed to prove by a preponderance of the evidence that "due diligence was used and proper means were employed to procure the testimony [being offered in support of his MAR] at trial." *Beaver*, 291 N.C. at 143; *see also* N.C.G.S. § 15A-1415(c) (2021). The MAR court entered two relevant findings of fact in support of its conclusion that Reid's trial counsel had exercised due diligence in attempting to procure William McCormick's testimony:

> 63. Before trial, Attorney Webb spoke to contacts "in the street" who had provided information that led him to believe Defendant was not involved in the crime. The names of the McCormick brothers, William and Elliott, came up as witnesses who had information that could be helpful to the defense. Attorney Webb moved for and secured funds to retain Investigator Mel Palmer for the specific purpose of locating and interviewing William McCormick. In the motions and orders for investigator funding, Attorney Webb specified that he was trying to locate William McCormick.
>
> 64. Investigator Palmer attempted to interview William McCormick, but was unable to locate him. Investigator Palmer made attempts to serve William McCormick with a subpoena but was unable to do so. McCormick's mother interfered with the investigator's efforts to locate William and would not allow him to be interviewed.

These findings of fact are supported by the evidence and binding on appeal.

¶ 33 The due diligence requirement does not demand that a defendant do everything imaginable to procure at trial the purportedly newly discovered evidence presented in a MAR. Rather, it requires the defendant to prove that he or she "could not, with *reasonable* diligence, have discovered and produced the evidence at the trial." *Beaver*, 291 N.C. at 143 (emphasis added); *see also Due Diligence*, Black's Law Dictionary (11th ed. 2019) (defining due diligence as "[t]he diligence reasonably expected from, and ordinarily exercised by, a person who seeks to satisfy a legal requirement or to discharge an obligation"). We have explained that "[w]hen the information presented by the purported newly discovered evidence was *known or available* to the defendant at the time of trial,

the evidence does not meet the requirements of N.C.G.S. § 15A-1415(c)." *State v. Rhodes*, 366 N.C. 532, 537 (2013) (emphasis added).

¶ 34 In this case, the MAR court did not commit legal error or abuse its discretion in concluding that William McCormick's testimony was neither known nor available to Reid or his counsel, Webb, at the time of trial. Neither Reid nor Webb knew that Shaw had confessed regarding his role in the murder to William McCormick; at most, Webb knew that his contacts "in the street" had identified William McCormick as someone who might possess information that could potentially benefit Reid. He had no knowledge of and no reason to know what that information was, or even whether it existed, at the time of trial. And William McCormick was decidedly not "available" to Reid and Webb; despite repeated efforts, the investigator hired by Webb was unable to locate William McCormick in order to interview him and ascertain what information McCormick possessed.[2]

¶ 35 Nevertheless, the Court of Appeals concluded that Reid and his counsel "failed to exercise due diligence in procuring McCormick's testimony." *Reid*, 274 N.C. App. at 129. As recounted above, the rationale for this conclusion was that Webb "could have secured McCormick's attendance to testify at trial" by, for example, issuing a subpoena or requesting a material witness order. *Id.* at 127. But the question is not whether there was any possible existing procedural mechanism by which Webb *could* have secured McCormick's appearance at trial; the question is whether utilizing any of these mechanisms would have been "reasonably expected" of someone who possessed the information Webb possessed. Judged against this standard, we disagree with the State that Webb's failure to issue a subpoena or request a material witness order means that the MAR court committed legal error or abused its discretion in determining that Webb exercised due diligence.

¶ 36 Due diligence does not require counsel to take speculative risks on the basis of rumors. Having only heard intimations that William McCormick possessed information that might have benefited his client—but having not been able to interview McCormick and having no

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2. Further, the State concedes that the MAR court made no finding—and there is no testimony in the record—supporting the Court of Appeals' assertion that Webb knew William McCormick was "actually present at [Reid's] trial." At most, there is testimony indicating that Webb saw William McCormick's family in the courthouse on one occasion but they "refused to even talk to [Webb]" and testimony indicating that William McCormick saw Reid in the courthouse on some unspecified occasion. The Court of Appeals exceeded its proper role as an appellate court in asserting the existence of a fact not found by the MAR court based on vague and ambiguous record evidence.

insight into the substance of the information McCormick may (or, as far as Webb knew, may not) have possessed—it would not have been reasonably expected of Webb to subpoena William McCormick to testify at trial. *Cf. Gatling v. Commonwealth*, 14 Va. App. 60, 63 (1992) ("[I]t is unreasonable to require, as an exercise of due diligence, that defense counsel call to the witness stand a witness as to whose testimony he is uninformed."). Similarly, it would not have been reasonably expected of Webb to submit an affidavit swearing that William McCormick "possesse[d] information material to the determination of the proceeding," given that he did not know what (if any) information McCormick possessed. N.C.G.S. § 15A-803(a) (2021). Finally, given that Webb had already tried and failed to locate William McCormick for an interview on multiple occasions, it would not have been reasonably expected of Webb to utilize any of the other procedural options identified by the Court of Appeals, such as requesting a recess or moving for a continuance. On the basis of the information Webb possessed at the time of trial, his actions in obtaining funding to hire an investigator who repeatedly attempted to locate and interview William McCormick constituted due diligence.

¶ 37 The facts of this case are distinguishable from the facts of prior cases in which this Court has held that a defendant failed to exercise due diligence at trial. For example, in *Beaver*, a defendant who was convicted of burglary asserted in a postconviction MAR that "while the jury deliberated" he learned detectives had located his former roommate, who would have testified that the defendant was living at the house he supposedly burglarized on the night the crime was committed. 291 N.C. at 142. This Court concluded that the MAR court did not abuse its discretion in denying the defendant's MAR because (1) the defendant himself testified at trial to the same facts the roommate would have presented; (2) the detectives who located the former roommate testified at trial and were available to be cross-examined by the defendant; and (3) the defendant knew the substance of the information the roommate would have testified to if he had been called at trial. Thus, the defendant "*should* have filed an affidavit before trial so stating and moved for a continuance to enable him to locate this witness." *Id.* at 144 (emphasis added). By contrast, in this case, no other witness who had knowledge of Shaw's confession testified at trial, no person who knew where William McCormick could be found testified at trial, and Webb was unaware of what information McCormick would have disclosed had he been located and compelled to testify.

¶ 38 Similarly, in *State v. Powell*, a defendant who was convicted of rape filed a MAR on the basis of newly discovered evidence in the form of

testimony from a woman who witnessed the defendant walking "hand in hand" with the victim around the time of the alleged crime. 321 N.C. 364, 370 (1988). This Court concluded that the woman's testimony was not newly discovered evidence because the defendant's attorney "examined [the special agent's] notes during the trial, at which time he learned of [the woman's] statement and [yet] he did not ask for a recess for the purpose of procuring [the woman] as a witness." *Id.* Because "[t]he evidence showed that the defendant *knew* of the statement of [the woman] during the trial," it was not an abuse of discretion to deny his MAR. *Id.* at 371 (emphasis added). By contrast, in this case, Reid and Webb did not learn Shaw confessed to William McCormick until an investigator was able to locate and interview McCormick many years after trial.

¶ 39 Most recently, in *Rhodes*, a defendant who was convicted of various drug offenses claimed he was entitled to a new trial on the basis of newly discovered evidence in the form of an affidavit alleging that the defendant had learned that "after the trial, [the defendant's father] told a probation officer that the contraband belonged to him." 366 N.C. at 534. However, the defendant had himself testified at trial and offered "no testimony regarding the ownership of the drugs." *Id.* at 538. In addition, although the defendant's father had invoked his Fifth Amendment right to avoid self-incriminating testimony when asked if he owned the drugs at trial, the defendant "did not pursue a line of questioning about whether the drugs belonged to [the defendant's father]" on direct examination of the defendant's mother, who co-owned with the defendant's father the home where the contraband was found. *Id.* Accordingly, we concluded that the defendant had failed to make the requisite "showing of due diligence" at trial. *Id.* By contrast, in this case, Reid had no way of knowing the substance of the information forming the basis of his MAR at the time of trial, and no person who did know such information testified.

¶ 40 Accordingly, on the facts as determined by the MAR court, the MAR court did not err as a matter of law or abuse its discretion in concluding that Reid had exercised due diligence in attempting to procure William McCormick's testimony at trial. Because neither Reid nor his counsel knew whether William McCormick actually possessed any information about Graham's killing, let alone whether that information would have benefitted Reid's case—and because Webb undertook proactive efforts to locate and interview McCormick before trial—Webb could not have been reasonably expected to utilize any of the additional procedural mechanisms identified by the Court of Appeals to compel McCormick's appearance at trial. As our precedents illustrate, on a different set of facts it might have been reasonably expected that Webb would do

something more than hiring an investigator to try to interview William McCormick; however, on this set of facts, we conclude that the MAR court did not err as a matter of law or abuse its discretion in concluding that Webb exercised due diligence.

C. Material, competent, and relevant evidence.

¶ 41 The Court of Appeals held that the MAR court abused its discretion in concluding that William McCormick's testimony was "competent" evidence because it was inadmissible hearsay. *Reid*, 274 N.C. App. at 129. As explained above, the sole basis for this conclusion was that Reid had failed to "file[ ] a proper notice of intent to offer hearsay evidence pursuant to Rule 803(24) prior to hearing the motion for appropriate relief." *Id.* at 132. Although the Court of Appeals was correct that Reid bore the burden of proving that the evidence he presented in support of his MAR was "material, competent[,] and relevant," *Beaver*, 291 N.C. at 143, the Court of Appeals' analysis misses the mark for two reasons.

¶ 42 First, if the Court of Appeals is correct that evidence in support of a MAR is competent if it is admissible at the evidentiary hearing on the MAR, then the Court of Appeals erred in concluding that McCormick's testimony was inadmissible for lack of proper notice. In its reply brief at the Court of Appeals, the State conceded that it "did not object at the time defendant offered McCormick's testimony at the MAR hearing" and thus "waived appellate review of the MAR court's . . . admission of McCormick's testimony at the MAR hearing by not objecting." In its brief at this Court, the State concedes that it "knew McCormick would testify [at the MAR hearing] and did not object to his testimony." Evidence that is admitted without objection is competent evidence. *See State v. Bryant*, 235 N.C. 420, 423 (1952) ("While some of the evidence offered by the State might have been excluded as hearsay, it was admitted without objection, and hence . . . may be considered with the other evidence and given such evidentiary value as it properly may possess." (citation omitted)). Thus, if the test for competence is admissibility at the MAR hearing, the Court of Appeals erred in concluding that McCormick's testimony was not competent evidence.

¶ 43 Regardless, we disagree with the Court of Appeals that admissibility at the MAR hearing is the test for competence. Rather, courts assess whether evidence would be material, competent, and relevant *in a future trial* if the defendant's MAR were granted in order to determine whether a new trial is warranted. *See, e.g.*, *State v. Nickerson*, 320 N.C. 603, 609–10 (1987) ("The rule for newly discovered evidence is that *in order for a new trial to be granted* . . . ." (emphasis added)).

Applying the proper test for competence, we conclude that the MAR court did not commit legal error or abuse its discretion in determining that McCormick's testimony would have been admissible under the residual exception, Rule 803(24).

¶ 44 The residual exception provides for the admission of "[a] statement not specifically covered by any" other hearsay exception but "having equivalent circumstantial guarantees of trustworthiness." N.C.G.S. § 8C-1, Rule 803(24) (2021). In order for evidence to be admissible under Rule 803(24), a court must make findings addressing the following six factors:

> (1) whether proper notice has been given, (2) whether the hearsay is not specifically covered elsewhere, (3) whether the statement is trustworthy, (4) whether the statement is material, (5) whether the statement is more probative on the issue than any other evidence which the proponent can procure through reasonable efforts, and (6) whether the interests of justice will be best served by admission.

State v. Valentine, 357 N.C. 512, 518 (2003). We have deemed the third factor, whether the testimony was trustworthy, the "most significant requirement." *State v. Smith*, 315 N.C. 76, 93 (1985). "When assessing trustworthiness, a court considers the following, non-exhaustive set of factors: '(1) assurances of the declarant's personal knowledge of the underlying events, (2) the declarant's motivation to speak the truth or otherwise, (3) whether the declarant has ever recanted the statement, and (4) the practical availability of the declarant at trial for meaningful cross-examination.' " *State v. Corbett*, 376 N.C. 799, 2021-NCSC-18, ¶ 41 (quoting *State v. Triplett*, 316 N.C. 1, 10–11 (1986)). "A trial court's determination as to the admissibility of hearsay statements pursuant to Rule 803(24) is reviewed for abuse of discretion." *Id.* ¶ 40.

¶ 45 In this case, the MAR court entered findings corresponding to all six admissibility factors:

> After careful scrutiny, the court concludes that the testimony of William McCormick about Robert Shaw's statement regarding the details of Shaw, Bristow and Cox assaulting the victim is admissible evidence under Rule 803(24). First, the State is on notice that Defendant would offer such evidence at trial. Second, this hearsay evidence is not specifically covered by any other exception in Rule 803. Third, the evidence

> possesses circumstantial guarantees of trustworthiness equivalent to other hearsay exceptions because it constitutes an admission of criminal conduct by Shaw, is consistent with events actually observed by William McCormick the day before, when Shaw and the other youths arrived at McCormick's house out of breath having jumped and run from a cab, and is consistent with known circumstances of the case, including that the victim was assaulted by more than one young male person. Fourth, the evidence is material to the case. Fifth, the evidence is more probative on the issue of whether Shaw, Bristow and Cox, rather than Defendant, were the actual perpetrators of these crimes than any other evidence procurable by reasonable efforts. Defendant cannot reasonably be expected to procure the in-court confession of Shaw that Shaw himself is guilty of robbery and first degree murder. Sixth, admission of the evidence of Shaw's statements will best serve the purposes of the Rules of Evidence and the interests of justice.

Further, with respect to the third factor, the MAR court specifically found that "(1) Shaw had personal knowledge of the events described; (2) Shaw had a strong motivation to confide the truth to his friend William McCormick and no reason to claim false responsibility for such serious acts which could expose him to criminal liability; and (3) there is no evidence that Shaw ever recanted his statement."

¶ 46 According to the State, these findings were insufficient to support the MAR court's conclusion that the evidence was admissible because "[t]here was no independent, non-hearsay evidence connecting Shaw, Cox, or Bristow to Graham's murder." However, we have never held that a trial court lacks the discretion to find hearsay evidence trustworthy in the absence of independent non-hearsay corroborating evidence. Rather, as we explained in the related context of examining the scope of the hearsay exception for declarations against penal interest, "the precise application of the standards of reliability must be left to the discretion of the trial judge." *State v. Haywood*, 295 N.C. 709, 729 (1978). In view of these findings, the MAR court's determination that McCormick's testimony was sufficiently trustworthy and admissible under the residual exception was not "manifestly unsupported by reason . . . [or] so arbitrary that it could not have been the result of a reasoned decision." *White*, 312 N.C. at 777.

D. Other claims that the MAR court abused its discretion.

¶ 47 In addition to the purported deficiencies in the MAR court's reasoning identified by the Court of Appeals, the State also argues before this Court that the MAR court abused its discretion in granting Reid a new trial because Reid "failed to establish McCormick's testimony showed that a different result would probably be reached at a new trial." Reid bore the burden of proving by a preponderance of the evidence that his newly discovered evidence was "of such a nature that a different result will probably be reached at a new trial." *Beaver*, 291 N.C. at 143. In this case, the MAR court concluded that

> [t]he newly discovered evidence is of such a nature as to show that [i]n another trial a different result will probably be reached . . . . This was an extremely close case, tried once to a hung jury, finally resulting in a conviction based largely on the purported confession of the fourteen-year-old, mentally disabled Defendant. No physical evidence connected Defendant to the case, and alibi evidence was offered. The addition of credible testimony from William McCormick will probably result in a different outcome than that reached in the original trial.
>
> . . . The testimony of William McCormick points directly to the guilt of specific persons and is inconsistent with Defendant's guilt.

¶ 48 The State takes issue with the MAR court's characterization of Reid's confession as "purported" in light of the Court of Appeals resolution of Reid's direct appeal, where the court held that his confession was admissible at trial. *See State v. Reid*, No. COA98-1392, slip op. at 4 (N.C. Ct. App. Oct. 19, 1999) (unpublished). We agree with the State that for the purposes of this appeal, Reid's confession was validly obtained and properly admitted. However, the State is wrong to suggest that because Reid's confession has been established to be admissible, any potential impact of McCormick's testimony at trial is automatically negated.

¶ 49 The question of how much probative weight to give a confession in determining a defendant's guilt is distinct from the question of whether the confession is admissible, and a factfinder is entitled to consider the circumstances surrounding a confession even after the confession has been admitted. *State v. Roache*, 358 N.C. 243, 286 (2004) (explaining that evidence was properly admitted because it "lent credibility" to a defendant's confession); *see also Crane v. Kentucky*, 476 U.S. 683, 689

(1986) ("[T]he physical and psychological environment that yielded the confession can also be of substantial relevance to the ultimate factual issue of the defendant's guilt or innocence. Confessions, even those that have been found to be voluntary, are not conclusive of guilt."). Indeed, even after a trial court has denied a defendant's motion to suppress a confession, a defendant possesses a constitutional right to admit evidence regarding the circumstances surrounding the confession. *Crane*, 476 U.S. at 690. In this case, the unrecorded confession was elicited from a fourteen-year-old child with intellectual deficiencies who was interviewed in a police station outside the presence of a parent or guardian. There was no physical evidence, and limited corroborating evidence, connecting Reid to the crime scene. As the initial mistrial due to a hung jury illustrates, the evidence of Reid's guilt was not overwhelming. Accordingly, the MAR court did not abuse its discretion in determining that "a different result w[ould] probably be reached at a new trial" if McCormick's testimony were admitted. *Beaver*, 291 N.C. at 143.

IV. Conclusion

¶ 50 After a defendant has been convicted by a jury of his or her peers, the defendant "has the laboring oar to rebut the presumption that the verdict is correct." *State v. Casey*, 201 N.C. 620, 624 (1931). However, in this case, the MAR court did not abuse its discretion or commit legal error in concluding that Reid met his burden of proving by a preponderance of the evidence all elements necessary to demonstrate his entitlement to a new trial on the basis of newly discovered evidence. Accordingly, we reverse the decision of the Court of Appeals.

REVERSED.

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

Chief Justice NEWBY dissenting.

¶ 51 "[A] new trial for newly discovered evidence should be granted with the utmost caution and only in a clear case, lest the courts should thereby encourage negligence or minister to the litigious passions of men." *State v. Rhodes*, 366 N.C. 532, 536, 743 S.E.2d 37, 40 (2013) (alteration in original) (quoting *State v. Davis*, 203 N.C. 316, 323, 166 S.E. 292, 296 (1932)). "The defendant 'has the laboring oar to rebut the presumption that the verdict is correct and that he has not exercised due diligence in preparing for trial.' " *Id.* at 537, 743 S.E.2d at 40 (quoting *State v. Casey*,

201 N.C. 620, 624, 161 S.E. 81, 83 (1931)). "Under the rule as codified, the defendant has the burden of proving that the new evidence 'could not with due diligence have been discovered or made available at [the time of trial].' " *Id.* (alteration in original) (quoting N.C.G.S. § 15A-1415(c) (2011)); *see* N.C.G.S. § 15A-1420(c)(5), (6) (2021). Because the majority ignores these fundamental principles and significantly lowers the standard for "newly discovered evidence," I respectfully dissent.

¶ 52 Defendant has the burden to rebut the presumption that the evidence in question could not have been discovered by due diligence before the trial. Due diligence is "diligence reasonably expected from, and ordinarily exercised by, a person who seeks to satisfy a legal requirement or to discharge an obligation." *Due Diligence*, *Black's Law Dictionary* (11th ed. 2019). "When the information presented by the purported newly discovered evidence was known or available to the defendant at the time of trial," but the defendant fails to procure the information, due diligence was not exercised, and "the evidence [thus] does not meet the requirements of N.C.G.S. § 15A-1415(c)." *Rhodes*, 366 N.C. at 537, 743 S.E.2d at 40; *see State v. Beaver*, 291 N.C. 137, 144, 229 S.E.2d 179, 183 (1976); *State v. Powell*, 321 N.C. 364, 371, 364 S.E.2d 332, 336 (1988).

¶ 53 Three cases should control our analysis. In *Beaver* the defendant was convicted of first-degree burglary and later filed a motion for a new trial on the basis of newly discovered evidence. *Beaver*, 291 N.C. at 142, 229 S.E.2d at 182. The defendant argued that he was entitled to a new trial because the State concealed the whereabouts of a witness who could testify that the defendant was a resident of the house he allegedly burglarized. *Id.* The trial court denied the motion. *Id.* On appeal, this Court noted that the defendant had ample opportunity to examine the detectives who allegedly knew the witness's location but failed to do so. *Id.* at 144, 229 S.E.2d at 183. We also reasoned that "if [the] defendant considered [the witness] an important and material witness, he should have filed an affidavit before trial so stating and moved for a continuance to enable him to locate this witness." *Id.* Since the defendant failed to take such action, we concluded that he did not exercise due diligence in procuring the witness's testimony. *Id.* As such, we upheld the trial court's denial of the defendant's motion for a new trial. *Id.*

¶ 54 Similarly, in *Powell* the defendant filed a motion for appropriate relief (MAR) with the trial court seeking to overturn his conviction of first-degree rape. *Powell*, 321 N.C. at 370, 364 S.E.2d at 336. There the victim testified that while she was sitting on the beach in Kitty Hawk, the defendant approached her, drew a knife, forced her into a dune, and raped her. *Id.* at 366, 364 S.E.2d at 334. During the trial, the defendant's

counsel inspected notes that a special agent with the State Bureau of Investigation had made throughout his investigation of the incident. *Id.* at 370, 364 S.E.2d at 336. The notes showed that a witness to the incident informed the special agent that she had observed through binoculars a male and female enter the dunes and leave approximately twenty minutes later hand in hand. *Id.* Despite having access to this material information, the defendant's counsel never called the witness to testify at trial. *Id.* As such, when the defendant filed a post-conviction MAR arguing that the witness's statement to the special agent constituted newly discovered evidence, the trial court denied the motion, concluding that the defendant failed to exercise due diligence in procuring the witness's testimony. *Id.* On appeal, since the defendant's counsel was aware of the witness's statement but failed to procure her testimony, this Court upheld the trial court's denial of the MAR. *Id.* at 371, 364 S.E.2d at 336.

¶ 55 A defendant also fails to exercise due diligence where a witness refuses to testify to material information, but the information could have been discovered through pursuing a different line of questioning or speaking to other witnesses. *See Rhodes*, 366 N.C. at 537–38, 743 S.E.2d at 40–41. In *Rhodes* the defendant and his father were the subjects of a search warrant. *Id.* at 533, 743 S.E.2d at 38. When police executed the warrant at the defendant's residence, they found the defendant and his mother downstairs. *Id.* After the officers found drugs and paraphernalia at the residence, the defendant was charged with possession with intent to manufacture, sell, or deliver cocaine and possession of drug paraphernalia. *Id.* at 534, 743 S.E.2d at 38. At trial the defense presented testimony by the defendant, his mother, and his father. *Id.* The defendant's mother testified that the drugs did not belong to the defendant, but the defendant's counsel did not pursue a line of questioning regarding whether the drugs belonged to the defendant's father. *Id.* The defendant's father also testified that the drugs did not belong to the defendant. *Id.* When the defendant's father was asked whether the drugs belonged to him, however, he invoked his Fifth Amendment privilege against self-incrimination. *Id.* Lastly, the defendant testified to facts concerning the execution of the search warrant, but the defendant's counsel never asked the defendant about the ownership of the contraband. *Id.* The jury found the defendant guilty of the drug offenses. *Id.*

¶ 56 The defendant later filed a MAR based upon the theory of newly discovered evidence. *Id.* The defendant alleged that after the conclusion of the trial, the defendant's father told a probation officer that the contraband belonged to him. *Id.* The trial court concluded that due diligence was used to procure the testimony at trial, set aside the defendant's

conviction, and awarded a new trial. *Id.* at 535, 743 S.E.2d at 38–39. On appeal, this Court explained that despite the defendant's father's refusal to testify to the true ownership of the drugs, the information could have been made available by other means. *Id.* at 538, 743 S.E.2d at 40. We specifically noted that on direct examination of the defendant's mother, the defendant failed to pursue a line of questioning about whether the drugs belonged to the defendant's father and that the defendant gave no testimony regarding the ownership of the drugs. *Id.* Therefore, we held that the trial court erred in concluding as a matter of law that due diligence was used to procure the information. *Id.* Accordingly, we reversed the decision of the Court of Appeals which affirmed the trial court's decision to award the defendant a new trial. *Id.* at 533, 743 S.E.2d at 38.

¶ 57 Like the defendants in *Beaver*, *Powell*, and *Rhodes*, defendant here failed to take reasonable action to procure the evidence that he now deems "newly discovered." Defendant's trial counsel, Fred Webb, believed that William McCormick likely had information that could exculpate defendant. When asked at the MAR hearing whether he made any effort to locate McCormick during his pretrial investigation, Webb responded as follows:

> Yes, we did. I got contact through some of the people that I knew in the street who had brought up the names of other guys that they thought had done it, and they had indicated to me that they didn't think [defendant] was the one that did it and that it was – the McCormick names popped up in those conversations.
>
> After that, I talked with [the investigator] and explained to him that I needed him to locate the McCormick kids, but I told him also it's going to be difficult because I knew the McCormick kids' mother and I had heard that she was protecting them and keeping them from – keeping them not being available so people could talk to them.
>
> I approached her once down in the lower lobby of the courthouse in an effort to try to talk with them, and they refused to even talk to me.

¶ 58 The majority opines that Webb's mere hiring of a private investigator to locate McCormick establishes the exercise of due diligence. According to the majority, since Webb did not specifically know about Shaw's confession to McCormick, he should not have been expected to conduct further inquiry after McCormick's mother prevented Webb

from speaking with him. Whether Webb specifically knew about Shaw's alleged confession to McCormick is not the question. Instead, the question is whether Webb exercised due diligence as defined by our cases after being told that McCormick had information that would likely help his client.

¶ 59 The record evidence indicates that Webb's efforts were not reasonable. Though Webb hired a private investigator, McCormick's mother prevented the investigator from speaking with McCormick. Webb then ceased his investigatory efforts when he realized that circumventing McCormick's mother was "going to be difficult." But difficulty in obtaining information does not make that information unavailable. As our cases indicate, due diligence required more. The defense attorney should have sought some form of relief from the trial court in an effort to speak to McCormick or should have further questioned other witnesses about the identity of the murderers. As we explained in *Beaver*, "if defendant considered [McCormick] an important and material witness, he should have filed an affidavit before trial so stating." *Beaver*, 291 N.C. at 144, 229 S.E.2d at 183.

¶ 60 Further, our General Statutes provide several mechanisms for eliciting material information from a reluctant witness. For example, "[t]he presence of a person as a witness in a criminal proceeding may be obtained by subpoena." N.C.G.S. § 15A-801 (2021). And,

> [a] judge may issue an order assuring the attendance of a material witness at a criminal proceeding. This material witness order may be issued when there are reasonable grounds to believe that the person whom the State or a defendant desires to call as a witness in a pending criminal proceeding possesses information material to the determination of the proceeding and may not be amenable or responsive to a subpoena at a time when his attendance will be sought.
>
> . . . .
>
> . . . A material witness order may be obtained upon motion supported by affidavit showing cause for its issuance.

Id. § 15A-803(a), (d) (2021). Webb knew McCormick's address and even approached McCormick and his mother in the courthouse. Despite Webb's belief that McCormick possessed exculpatory information, however, he did not seek any form of relief from the trial court or otherwise.

Had Webb gone to the trial court for assistance, he likely could have gained access to McCormick and elicited his testimony.

¶ 61 Webb also could have discovered the relevant information by speaking to other witnesses or further questioning those he had already interviewed. For example, McCormick's brother likely had the same information as McCormick. Nonetheless, it does not appear that Webb or the private investigator attempted to speak with McCormick's brother or his attorney.

¶ 62 Further, Webb's testimony demonstrates that he spoke with several unnamed potential witnesses that had information related to the identity of the murderers. Webb, however, never explained the basis for these potential witnesses' belief that defendant was innocent nor had them testify at trial. If Webb knew these potential witnesses believed defendant was innocent and had information implicating other perpetrators, then Webb had an obligation to further investigate the extent of their knowledge. For example, Webb could have inquired into the identities and locations of the "other guys that [the potential witnesses] thought had done it." Instead, it appears that for reasons of his own, Webb declined to pursue these leads. Due diligence required Webb to conduct further investigation where he likely could have discovered the information that defendant now classifies as newly discovered.

¶ 63 Just as the identity of the true owner of the drugs was available to the defendant in *Rhodes* and just as the eyewitness testimony contained in the notes was available to the defendant in *Powell*, the fact that McCormick had possibly exculpatory information was available to defendant in the present case. As such, based upon our prior decisions, McCormick's testimony at the MAR hearing does not constitute newly discovered evidence. *See Beaver*, 291 N.C. at 144, 229 S.E.2d at 183; *Powell*, 321 N.C. at 371, 364 S.E.2d at 336; *Rhodes*, 366 N.C. at 538, 743 S.E.2d at 40. Nonetheless, the majority now lowers the due diligence bar, allowing a defendant to decline to interview a witness he believed to be material and to later file a MAR asserting that the witness's testimony is newly discovered.

¶ 64 In summary, our case law presumes that an underlying verdict is correct. When a defendant seeks a new trial based upon newly discovered evidence, there is a presumption that the defendant did not exercise due diligence in preparing for trial. It is the defendant's burden to overcome the presumption of lack of due diligence. Defendant could have discovered the information contained in McCormick's testimony through due diligence—i.e., issuing a subpoena, seeking a material witness order or

other court assistance in accessing McCormick, or further investigating the information known by other witnesses. Since defendant failed to pursue the available information, he is unable to establish a necessary element of his MAR. Though "[t]he decision of whether to grant a new trial in a criminal case on the ground of newly discovered evidence is within the trial court's discretion and is not subject to review absent a showing of an abuse of discretion," a trial court "by definition abuses its discretion when it makes an error of law." *Rhodes*, 366 N.C. at 535–36, 743 S.E.2d at 39 (first quoting *State v. Wiggins*, 334 N.C. 18, 38, 431 S.E.2d 755, 767 (1993), then quoting *Koon v. United States*, 518 U.S. 81, 100, 116 S. Ct. 2035, 2047 (1996)). Here the trial court made an error of law when it concluded that defendant "could not have discovered or made available the new evidence from McCormick with due diligence." The decision of the Court of Appeals should be affirmed. Therefore, I dissent.

Justice BARRINGER joins in this dissenting opinion.

STATE OF NORTH CAROLINA	)	
	)	
v.	)	Onslow County
	)	
BRYAN CHRISTOPHER BELL	)	

No. 86A02-2

ORDER

This matter is before the Court pursuant to motions filed by the State on 10 February 2022. The State's request for expedited ruling is allowed, and this Court also allows the State's motion to hold defendant's appeal in abeyance and remand for an evidentiary hearing.

It is therefore ordered that this matter is remanded to the Superior Court of Onslow County for a joint evidentiary hearing with co-defendant Antwuan Sims on their claims of gender discrimination in jury selection under *J.E.B. v. Ala. ex rel. T.B.*, 511 U.S. 127 (1994). The trial court is hereby instructed to provide counsel for defendant Bell sufficient opportunity to prepare for this hearing and, thereafter, to proceed expeditiously to issue a ruling. Upon entry, the trial court's order shall be transmitted to this Court.

By order of the Court in conference, this the 17th day of February 2022.

s/Berger, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 17 day of February 2022.

s/Amy L. Funderburk

AMY L. FUNDERBURK
Clerk of the Supreme Court

HOLMES v. MOORE

[380 N.C. 673 (2022)]

JABARI HOLMES, FRED CULP, DANIEL E. SMITH, BRENDON JADEN PEAY, AND PAUL KEARNEY, SR.	)	
v.	)	WAKE COUNTY
TIMOTHY K. MOORE, IN HIS OFFICIAL CAPACITY AS SPEAKER OF THE NORTH CAROLINA HOUSE OF REPRESENTATIVES; PHILIP E. BERGER, IN HIS OFFICIAL CAPACITY AS PRESIDENT PRO TEMPORE OF THE NORTH CAROLINA SENATE; DAVID R. LEWIS, IN HIS OFFICIAL CAPACITY AS CHAIRMAN OF THE HOUSE SELECT COMMITTEE ON ELECTIONS FOR THE 2018 THIRD EXTRA SESSION; RALPH E. HISE, IN HIS OFFICIAL CAPACITY AS CHAIRMAN OF THE SENATE SELECT COMMITTEE ON ELECTIONS FOR THE 2018 THIRD EXTRA SESSION; THE STATE OF NORTH CAROLINA; AND THE NORTH CAROLINA STATE BOARD OF ELECTIONS	)	

No. 342P19-2

ORDER

Pursuant to this Court's administrative order of 23 December 2021, and after thorough and thoughtful deliberation, I have concluded that I can and will be fair and impartial in deciding *Holmes v. Moore, et al.* (No. 342P19-2). Accordingly, the 15 January 2022 Motion for Disqualification filed therein is denied.

In reaching this conclusion, I thoughtfully considered: (1) the arguments presented by the parties; (2) my ethical responsibilities as an Associate Justice of the Supreme Court of North Carolina under our Code of Judicial Conduct; (3) my solemn oath to serve on our state's Court of last resort—rather than recusing myself or being disqualified to avoid controversy; and (4) my resulting judicial duty to all North Carolinians and my personal ability to discharge that duty.

For the reasons summarized above, the Motion for Disqualification is denied. This the 1st day of March 2022.

s/Tamara Patterson Barringer
Tamara Patterson Barringer

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 1st day of March, 2022.

s/Grant E. Buckner

GRANT E. BUCKNER
Clerk of the Supreme Court

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

11 MARCH 2022

3P22-2	Michael Buttacavoli v. Katherine Langley	1. Plt's Pro Se Motion to Require Judges to Apply the Law 2. Plt's Pro Se Motion for Extension of Time to File Appeal	1. Dismissed **02/18/2022** 2. Dismissed **02/18/2022** **Berger, J., recused**
13P22	Mary Cooper Falls Wing v. Goldman Sachs Trust Company, N.A., et al. ——— Ralph L. Falls, III, et al. v. Louise Falls Cone, et al. ——— Ralph L. Falls, III, et al. v. John T. Bode ——— In re Estate of Ralph L. Falls, Jr., deceased ——— Ralph L. Falls, III, et al. v. Goldman Sachs Trust Company, N.A., et al.	1. Defs' (Sellers and the Cone Family) PDR Under N.C.G.S. § 7A-31 (COA21-133) 2. Defs' (Sellers and the Cone Family) Petition for Writ of Certiorari to Review Decision of COA 3. North Carolina Association of Defense Attorneys' Motion for Leave to File Amicus Brief 4. North Carolina Association of Defense Attorneys' Motion for Extension of Time to File Amicus Curiae Brief	1. Allowed 2. Dismissed as moot 3. Allowed 4. Allowed
25P22	State v. Hussina Jacquelin Paktiawal	Def's Pro Se PDR Under N.C.G.S. § 7A-31 (COA20-925)	Denied
27P22	State v. Dwight G. Daye	Def's Pro Se Motion for Miranda Rights Violation and Immediate Release	Denied **02/18/2022**
29P22	State v. Efren Ernesto Caballero	Def's PDR Under N.C.G.S. § 7A-31 (COA21-82)	Allowed

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

11 MARCH 2022

35P21	In the Matter of A.J.L.H., C.A.L.W., M.J.L.H.	1. Petitioner's PDR Under N.C.G.S. § 7A-31 (COA20-267) 2. Petitioner's Motion for Temporary Stay 3. Petitioner's Petition for Writ of Supersedeas 4. Respondent-Father's Emergency Motion to Dissolve the Temporary Stay 5. Respondent-Father's Motion for Sanctions 6. Respondent-Mother's Motion for Sanctions 7. Guardian ad Litem's Motion to Withdraw and Substitute Counsel 8. Respondent-Father's Motion to Dissolve the Temporary Stay	1. 2. Allowed **01/21/2021** 3. 4. Denied **02/01/2021** 5. Denied 6. Denied 7. Allowed **02/17/2021** 8. Denied **02/17/2021**
39A22	State v. Robin Applewhite	1. Def's Notice of Appeal Based Upon a Dissent (COA20-610) 2. Def's PDR as to Additional Issues 3. State's Motion for Permission to Deliver Original Sealed Exhibit	1. 2. 3. Allowed **02/11/2022**
43P22	In the Matter of Robert Dudley	Petitioner's Pro Se Motion for Grievance	Dismissed
45P22	State v. Derrick Quentin McFadden	Def's Pro Se Motion to be Brought in Front of Magistrate	Denied **02/16/2022**
46P22	Thomas Shelly Long, Jr. v. Erik A. Hooks, Secretary, North Carolina Department of Public Safety, et al.	Petitioner's Pro Se Petition for Writ of Habeas Corpus	Denied **02/11/2022**
50P22	Juan Carlos Rodriguez-Garcia v. Eddie M. Buffaloe, Jr., Secretary, North Carolina Department of Public Safety, et al.	1. Petitioner's Pro Se Petition for Writ of Habeas Corpus (COAP15-982) 2. Petitioner's Pro Se Motion to Proceed *In Forma Pauperis*	1. Denied **02/18/2022** 2. Allowed **02/18/2022**
54P22	State v. John Patrick Wimunc	Def's Pro Se Motion for Continuance (COAP22-17)	Dismissed **02/22/2022**
55P22	Alexander, et al. v. North Carolina State Board of Elections, et al.	1. Plts' Motion for Temporary Stay (COA21-77) 2. Plts' Petition for Writ of Supersedeas	1. Allowed **02/23/2022** 2.

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

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65P22	State v. Donovan M. Williams	Def's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Wake County	Denied **03/02/2022**
66PA21	Pia Townes v. Portfolio Recovery Associates, LLC	Legal Aid of North Carolina's Motion to Admit Nadine Chabrier Pro Hac Vice (COA20-78)	Allowed **03/01/2022** **Ervin, J., recused**
67P22	In the Matter of Michael McRae	Plt's Pro Se Motion for Petition for Expedited Review and Emergency Order	Dismissed **03/04/2022**
68P21	State v. Leslie Ann McNeill and Timothy Edward Doolittle	1. Defs' Notice of Appeal Based Upon a Constitutional Question (COA19-819) 2. Defs' PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed
70A21	Mark W. Ponder v. Stephen R. Been	1. Plt's Notice of Appeal Based Upon a Dissent (COA19-1021) 2. Def's Motion to Dismiss Appeal	1. --- 2. Denied
75P14-2	State v. Eric Rogers	1. Def's Petition for Writ of Certiorari to Review Order of the COA (COAP21-25) 2. Def's Petition for Writ of Certiorari to Review Order of Superior Court, Scotland County	1. Denied 2. Denied **Ervin, J., recused; Berger, J., recused**
86A02-2	State v. Bryan Christopher Bell	1. State's Motion to Hold Appeal in Abeyance and Remand for Evidentiary Hearing 2. State's Motion to Expedite the Ruling on this Motion in the Interest of Judicial Economy 3. State's Motion to Hold Briefing Schedule in Abeyance 4. State's Motion to Hold Briefing Schedule in Abeyance	1. Special Order **02/17/2022** 2. Special Order **02/17/2022** 3. Allowed **02/11/2022** 4. Special Order **02/17/2022**

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

11 MARCH 2022

105P21	In the Matter of K.M., K.M.	1. Petitioner's Petition for Writ of Certiorari to Review Decision of COA (COA19-871) 2. Petitioner's Motion for Temporary Stay 3. Petitioner's Petition for Writ of Supersedeas	1. Denied 2. Allowed **07/14/2021** Dissolved **03/09/2022** 3. Denied
114P21	State v. Edwin Guillermo Perdomo	Def's PDR Under N.C.G.S. § 7A-31 (COA20-243)	Denied
129P04-5	Carl Edward Lyons v. Erik A. Hooks, Secretary of Public Safety, and Superintendent of Tabor Correctional Institution	Petitioner's Pro Se Petition for Writ of Habeas Corpus	Denied **02/16/2022**
131P16-23	State v. Somchai Noonsab	Def's Pro Se Motion for Pretrial Bond	Dismissed
131P21	State v. Nelson Gabri Guerrero-Avila	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA20-297) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed
144P21	State v. Derrick Jervon Lindsay	Def's Pro Se Motion for Special Appearance and Protection of the Court	Dismissed
155A21	In the Matter of L.D., A.D.	Petitioner and Guardian ad Litem's Joint Motion to Strike Portions of the Record on Appeal and Portions of Respondent-Mother's Brief	Dismissed as moot
159P21	Robert E. Hovey and wife, Tanya L. Hovey v. Sand Dollar Shores Homeowners Association, Inc., and the Town of Duck	Plts' PDR Under N.C.G.S. § 7A-31 (COA20-423)	Denied
160P21	State v. Reginald Malker	Def's PDR Under N.C.G.S. § 7A-31 (COA20-449)	Denied

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

11 MARCH 2022

179P21	State v. Willie Henderson Womble	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA20-364) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed
196P21	State v. Sherry Lee Lance	1. Def's Motion for Temporary Stay (COA20-273) 2. Def's Petition for Writ of Supersedeas 3. Def's PDR Under N.C.G.S. § 7A-31	1. Allowed **06/07/2021** Dissolved **03/09/2022** 2. Denied 3. Denied
215A21	In the Matter of M.S.L. a/k/a M.S.H.	Respondent-Father's Motion to Supplement the Record on Appeal	Allowed
216A21	In the Matter of L.Z.S.	1. Respondent-Father's Motion to Move Oral Argument to a Future Calendar 2. Respondent-Father's Motion in the Alternative to Allow Oral Argument to be Held Via Audio and Video Transmission 3. Respondent-Father's Motion to Withdraw Motions to Modify Oral Argument Date or Manner	1. --- **02/28/2022** 2. -- **02/28/2022** 3. Allowed **02/28/2022**
221P18-2	State v. Michael Eugene Bowden	1. Def's Pro Se Motion for Notice of Appeal 2. Def's Pro Se Motion for PDR 3. Def's Pro Se Petition in the Alternative for Writ of Certiorari to Review Order of COA	1. Dismissed *ex mero motu* 2. Denied 3. Dismissed
221A19-2	State v. Anton Thurman McAllister	Def's Pro Se Motion to Resolve State Court Matters (COA18-726)	Dismissed as moot **02/28/2022**
226P06-4	State v. De'Norris Levelle Sanders	Def's Pro Se Petition for Writ of Habeas Corpus	Denied **02/25/2022**
228A21	C Investments 2, LLC v. Auger, et al.	1. Defs' (Arlene P. Auger, Herbert W. Auger, Eric E. Craig, Gina Craig, Stephen Ezzo, Janice Huff Ezzo, Ashfaq Uraizee, and Jabeen Uraizee) PDR as to Additional Issues (COA19-976) 2. Defs' (Ashfaq Uraizee and Jabeen Uraizee) Motion to Withdraw Appeal and PDR	1. Allowed **02/09/2022** 2. Allowed **02/17/2022**

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

11 MARCH 2022

231P21	C.E. Williams, III and wife, Margaret W. Williams, R. Michael James and wife, Katherine H. James, Strawn Cathcart and wife, Susan S. Cathcart, Mark B. Mahoney and wife, Noelle S. Mahoney, Plaintiffs v. Michael Reardon and wife, Karyn Reardon, Defendants and Jeffrey S. Alvino and wife, Kristina C. Alvino, et al., Necessary Party Defendants	1. Plts' and Necessary Party Defs' PDR Under N.C.G.S. § 7A-31 (COA20-450) 2. Plts' and Necessary Party Defs' Motion to Amend PDR	1. 2. Allowed **02/17/2022**
247P16-8	State v. Jonathan Eugene Brunson	Def's Pro Se Petition for Writ of Habeas Corpus	Denied **03/01/2022**
265P21	State v. Vinston Levi Kearney, Jr.	1. State's Motion for Temporary Stay (COA20-486) 2. State's Petition for Writ of Supersedeas 3. State's PDR Under N.C.G.S. § 7A-31 4. Def's Conditional PDR Under N.C.G.S. § 7A-31	1. Allowed **07/26/2021** Dissolved **03/09/2022** 2. Denied 3. Denied 4. Dismissed as moot
266A21	In the Matter of A.L.I.	Respondent-Father's Motion to Amend Record on Appeal	Allowed
278P21	State v. Fernando Alvarez	1. State's Motion for Temporary Stay (COA20-611) 2. State's Petition for Writ of Supersedeas 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **08/06/2021** 2. Allowed 3. Allowed

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

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342PA19-2	Holmes, et al. v. Moore, et al.	1. Plts' Motion for Disqualification of Justice Tamara Patterson Barringer 2. Plt's PDR Prior to Determination of COA 3. Plts' Motion for Expedited Consideration of PDR 4. Defs' Motion to Admit David H. Thompson Pro Hac Vice 5. Defs' Motion to Admit Peter A. Patterson Pro Hac Vice 6. Defs' Motion to Admit Joseph O. Masterman Pro Hac Vice 7. Defs' Motion to Admit Nicholas A. Varone Pro Hac Vice 8. Defs' Motion to Admit John W. Tienken Pro Hac Vice	1. Special Order **03/01/2022** 2. Allowed **03/02/2022** 3. Dismissed as moot **03/02/2022** 4. Allowed **03/10/2022** 5. Allowed **03/10/2022** 6. Allowed **03/10/2022** 7. Allowed **03/10/2022** 8. Allowed **03/10/2022**
353P21-4	State v. Travis Wayne Baxter	Def's Pro Se Motion for Notice of Review De Novo (COAP21-332)	Dismissed
357P17-2	State v. Fredrick L. Canady	1. Def's Pro Se Motion for Petition for Re-Sentence 2. Def's Pro Se Motion to Appoint Counsel 3. Def's Pro Se Motion for Grievance	1. Dismissed 2. Dismissed as moot 3. Dismissed **Berger, J., recused**
363A14-4	Gift Surplus, LLC, et al. v. Sheriff of Onslow County, et al.	Plts' Motion for Court to Take Judicial Notice of Recent Legislative Action (COA14-85)	Allowed **02/11/2022** **Ervin, J., recused** **Berger, J., recused**
372P21	State v. Justin Stephen Herr	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA20-723) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed

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

11 MARCH 2022

374P21	Fred Cohen, Executor of the Estate of Dennis Alan O'Neal, Deceased, and Fred Cohen, Executor of the Estate of Debra Dee O'Neal, Deceased v. Continental Motors, Inc. (f/k/a Teledyne Continental Motors, Inc. and/or Teledyne Continental Motors); and Aircraft Accessories of Oklahoma, Inc.	1. Def's (Continental Motors, Inc.) PDR Under N.C.G.S. § 7A-31 (COA20-418) 2. Plt's Motion to Admit Michael S. Miska Pro Hac Vice 3. Def's (Continental Motors, Inc.) Motion to Admit Lacey D. Smith Pro Hac Vice 4. Def's (Continental Motors, Inc.) Motion to Admit Sherri R. Ginger Pro Hac Vice 5. Def's (Continental Motors, Inc.) Motion to Admit Timothy A. Heisterhagen Pro Hac Vice	1. Denied 2. Denied 3. Allowed 4. Allowed 5. Allowed
376A20	James C. Button v. Level Four Orthotics & Prosthetics, Inc.; Level Four SBIC Holdings, LLC; Penta Mezzanine SBIC Fund I, L.P.; Rebecca R. Irish; and Seth D. Ellis	1. Plt's Petition for Writ of Certiorari from Business Court 2. Defs' Motion to Dismiss Appeal	1. Denied 2. Allowed
384P16-2	State v. Phillip Wayne Broyal	1. Def's Pro Se Motion for Notice of Appeal (COAP21-365) 2. Def's Pro Se Motion for Appointment of Counsel	1. Dismissed *ex mero motu* 2. Dismissed as moot
391P21	State v. Marcus L. Alston	Def's PDR Under N.C.G.S. § 7A-31 (COA20-691)	Denied
392P21	State v. Gordon Lawrence Cox, Jr.	Def's PDR Under N.C.G.S. § 7A-31 (COA20-678)	Denied
394P21	Michael Mole' v. City of Durham, North Carolina, a municipality	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA19-683) 2. North Carolina Fraternal Order of Police's Motion for Leave to File Amicus Brief in Support of PDR	1. Allowed 2. Denied

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

11 MARCH 2022

402A21	State v. Montez Gibbs	1. State's Motion for Temporary Stay (COA20-591)	1. Allowed **11/19/2021**
		2. State's Petition for Writ of Supersedeas	2. Allowed
		3. State's Notice of Appeal Based Upon a Dissent	3. ---
		4. Def's Motion to Strike Portions of the State's Brief	4.
		5. Def's Motion to Stay Briefing Until Resolution of the Motion	5.
		6. State's Petition for Writ of Certiorari to Review Decision of COA	6.
405P21	State v. Rakeem Montel Best	Def's PDR Under N.C.G.S. § 7A-31 (COA20-614)	Denied
413PA21	Harper, et al. v. Hall, et al., and NC League of Conservation Voters, et al. v. Hall, et al.	1. Plts' (Harper, et al.) PDR Prior to Determination by COA	1. Special Order **12/08/2021**
		2. Plts' (Harper, et al.) Motion to Suspend Appellate Rules to Expedite a Decision	2. Special Order **12/08/2021**
		3. Plts' (Harper, et al.) Motion for Prompt Disqualification of Justice Berger, Jr.	3. Special Order **01/31/2022**
		4. Plts' (Harper, et al.) Motion in the Alternative for Deferred Consideration of Disqualification Following the Court's Resolution of PDR Prior to a Determination by COA	4. Dismissed as moot **02/22/2022**
		5. Plts' (N.C. League of Conservation Voters, Inc., et al.) PDR Prior to Determination by COA	5. Special Order **12/08/2021**
		6. Plts' (N.C. League of Conservation Voters, Inc., et al.) Petition in the Alternative for Writ of Certiorari to Review Order of Superior Court, Wake County	6. Special Order **12/08/2021**
		7. Plts' (N.C. League of Conservation Voters, Inc., et al.) Motion to Suspend Appellate Rules and Expedite Schedule	7. Special Order **12/08/2021**
		8. Plts' (N.C. League of Conservation Voters, Inc., et al.) Petition for Writ of Supersedeas or Prohibition	8. Special Order **12/08/2021**
		9. Governor Roy A Cooper, III's and Attorney General Joshua H. Stein's Motion for Leave to File Amicus Brief	9. Dismissed as moot **02/22/2022**
		10. Plts' (N.C. League of Conservation Voters, Inc., et al.) Motion for Temporary Stay	10. Special Order **12/08/2021**

		11. Intervenors' (N.C. Sheriffs' Association, N.C. District Attorneys Association, and N.C. Association of Clerks of Superior Court) Motion to Intervene as Parties	11. Denied **01/24/2022**
		12. Intervenors' (N.C. Sheriffs' Association, N.C. District Attorneys Association, and N.C. Association of Clerks of Superior Court) Motion for Reconsideration of the Court's 8 December 2021 Order Staying the Candidate Filing Period	12. Dismissed **01/24/2022**
		13. Legislative Defs' Motion for Recusal of Justice Samuel J. Ervin, IV	13. Special Order **01/31/2022**
		14. Plts' (N.C. Conservation Voters, Inc. et al.) Notice of Appeal Pursuant to Special Order dated 8 December 2021	14. ---
		15. Plts' (Harper, et al.) Notice of Appeal Pursuant to Special Order dated 8 December 2021	15. ---
		16. Plts' (Harper, et al.) Renewed Motion for Disqualification of Justice Berger, Jr.	16. Special Order **01/31/2022**
		17. Plt-Intervenor's (Common Cause) Notice of Appeal Pursuant to Special Order dated 8 December 2021	17. ---
		18. Legislative Defs' Motion for Recusal of Justice Anita S. Earls	18. Special Order **01/31/2022**
		19. Plt-Intervenor's (Common Cause) Motion for Disqualification of Justice Berger, Jr.	19. Special Order **01/31/2022**
		20. Plts' (N.C. League of Conservation Voters, Inc., et al.) Motion to Admit Sam Hirsch, Jessica Ring Amunson, Zachary C. Schauf, Urja Mittal, and Kartik P. Reddy Pro Hac Vice	20. Allowed **01/21/2022**
		21. Plt-Intervenor's (Common Cause) Motion to Admit J. Tom Boer and Olivia T. Molodanof Pro Hac Vice	21. Special Order **01/21/2022**
		22. Legislative Defs' Motion to Admit Mark Braden Pro Hac Vice	22. Allowed **01/21/2022**
		23. Legislative Defs' Motion to Admit Katherine McKnight Pro Hac Vice	23. Allowed **01/21/2022**
		24. Plts' (Harper, et al.) Motion to Admit Elisabeth S. Theodore, R. Stanton Jones, Samuel F. Callahan, Abha Khanna, Lalitha D. Madduri, Jacob D. Shelly, and Graham W. White Pro Hac Vice	24. Motion Allowed in Part; Denied in Part **01/21/2022**

		25. Buncombe County Board of Commissioners' Motion for Leave to File Amicus Brief	25. Allowed **01/24/2022**
		26. Campaign Legal Center's Motion for Leave to File Amicus Brief	26. Allowed **01/24/2022**
		27. Campaign Legal Center's Motion to Admit Christopher Lamar and Orion de Nevers Pro Hac Vice	27. Allowed **01/24/2022**
		28. Bipartisan Former Governors Michael F. Easley, Arnold Schwarzenegger, Christine Todd Whitman, and William Weld's Motion for Leave to File Amicus Brief	28. Allowed **01/24/2022**
		29. Plts' (Harper, et al.) Renewed Motion to Admit Elisabeth S. Theodore, R. Stanton Jones, Samuel F. Callahan, Jacob D. Shelly, and Graham W. White Pro Hac Vice	29. Allowed **01/24/2022**
		30. Governor Roy A. Cooper, III's and Attorney General Joshua H. Stein's Motion for Leave to File Amicus Brief	30. Allowed **01/24/2022**
		31. Professor Charles Fried's Motion for Leave to File Amicus Brief	31. Allowed **01/24/2022**
		32. Caroline P. Mackie's Motion to Admit Ruth M. Greenwood, Theresa J. Lee, and Nicholas O. Stephanopoulos Pro Hac Vice	32. Allowed **01/24/2022**
		33. NCLCV Plts', Harper Plts', and Plt Intervenor Common Cause's Motion for Extension of Time Allowed for Oral Argument	33. Allowed **01/26/2022**
		34. National Republican Congressional Committee's Motion for Leave to File Amicus Brief	34. Denied **01/31/2022**
		35. NC NAACP's Motion for Leave to File Amicus Brief	35. Allowed **01/31/2022**
		36. Plt-Intervenor's (Common Cause) Motion for Temporary Stay	36. Denied **02/23/2022**
		37. Plt's (Common Cause) PDR Prior to Determination by COA	37. Dismissed as moot **02/23/2022**
		38. Plts' (N.C. League of Conservation Voters, Inc., et al.) Notice of Appeal Pursuant to Special Orders dated 8 December 2021 and 4 February 2022	38. ---
		39. Defs' (Harper, et al.) Motion for Temporary Stay	39. Denied **02/23/2022**

		40. Defs' (Harper, et al.) Petition for Writ of Supersedeas	40. Denied **02/23/2022**
		41. Plts' (Harper, et al.) Notice of Appeal Pursuant to Special Orders dated 8 December 2021 and 4 February 2022	41. ---
		42. Plts' (Harper, et al.) Motion for Temporary Stay	42. Denied **02/23/2022**
		43. Plts' (Harper, et al.) Petition for Writ of Supersedeas	43. Denied **02/23/2022**
		44. Plts' (N.C. League of Conservation Voters, et al.) Motion for Temporary Stay	44. Denied **02/23/2022**
		45. Plts' (N.C. League of Conservation Voters, et al.) Petition for Writ of Supersedeas	45. Denied **02/23/2022**
		46. Plts' (N.C. League of Conservation Voters, et al.) Writ of Mandamus	46. Denied **02/23/2022**
		47. Plts' (N.C. League of Conservation Voters, Inc., et al.) Petition for Writ of Prohibition	47. Denied **02/23/2022**
		48. Plts' (N.C. League of Conservation Voters, et al.) Motion to Suspend Appellate Rules	48. Denied **02/23/2022**
		49. Plts' (N.C. League of Conservation Voters, Inc., et al.) Motion for Preliminary Injunction	49. Denied **02/23/2022**
		50. Governor Roy A. Cooper, III's and Attorney General Joshua H. Stein's Motion for Leave to File Amicus Brief	50. Allowed **02/23/2022**
		51. Plts' (N.C. League of Conservation Voters, Inc. et al.) Petition for Writ of Certiorari	51. Dismissed as moot **02/23/2022**
		52. Plt-Intervenor's (Common Cause) Notice of Appeal Pursuant to Special Orders dated 8 December 2021 and 4 February 2022	52. ---
419P21	In the Matter of the Estate of Michael Roger Chambers	Petitioners' PDR Under N.C.G.S. § 7A-31 (COA20-757)	Denied
420P21	State v. Devonte Glenn Jones	Def's PDR Under N.C.G.S. § 7A-31 (COA20-173)	Denied

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

11 MARCH 2022

455PA20	State v. Michael Ray Waterfield	Def's Motion for Order Abating this Action, Dissolving the Writ of Supersedeas, Dismissing the Appeal, and Vacating the Judgment (COA19-427)	Allowed **02/28/2022**
507P20	State v. Michael Ray Waterfield	1. Def's Motion for Temporary Stay (COA19-813)	1. Allowed **12/11/2020** Dissolved **02/28/2022**
		2. Def's Petition for Writ of Supersedeas	2. Dismissed as moot
		3. Def's PDR Under N.C.G.S. § 7A-31	3. Dismissed **02/28/2022**
		4. Def's Motion for Order Abating the Action, Dissolving the Temporary Stay, Dismissing the Petition, and Vacating the Judgment	4. Allowed **02/28/2022**

IN RE A.E.S.H.

[380 N.C. 688, 2022-NCSC-30]

IN THE MATTER OF A.E.S.H.

No. 208A21

Filed 18 March 2022

Termination of Parental Rights—grounds for termination—neglect—likelihood of future neglect—drugs, parenting, and home

The trial court did not err in determining that there was a probability of a repetition of neglect if respondent-father's child were returned to his custody, where the child had been removed from the father's custody two years before the termination hearing due to the father's substance abuse, his parenting issues, and the filthy condition of the home. The trial court's findings, which were supported by sufficient evidence, established that the father had tested positive for methamphetamine approximately twenty-three months before the termination hearing, had willfully failed to complete a parenting class despite ample opportunity to do so, had failed to pay child support or find employment, and continued to have no known residence suitable for the child.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) (2019) from an order entered on 15 February 2021 by Judge Mack Brittain in District Court, Henderson County. This matter was calendared for argument in the Supreme Court on 18 February 2022 but determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

Susan F. Davis for petitioner-appellee Henderson County Department of Social Services.

John H. Cobb for appellee Guardian ad Litem.

David A. Perez for respondent-appellant father.

EARLS, Justice.

¶ 1 Respondent-Father appeals from an order terminating his parental rights in his child, A.E.S.H. (Andrew).[1] We affirm the trial court's order.

1. A pseudonym is used to protect the identity of the juvenile and for ease of reading. Andrew's mother is deceased.

I. Background

¶ 2 Andrew was born in August 2009. On 17 January 2019, when Andrew was nine years old, the Henderson County Department of Social Services (HCDSS) filed a juvenile petition alleging that Andrew was a neglected and dependent juvenile, based on conditions observed the day before when the Henderson County Sheriff's Department responded to a medical call at the family's residence in Mills River, North Carolina, relating to Andrew's mother.

¶ 3 However, that was not the first time that Andrew's family had been involved with social services. In 2017 and 2018, when they lived in Asheville, North Carolina, the Buncombe County Department of Social Services (BCDSS) was involved with the family because of the parents' alleged substance abuse, unsanitary conditions in the home, specifically the presence of animal feces, and reports that Andrew had poor hygiene and attended school smelling dirty.

¶ 4 After Andrew's family moved to Mills River, North Carolina, HCDSS received a report on 14 November 2018 concerning the unsanitary condition of that home including animal feces throughout the house. HCDSS closed this case in December 2018 after the family was provided resources and cleaned up the home.

¶ 5 On 16 January 2019, when officers responded to the medical call, they stated that Andrew's mother's condition was so shocking she "looked like something out of a horror movie." According to the officers, her body was swollen and she was lying in her own waste. Andrew's mother was diabetic, bedridden, and suffered from degenerative bone disease. After refusing to take her medication, she was transported to the hospital. The officers saw animal feces throughout the home and noted a strong odor of ammonia due to cat urine.

¶ 6 That same day, HCDSS became involved. HCDSS learned from the officers that Andrew's mother was unresponsive and on a ventilator in the Intensive Care Unit at Pardee Hospital. HCDSS also learned that upon her arrival at the hospital, she was diagnosed with alcohol dependence, multiple organ failure, internal bleeding, and had feces between her toes.

¶ 7 A HCDSS social worker visited the home where they also observed animal feces throughout the living areas. They noted there was a hole a few inches wide in Andrew's room leading to the exterior of the home. Andrew explained that cats come in and out through the hole, and he was trying to fix it as they were touring the home. Andrew appeared and

smelled dirty and he had not eaten all day. There were empty beer cans throughout the home and piles of beer cans on each side of the bed. Respondent-father admitted that Andrew's mother had been bedridden for at least six days, during which time she refused food and medicine and defecated and urinated on herself in the bed. Respondent-father further acknowledged that he had been sleeping in the bed with her and that uncleanliness also led to her bleeding from her private area. Andrew told the HCDSS social worker that his mother had been trying to eat cigarettes, her phone, and pillows.

¶ 8 HCDSS social workers also were concerned about the family's obviously malnourished dog whose ribs were visible. Respondent-father was arrested at the home that day and charged with felony cruelty to animals. Just two days earlier, on 14 January 2019, respondent-father had been indicted on sex offense charges. At the time of his arrest for felony cruelty to animals, respondent-father was a registered sex offender and had nine previous convictions of taking indecent liberties with a minor for incidents that occurred between 2005 and 2009. None of these incidents involved Andrew.

¶ 9 HCDSS social workers sought to speak with both respondent-father and Andrew's mother on 16 January 2019 about alternative placements for Andrew and plans for his care. However, Andrew's mother was too ill to be interviewed. Respondent-father was unable to name any appropriate placements for Andrew or develop a plan for his care. On 17 January 2019, Andrew's mother passed away and Andrew was placed into HCDSS custody where he has remained ever since.

¶ 10 The trial court adjudicated Andrew neglected following a hearing on 7 February 2019, at which respondent-father was present. The court granted custody to HCDSS, and placed Andrew in foster care. The trial court determined that Andrew was a neglected juvenile for three reasons: (1) Andrew was residing in a home that was unsuitable due to filth, (2) Respondent-father's substance abuse, and (3) Respondent-father's parenting issues. The primary permanent plan was reunification, and the trial court ordered respondent-father to complete a reunification plan in order to regain custody.

¶ 11 On 28 February 2019, respondent-father was arrested for felony domestic neglect of a disabled or elder person and misdemeanor child abuse. Although released on bond a month later, respondent-father was subsequently rearrested in April 2019 pursuant to a bill of indictment and was convicted in August 2019 of felony cruelty to animals, felony domestic neglect of a disabled or elder person, and misdemeanor child abuse. He was released from the Department of Corrections on 15 August 2020.

¶ 12 Review hearings were held on 9 May 2019, 8 August 2019, and 2 July 2020. After each hearing, the trial court entered an order finding that respondent-father had not made adequate progress within a reasonable time under the reunification plan. On 12 August 2020, HCDSS moved to terminate respondent-father's parental rights in Andrew.[2] In support of its motion to terminate respondent-father's parental rights, HCDSS alleged that: (1) Respondent-father neglected Andrew, and it was probable there would be a repetition of neglect if Andrew were returned to Respondent-father's care, *see* N.C.G.S.§ 7B-1111(a)(1) (2021); and (2) Respondent-father had willfully left Andrew in foster care for more than twelve months without showing reasonable progress under the circumstances to correct the conditions that led to Andrew's removal, *see* N.C.G.S. § 7B-1111(a)(2) (2021).

¶ 13 The motion to terminate respondent-father's parental rights was heard on 4 February 2021. On 15 February 2021, the trial court entered an order terminating respondent-father's parental rights, on two grounds. First, pursuant to N.C.G.S. § 7B-1111(a)(1), the trial court found that respondent-father neglected Andrew, and there is a probability that such neglect would recur if Andrew was returned to respondent-father's care. Second, pursuant to N.C.G.S. § 7B-1111(a)(2), the trial court found that Respondent-father willfully left Andrew in foster care for more than twelve months without showing to the satisfaction of the court that reasonable progress under the circumstances had been made in correcting the conditions which led to Andrew's removal. The trial court determined it is in Andrew's best interests that Respondent-father's parental rights be terminated. Respondent-father appeals.

II. Analysis

¶ 14 Respondent-father's first argument on appeal is that the trial court erred in terminating his parental rights in Andrew based upon neglect pursuant to N.C.G.S. § 7B-1111(a)(1). Respondent-father contends that the trial court's findings of fact were insufficient to establish that there is a probability that his neglect of Andrew is either continuing or likely to reoccur in the future. Respondent-father also argues that because some of the trial court's challenged findings of fact relating to its determination of neglect are unsupported by clear and convincing evidence, the trial court erred in concluding that his parental rights in Andrew were

2. Although this 12 August 2020 motion in the cause was voluntarily dismissed without prejudice on 10 November 2020, a renewed motion in the cause seeking the same relief was filed the next day that was identical except for the addition of an allegation that "the father has been in and out of prison during the lifetime of the juvenile."

subject to termination. We hold that the trial court's findings are supported by the evidence and are sufficient to support its determination that there is a likelihood that Andrew would be neglected in the future if returned to respondent-father's custody.

¶ 15 A trial court may terminate an individual's parental rights if it concludes the parent has neglected the juvenile within the meaning of N.C.G.S. § 7B-101. N.C.G.S. § 7B-1111(a)(1). A neglected juvenile is defined, in pertinent part, as a juvenile "whose parent, guardian, custodian, or caretaker does not provide proper care, supervision, or discipline; or who has been abandoned; . . . or who lives in an environment injurious to the juvenile's welfare." N.C.G.S. § 7B-101(15) (2019). "Termination of parental rights based upon this statutory ground [under N.C.G.S. § 7B-1111(a)(1)] requires a showing of neglect at the time of the termination hearing . . .." *In re D.L.W.*, 368 N.C. 835, 843 (2016). A prior adjudication of neglect is not determinative in a termination-of-parental-rights proceeding. *In re J.W.*, 173 N.C. App. 450, 455 (2005); *In re Stewart*, 82 N.C. App. 651, 653 (1986).

¶ 16 However, "if the child has been separated from the parent for a long period of time, there must be a showing of past neglect and a likelihood of future neglect by the parent." *In re D.L.W.*, 368 N.C. at 843. This is because "in most termination cases the children have been removed from the parent['s] custody before the termination hearing." *In re Beasley*, 147 N.C. App. 399, 404 (2001). In such a situation, "[a] parent's failure to make progress in completing a case plan is indicative of a likelihood of future neglect." *In re M.A.*, 374 N.C. 865, 870 (2020) (quoting *In re M.J.S.M.*, 257 N.C. App. 633, 637 (2018)). The trial court may also look to the historical facts of a case to predict the probability of a repetition of neglect. *In re McLean*, 135 N.C. App. 387, 396 (1999).

¶ 17 Here, Andrew had been in HCDSS's custody since 16 January 2019. The trial court found that the circumstances contributing to Andrew's foster care placement were respondent-father's substance abuse, his parenting issues, and the fact that Andrew was residing in a home that was unsuitable and filthy. After Andrew was adjudicated neglected on 7 February 2019, Respondent-father was granted supervised visits for a minimum of one hour per week, scheduled on Mondays from 3:30 p.m. to 4:30 p.m. respondent-father was required to give HCDSS a 24-hour advance confirmation that he would attend the visit. To work toward reunification with Andrew, the trial court ordered respondent-father to complete several requirements including drug screens and parenting classes.

¶ 18 We review a trial court's adjudication of grounds to terminate parental rights "to determine whether the findings are supported by clear,

cogent and convincing evidence and the findings support the conclusions of law." *In re E.H.P.*, 372 N.C. 388, 392 (2019) (quoting *In re Montgomery*, 311 N.C. 101, 111 (1984)). "A trial court's finding of fact that is supported by clear, cogent, and convincing evidence is deemed conclusive even if the record contains evidence that would support a contrary finding." *In re B.O.A.*, 372 N.C. 372, 379 (2019). We note that the "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." *Witherow v. Witherow*, 99 N.C. App. 61, 63 (1990), *aff'd per curiam*, 328 N.C. 324 (1991). "The trial court's conclusions of law are reviewable de novo on appeal." *In re C.B.C.*, 373 N.C. 16, 19 (2019).

¶ 19 On the issue of neglect, respondent-father primarily argues that the findings of fact are not sufficient to establish that there is a probability of a repetition of neglect in the future. The findings respondent-father addresses include the following:

> 27. During the time [Respondent-father] was not incarcerated he was asked to submit to one drug screen. On April 5, 2019, he tested positive for Methamphetamine.
>
> 28. [Respondent-father] failed to engage with and complete a parenting class during his incarceration or at any time when he was not incarcerated. [Respondent-father] was given the opportunity to participate in a parenting class while incarcerated, but failed to do so.
>
> . . . .
>
> 30 [Respondent-father] was directed to pay child support. That obligation was suspended during his times of incarceration. However, [Respondent-father] paid $0.00 in support, either directly or indirectly during the times he was not incarcerated.
>
> . . . .
>
> 33. [Respondent-father] continues to have no known income or employment.
>
> 34. [Respondent-father] continues to have no known residence that is suitable for [Andrew]. On November 5, 2020. [Respondent-father] told the Social

> Worker he is "fixing up" the residence and would contact her when the home was ready. [Respondent-father] has not followed up with the Social Worker concerning his residence.

¶ 20 Concerning finding of fact 27, respondent-father argues that there is no record evidence to establish that he used any drugs after the date of his only drug screen on 5 April 2019, which occurred some twenty-three months before the termination hearing. While this is true, finding of fact 27 concerning the failed drug screen is only one of numerous findings. Although standing alone the prior drug use may be fairly remote in time, it is part of the context the court properly took into account.

¶ 21 Next, respondent-father argues that findings of fact 28, 30, and 33 are insufficient because they do not address whether his conduct at issue was willful. As to finding of fact 28, concerning the completion of parenting classes, respondent-father's contention is contradicted by the record. Cynthia Brewer, a correctional case manager with the North Carolina Department of Public Safety, Division of Prisons, who conducts the parenting classes at the facility where respondent-father was incarcerated, testified at the termination hearing that after respondent-father's inquiry into parenting classes, she told him that he could put his name on a list if he was interested. Respondent-father inquired about how many merit days he would earn for attending the parenting classes and Ms. Brewer explained that she was only looking for people to participate in the program who wanted to become better fathers. When Ms. Brewer received the list of the names for the class, respondent-father's name was marked off the list. Because respondent-father was given an opportunity to participate in a parenting program while incarcerated, and Ms. Brewer's list ultimately showed that respondent-father's name had been removed, the trial court's finding that he failed to comply with the requirement of his reunification plan which ordered him to engage in and complete a parenting class during his incarceration is supported by clear and convincing evidence. Respondent-father's conduct in failing to sign up for the parenting class after being given the opportunity to do so is sufficient evidence of willfulness.

¶ 22 Additionally, Andrew's social worker, Gina Warren, testified at the termination hearing that after respondent-father was released from incarceration on 15 August 2020, she informed him of numerous parenting classes available for attendance. In a letter from 6 October 2020, Ms. Warren referred respondent-father to six agencies that facilitated local and online parenting courses. During a face-to-face interaction with Ms. Warren on 5 November 2020, respondent-father confirmed he

had received the October letter from Ms. Warren but requested that she resend the letter. Ms. Warren mailed the letter the next day again listing the six agencies offering parenting classes. Ms. Warren followed up to inquire about respondent-father's progress with engaging and completing a parenting program in letters dated 14 December 2020 and 25 January 2021. Respondent-father failed to respond to her letters to inform her of his progress in completing or even starting a parenting program. This evidence further supports the trial court's finding that when not incarcerated, respondent-father failed to engage in and complete a parenting class. Respondent-father's failure to even begin a parenting class, and his failure to respond to Ms. Warren's inquiries about his progress after being informed of several classes available to him, constitutes sufficient evidence of willfulness.

¶ 23 Turning to findings of fact 30 and 33, respondent-father contends that these findings do not sufficiently support the conclusion that Andrew would be likely to be neglected in the future because there is no showing that he willfully did not pay child support or willfully remained unemployed. However, for a finding of likelihood of future neglect, the relevant question is whether respondent-father will be able to provide for his son. *See, e.g.*, *In re K.L.T.*, 374 N.C. 826, 831 (2020), ("The determinative factors must be the best interests of the child and the fitness of the parent to care for the child at the time of the termination proceeding.") (quoting *In re K.N.*, 373 N.C. 274, 282 (2020)).

¶ 24 Finally, respondent-father disputes finding of fact 34 on the ground that the evidence does not support the finding that his residence was unsuitable. The record shows that Ms. Warren made numerous attempts to inspect respondent-father's residence after he was released from incarceration. Ms. Warren testified at the termination hearing that she last discussed with respondent-father the suitability of a residence for Andrew on 5 November 2020 and had not heard anything about the condition of the home in four months. On 5 November 2020, during a face-to-face meeting, Respondent-father told Ms. Warren that he was "fixing up" his grandmother's residence and would contact her when it was ready because he did not want her to see it unfinished.

¶ 25 Thereafter, Ms. Warren mailed respondent-father three letters inquiring about the condition of his residence. In a 6 November 2020 letter, Ms. Warren asked respondent-father to please contact her about a home visit when he felt the home was suitable. Receiving no response, Ms. Warren mailed a letter to respondent-father on 14 December 2020 inquiring if respondent-father had made any progress toward making the home appropriate. Again, receiving no response, Ms. Warren mailed another

letter on 25 January 2021 asking respondent-father to communicate with her and inquiring if he had made any progress toward making the home suitable for Andrew. Ms. Warren testified that although she knew the address of the grandmother's residence, she had not seen the home because respondent-father had not called her to schedule an appointment to conduct a home study nor invited her to see the home. Because respondent-father told Ms. Warren that he would contact her regarding the suitability of his grandmother's residence for Andrew and failed to communicate with and respond to Ms. Warren's attempts to conduct a home assessment, the trial court's finding that respondent-father did not establish a suitable residence for Andrew is supported by clear and convincing evidence. Importantly, this failure is material to a determination of whether there is a probability of repetition of neglect because the condition of respondent-father's previous two residences led to social services' involvement, Andrew's adjudication as a neglected juvenile, and respondent-father's conviction for misdemeanor child abuse on 28 February 2019.

¶ 26 In sum we conclude the trial court's challenged findings of fact are supported by clear, cogent, and convincing evidence. Further, the trial court's findings of fact support the conclusion that respondent-father neglected Andrew and that, based on the circumstances as they existed at the time of the hearing, it is probable that there would be a repetition of neglect if Andrew was returned to respondent-father's care. Because the existence of a single ground for termination suffices to support the termination of a parent's parental rights in a child, *see In re A.R.A.*, 373 N.C. 190, 194 (2019), we need not reach the issue of whether the trial court erred in terminating respondent-father's parental rights pursuant to N.C.G.S. § 7B-1111(a)(2). Respondent-father does not contest the trial court's determination that, pursuant to N.C.G.S. § 7B-1110, it is in Andrew's best interests to terminate Respondent-father's parental rights.

III. Conclusion

¶ 27 We hold that the trial court did not err in determining that there is a probability of a repetition of neglect if Andrew was returned to respondent-father's custody, and that the existence of this ground for termination is sufficient to support the termination of Respondent-father's parental rights. The trial court's order terminating Respondent-father's parental rights in Andrew is therefore affirmed.

AFFIRMED.

IN RE A.L.I.

[380 N.C. 697, 2022-NCSC-31]

IN THE MATTER OF A.L.I.

No. 266A21

Filed 18 March 2022

Jurisdiction—termination of parental rights case—sufficiency of service of process—statutory requirements—type of jurisdiction implicated

The trial court properly exercised jurisdiction over a private termination of parental rights matter in which respondent-father, a nonresident, alleged on appeal that the court lacked subject matter jurisdiction over him because he was not properly served with a summons as required by N.C.G.S. § 7B-1101. Respondent's argument implicated personal, not subject matter, jurisdiction, and since he participated in the hearing without objection, he waived any argument regarding insufficient service of process.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) (2019) from an order entered on 9 June 2021 by Judge William F. Brooks in District Court, Wilkes County. This matter was calendared for argument in the Supreme Court on 18 February 2022 but determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

Mary McCullers Reece for respondent-appellant father.

No brief filed by petitioner-appellee mother.

No brief filed by Guardian ad Litem.

NEWBY, Chief Justice.

¶ 1 Respondent, the father of A.L.I. (Amy), appeals from the trial court's order terminating his parental rights.[1] After careful review, we affirm.

¶ 2 Amy was born on 29 July 2013 to petitioner-mother and respondent. Though petitioner and respondent never married, they lived together with Amy for approximately two years. On 2 August 2016, petitioner took

1. A pseudonym is used in this opinion to protect the juvenile's identity and for ease of reading.

out a domestic violence protective order in Mecklenburg County, which lasted one year. Respondent then filed a custody action in Cabarrus County. While the custody action was pending, respondent took Amy and fled the state. At that time, respondent had an outstanding order for his arrest due to his failure to appear and serve jail time for a conviction of felony second-degree burglary. After respondent refused to return to the state with Amy, a child custody order was entered in Cabarrus County on 11 April 2017, granting petitioner exclusive care, control, and custody of Amy. Respondent was arrested in New York on or about 28 April 2017 and remained incarcerated in New York for the remainder of the trial court proceedings. After respondent's arrest, petitioner picked up Amy in New York in May of 2017. Since then, Amy has remained with petitioner.

¶ 3 Petitioner filed a petition to terminate respondent's parental rights to Amy on 17 April 2020. The trial court held a pretrial hearing on 30 April 2021 where petitioner's counsel stated that respondent "was served with a summons and the petition on May the 8th, 2020 via personal service at Bare Hill Correctional Facility in New York State." During the proceedings, respondent wrote several letters to the trial court, was represented by counsel, and fully participated in the hearings remotely. Following a hearing on 30 April 2021, in which respondent participated remotely and his counsel in person, the trial court entered an order on 9 June 2021 concluding that grounds existed to terminate respondent's parental rights based upon neglect and willful abandonment.[2] *See* N.C.G.S. § 7B-1111(a)(1), (7) (2021).

¶ 4 The only argument presented on appeal, which is here raised for the first time, is that the trial court did not have subject matter jurisdiction to terminate respondent's parental rights. According to respondent, since he is a nonresident, N.C.G.S. §§ 7B-1101 and 7B-1106 (2021) require that he be served with a summons in order to confer subject matter jurisdiction upon the trial court.[3] In respondent's view the requirement in N.C.G.S. § 7B-1101 that "before exercising jurisdiction under this Article regarding the parental rights of a nonresident parent, the court shall find . . . that process was served on the nonresident parent" pertains to the trial court's exercise of subject matter jurisdiction rather than personal

2. In that order, the trial court found that "[respondent] was personally served at Bare Hill with the summons and petition in this action on May 8, 2020." Nonetheless, for purposes of this opinion, we assume that respondent was not properly served with the summons.

3. Respondent relies upon an unpublished opinion from the Court of Appeals. *See In re P.D.*, No. COA16-1317, 2017 WL 3255343 (N.C. Ct. App. Aug. 1, 2017) (unpublished).

jurisdiction. N.C.G.S. § 7B-1101. Respondent contends that since there is no evidence in the record to support a finding that respondent was served with a summons, the trial court lacked subject matter jurisdiction to terminate his parental rights. Thus, the question presented in this appeal is whether the statutory language refers to personal jurisdiction or subject matter jurisdiction. Directed by our prior decisions, we determine the language relates to personal jurisdiction.

¶ 5 Pursuant to the broad language of N.C.G.S. § 7B-1101, a trial court has "exclusive original jurisdiction to hear and determine any petition or motion relating to termination of parental rights to any juvenile who . . . is found in . . . the district at the time of filing of the petition or motion." *Id.* "Because litigants cannot consent to jurisdiction not authorized by law, they may challenge 'jurisdiction over the subject matter . . . at any stage of the proceedings, even after judgment.' " *In re T.R.P.*, 360 N.C. 588, 595, 636 S.E.2d 787, 793 (2006) (alteration in original) (quoting *Pulley v. Pulley*, 255 N.C. 423, 429, 121 S.E.2d 876, 880 (1961)). Thus, "[a]rguments regarding subject matter jurisdiction may even be raised for the first time before this Court." *Id.* Arguments of insufficient service of process, however, "are defenses that implicate personal jurisdiction and thus can be waived by the parties." *In re J.T.*, 363 N.C. 1, 4, 672 S.E.2d 17, 19 (2009); *see* N.C.G.S. § 1A-1, Rule 12(h)(1) (2021) ("A defense of . . . insufficiency of service of process is waived . . . if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof . . . .").

¶ 6 In cases arising under the Juvenile Code as with other civil matters, deficiencies in the issuance or service of a summons affect a trial court's jurisdiction over the parties to an action and not over the subject matter of the case. *See In re K.J.L.*, 363 N.C. 343, 348, 677 S.E.2d 835, 838 (2009). In *In re K.J.L.*, Davidson County Department of Social Services (DSS) filed a juvenile petition alleging that the juvenile was neglected and dependent, but a summons was never issued. *Id.* at 344–45, 677 S.E.2d at 836–37. Nonetheless, both parents stipulated that the juvenile was neglected, and the trial court entered an order to that effect. *Id.* at 344, 677 S.E.2d at 836. DSS then filed a petition to terminate both parents' parental rights, and a summons was properly issued and served. *Id.* The respondent-mother participated in the TPR hearing without objecting to the trial court's jurisdiction, and the trial court entered an order terminating her parental rights.[4] *Id.* The respondent-mother appealed,

4. The respondent-father did not respond to the TPR petition and failed to appear at the hearing. *In re K.J.L.*, 363 N.C. at 344, 677 S.E.2d at 836. The trial court's order also terminated the respondent-father's parental right, but he did not appeal. *Id.*

and the Court of Appeals concluded that the trial court lacked subject matter jurisdiction to terminate the respondent-mother's parental rights because a summons was never issued in the neglect and dependency proceeding. *Id.* at 344–45, 677 S.E.2d at 836.

¶ 7 We reversed the decision of the Court of Appeals. *Id.* at 348, 677 S.E.2d at 838. In doing so, we explained that "the summons is not the vehicle by which a court obtains subject matter jurisdiction over a case, and failure to follow the preferred procedures with respect to the summons does not deprive the court of subject matter jurisdiction." *Id.* at 346, 677 S.E.2d at 837. We further noted that "[b]ecause the summons affects jurisdiction over the person rather than the subject matter, . . . a general appearance by a [respondent-parent] 'waive[s] any defect in *or nonexistence of* a summons.' " *Id.* at 347, 677 S.E.2d at 837 (emphasis and fourth alteration in original) (quoting *Dellinger v. Bollinger*, 242 N.C. 696, 698, 89 S.E.2d 592, 593 (1955)). Therefore, we concluded that "[a]ny deficiencies in the issuance and service of the summonses in the neglect and TPR proceedings at issue in this case did not affect the trial court's subject matter jurisdiction, and any defenses implicating personal jurisdiction were waived by the parties." *Id.* at 348, 677 S.E.2d at 838.

¶ 8 Similarly, in *In re J.T.*, we addressed various issues regarding the issuance and service of a summons in a TPR action. *In re J.T.*, 363 N.C. at 2, 672 S.E.2d at 17. There a summons was issued, but it failed to name the juveniles as respondents and was never served upon the juveniles through a GAL. *Id.* at 3, 672 S.E.2d at 18. We explained that

> [i]t is inconsequential to the trial court's subject matter jurisdiction that no summons named any of the three juveniles as respondent and that no summons was ever served on the juveniles or their GAL. These errors are examples of insufficiency of process and insufficiency of service of process, respectively, both of which are defenses that implicate personal jurisdiction and thus can be waived by the parties. The full participation of the juveniles' GAL and the attorney advocate throughout the TPR proceedings, without objection to the trial court's exercise of personal jurisdiction over the juveniles, constituted a general appearance and served to waive any such objections that might have been made.

Id. at 4–5, 672 S.E.2d at 19 (citations omitted) (citing N.C.G.S. § 1A-1, Rule 12(h)(1) (2007); *Harmon v. Harmon*, 245 N.C. 83, 86, 95 S.E.2d

355, 359 (1956)). In other words, the arguments about deficiencies in the summons and insufficient service were waived when not presented to the trial court. *Id.* Therefore, we concluded that "the trial court's subject matter jurisdiction was properly invoked." *Id.* at 4, 672 S.E.2d at 19.

¶ 9 A parent's status as a nonresident does not alter the fact that arguments of insufficient service of a summons pertain to personal jurisdiction rather than subject matter jurisdiction. *See In re K.J.L.*, 363 N.C. at 346, 677 S.E.2d at 837; N.C.G.S. § 1A-1, Rule 12(h)(1). Reading N.C.G.S. § 7B-1101 in conjunction with Rule 12(h)(1) and our prior decisions, it is clear that if a nonresident respondent-parent participates in the TPR proceedings without raising an objection to the trial court exercising personal jurisdiction, then he waives any argument of insufficient service of process. *See In re J.T.*, 363 N.C. at 4, 672 S.E.2d at 19; *In re K.J.L.*, 363 N.C. at 348, 677 S.E.2d at 838. Here respondent fully participated in the proceedings and was represented by counsel. Respondent personally wrote several letters to the trial court and was present at the hearings via speakerphone. Since respondent appeared in the proceeding without preserving his objection to the trial court's exercise of personal jurisdiction over him, his argument regarding insufficient service of process is waived.

¶ 10 Regardless of a respondent-parent's residency status, the issuance and service of a summons do not affect a trial court's subject matter jurisdiction in a TPR action. Here the trial court's subject matter jurisdiction was properly invoked. Since the alleged summons-related deficiencies implicate personal jurisdiction not subject matter jurisdiction, respondent waived his insufficient service argument by participating in the proceedings without objecting. Therefore, we affirm the trial court's 9 June 2021 order terminating respondent's parental rights.

AFFIRMED.

IN RE A.N.D.

[380 N.C. 702, 2022-NCSC-32]

IN THE MATTER OF A.N.D., A.N.D., AND A.C.D.

No. 113A21

Filed 18 March 2022

Termination of Parental Rights—best interests of the child—factual findings—statutory factors

The trial court did not abuse its discretion by concluding that termination of a father's parental rights was in his children's best interests, where the dispositional findings were supported by sufficient evidence and the court properly considered the statutory factors in N.C.G.S. § 7B-1110(a) and performed a reasoned analysis in reaching its conclusion. Although one of the findings incorrectly listed certain crimes as ones for which the father had been convicted, the finding nonetheless accurately characterized his criminal history as "extensive"; further, the appellate court rejected the father's arguments that the trial court erred by failing to consider the impact of the coronavirus restrictions and options short of termination.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from an order entered on 16 December 2020 by Judge V.A. Davidian III in District Court, Wake County. This matter was calendared for argument in the Supreme Court on 22 December 2021 but determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

Mary Boyce Wells for petitioner-appellee Wake County Human Services.

Michelle FormyDuval Lynch for appellee Guardian ad Litem.

Leslie Rawls for respondent-appellant father.

BERGER, Justice.

¶ 1 Respondent[1] appeals from the trial court's order terminating his parental rights in A.N.D. (Andrew),[2] born December 2009; A.N.D. (Adam),

1. The trial court's order also terminated the parental rights of the minor children's mother, who is not a party to this appeal.

2. Pseudonyms are used throughout the opinion to protect the identities of the children and for ease of reading.

born February 2011; and A.C.D. (Anna), born July 2016, based on neglect and failure to show reasonable progress in correcting the conditions which led to the removal of the children from the home. We affirm the trial court's order.

I. Factual and Procedural Background

¶ 2 On April 29, 2015, Wake County Human Services (DSS) filed a juvenile petition alleging that Andrew, Adam, and "Nigel"[3] were neglected juveniles. The petition alleged that the children witnessed two domestic violence incidents between the children's mother and Nigel's father and the parents had substance abuse issues. Nigel was placed in foster care and Andrew and Adam remained in the care of their maternal grandmother. At that time, respondent was in federal custody and unable to provide care for Andrew and Adam.

¶ 3 In May 2015, the trial court found that respondent was still incarcerated with an expected release date in October 2015, and suspended respondent's visitation with the children. On September 3, 2015, the court adjudicated Andrew and Adam neglected juveniles and granted legal and physical custody to their maternal grandmother.

¶ 4 On September 12, 2017, DSS filed a petition alleging Anna[4] to be a neglected juvenile. The petition alleged that the maternal grandmother was unable to obtain timely medical care for Anna because both parents were incarcerated and could not provide consent for treatment. Following a hearing in February 2018, the trial court determined, and respondent agreed, that it was in Anna's best interests for the maternal grandmother to be appointed as Anna's legal custodian. The trial court adjudicated Anna as a neglected juvenile on March 14, 2018, and placed her in the custody of the maternal grandmother along with Andrew and Adam. The trial court suspended respondent's visitation with Anna and ordered him to enter into a case plan with DSS.

¶ 5 On September 12, 2018, the trial court entered an order granting DSS nonsecure custody of all three children following the filing of a DSS petition alleging that Andrew, Adam, and Anna were abused, neglected, and dependent juveniles. The petition included allegations that the

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3. Nigel, born December 11, 2014, shares the same mother as Andrew, Adam, and Anna but has a different father. Nigel's father is not a party to this appeal.

4. Anna is respondent's third child. In September 2016, the mother was in a car accident with Anna in the car. Anna was taken to the hospital, and her mother was taken into custody. After this incident, Anna was placed in the care of her maternal grandmother along with Andrew and Adam.

maternal grandmother had been arrested for driving while impaired and child abuse, among other allegations. This was the second time that the maternal grandmother had been charged with driving while impaired and child abuse within a six-month period. At that time, the children could not be placed with respondent, as he was residing in a "rooming house" that was not appropriate for children, and he could not provide for their care.

¶ 6 The trial court entered a consent order on adjudication and disposition on November 20, 2018. At the time of the hearing on adjudication and disposition, respondent was incarcerated in the Wake County Detention Center following his arrest for assault with a deadly weapon inflicting serious injury. DSS placed the children in foster care, and the trial court suspended respondent's visitation.

¶ 7 On October 11, 2019, DSS filed a motion to terminate respondent's parental rights in Andrew, Adam, and Anna, alleging that grounds existed for termination based on neglect, willfully leaving the minor children in foster care without showing reasonable progress in correcting the conditions which led to the removal of the children from the home, and failing to pay a reasonable portion of the cost of care for the children for a period of six months while the children remained in foster care.

¶ 8 In an order entered after a February 2020 hearing, the trial court found that respondent did not cooperate with recommended services in his case plan. The primary permanent plan was changed to adoption, with a secondary plan of reunification. In a June 11, 2020 order, the trial court determined that respondent resided in a "structurally sound" residence but that he refused to participate with his case plan and failed to comply with random drug screens. The trial court further found that respondent was not making adequate progress within a reasonable time, and his behavior was "inconsistent with the children's health and safety."

¶ 9 The trial court determined that grounds existed to terminate respondent's parental rights under N.C.G.S. § 7B-1111(a)(1) and (2) and that it was in the children's best interests that respondent's parental rights be terminated.

¶ 10 On appeal, respondent does not challenge the trial court's grounds for termination. Instead, respondent argues that the trial court abused its discretion in concluding that it was in Andrew's, Adam's, and Anna's best interests to terminate respondent's parental rights. Specifically, respondent argues that finding of fact 39 "misrepresents and mischaracterizes" his criminal history and the trial court failed to consider the impact of the coronavirus pandemic and options short of termination of his parental rights in its analysis.

II. Analysis

¶ 11 Our Juvenile Code provides a two-stage process for terminating parental rights: an adjudication stage and a dispositional stage. *See* N.C.G.S. §§ 7B-1109, -1110 (2021). At the adjudication stage, the petitioner bears the burden of proving by "clear, cogent, and convincing evidence" the existence of one or more grounds for termination under N.C.G.S. § 7B-1111(a). N.C.G.S. § 7B-1109(e), (f). If one or more grounds exist for termination of parental rights, the court proceeds to the dispositional stage. N.C.G.S. § 7B-1110(a). At the dispositional stage, the trial court must "determine whether terminating the parent's rights is in the juvenile's best interest" based on the following criteria:

> (1) The age of the juvenile.
>
> (2) The likelihood of adoption of the juvenile.
>
> (3) Whether the termination of parental rights will aid in the accomplishment of the permanent plan for the juvenile.
>
> (4) The bond between the juvenile and the parent.
>
> (5) The quality of the relationship between the juvenile and the proposed adoptive parent, guardian, custodian, or other permanent placement.
>
> (6) Any relevant consideration.

Id.

¶ 12 This Court reviews "the trial court's dispositional findings of fact to determine whether they are supported by competent evidence." *In re E.S.*, 378 N.C. 8, 2021-NCSC-72, ¶ 11 (quoting *In re J.J.B.*, 374 N.C. 787, 793, 845 S.E.2d 1, 5 (2020)).[5] If supported by competent evidence, the trial court's findings are binding on appeal. *In re A.M.O.*, 375 N.C. 717, 720, 850 S.E.2d 884, 887 (2020). "[A]ssessment of a juvenile's best interest . . . is reviewed only for abuse of discretion." *In re A.R.A.*, 373 N.C. 190, 199, 835 S.E.2d 417, 423 (2019). A trial court's determination in a termination-of-parental-rights case "will remain undisturbed . . . so long as that determination is not 'manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision.' "

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5. Recently, this Court has noted that despite precedent using the term "competent evidence" in describing the applicable standard of review in such an analysis, N.C.G.S. § 7B-906.1(c) instructs that the evidence a trial court may receive and consider need not be limited to that which is "competent." *See Matter of C.C.G.*, 2022-NCSC-3 n. 4.

In re A.M., 377 N.C. 220, 2021-NCSC-42, ¶ 18 (quoting *In re A.U.D.*, 373 N.C. 3, 6–7, 832 S.E.2d 698, 700–01 (2019)).

¶ 13 Respondent first challenges finding of fact 39 for its inclusion of "duplicate charges, dismissed charges, and charges that resulted in not guilty judgments." In finding of fact 39, the trial court found that respondent

> has an extensive criminal history and has served several extended prison sentences for the following offenses: felony and misdemeanor breaking and entering, interfering with emergency communications, misdemeanor larceny, assault on a female, possession and distribution of cocaine and habitual misdemeanor assault. He was again arrested in mid-2019 and released in November 2019.

¶ 14 Respondent correctly asserts that there is no support in the record for the trial court's finding that he was convicted of breaking and entering and possession of cocaine. However, a certified copy of respondent's criminal history in the record provides competent evidence for the remaining convictions set forth in finding of fact 39. Specifically, competent evidence in the record indicates that respondent was previously convicted of at least one count of (1) interfering with emergency communications; (2) misdemeanor larceny; (3) assault on a female; (4) distribution of cocaine; and (5) habitual misdemeanor assault. Thus, competent evidence supports the characterization of respondent's criminal history included in finding of fact 39.

¶ 15 Respondent next argues that the trial court's decision to terminate his parental rights was "manifestly unsupported by reason" because the trial court failed to consider the impact that coronavirus restrictions had on his housing and employment as a "relevant factor" in its best interest analysis. However, respondent did not have suitable housing before or after the filing of the October 2019 motion to terminate parental rights. Respondent concedes this fact in his brief when he states that "[respondent] was not able to obtain housing that would enable him to have his children in the home." Respondent further states in his brief that when he was not incarcerated, there was no place in which he resided that "could accommodate the children."

¶ 16 Regarding employment, respondent maintained fairly steady employment during the periods in which he was not incarcerated. While respondent was laid off from employment at a restaurant due to coronavirus restrictions, respondent admitted that his income increased after

he was laid off and that he could have worked but chose not to. Although coronavirus restrictions may have impacted respondent's housing and employment situations, respondent acknowledged that he did not have a plan for his family and that it could take up to a year to obtain a suitable residence.

¶ 17 Respondent here has not demonstrated that the trial court's determination that termination of parental rights was in the best interests of the minor children was not the product of a reasoned decision. *See In re A.U.D.*, 373 N.C. at 6–7, 832 S.E.2d at 700–01. The trial court properly considered the relevant statutory factors set forth in N.C.G.S. § 7B-1110(a) before concluding that termination was in the children's best interests. Specifically, the trial court made the following unchallenged findings of fact:

> 54. The children reside together in a licensed foster home in Franklin County, North Carolina. The children have bonded closely with their foster family and the family intends to adopt all four children.
>
> 55. The foster family has a good relationship with [respondent] and intend[s] to encourage contact between him and the children.
>
> 56. [Andrew] and [Adam], ages 10 and 9, attend Youngsville Elementary School and [are] making some academic progress. They both are diagnosed with Adjustment Disorder and they continue to receive outpatient therapy. Both children wish to remain with the foster parents because they feel safe, secure and supported in the home.
>
> 57. [Nigel], age 5, attends daycare at the Learning Experience in Franklin County and does not receive additional services. [Nigel] appears to be developmentally on-target.
>
> 58. [Anna], age 4, refers to the foster family as "mommy" and "daddy" and has strongly bonded with the family. . . .
>
> 59. There is a high likelihood of adoption for all four children.
>
> 60. Adoption is one of the children's concurrent permanency plans, and termination of parental rights is necessary to accomplish this plan.

. . . .

> 63. While it is clear that the children have a bond with [respondent] and that [respondent] loves his children, that love does not equate to an ability to provide permanence and daily parenting. These children finally have stability in their lives after many years and they are thriving.

¶ 18 These unchallenged findings of fact are binding on appeal and further show that the trial court's decision was not "manifestly unsupported by reason or . . . so arbitrary that it could not have been the result of a reasoned decision." *In re A.M.*, 377 N.C. 220, 2021-NCSC-42, ¶ 18 (quoting *In re A.U.D.*, 373 N.C. at 6–7, 832 S.E.2d at 698, 700–01). Thus, the trial court did not abuse its discretion when it terminated respondent's parental rights to the minor children.

¶ 19 Finally, respondent argues that the trial court did not consider "options short of termination that would have preserved the family relationship." However, as set forth above, the trial court properly considered the statutory factors in N.C.G.S. § 7B-1110(a) and determined that a permanent plan of care could only be obtained by a "severing of the relationship between the children and [respondent]." Respondent has again failed to show that the trial court abused its discretion by terminating his parental rights. Therefore, we affirm the trial court's order terminating respondent's parental rights.

III. Conclusion

¶ 20 The trial court did not abuse its discretion in determining that termination of respondent's parental rights was in the best interests of Andrew, Adam, and Anna, and we affirm the trial court's order.

AFFIRMED.

IN RE C.S.

[380 N.C. 709, 2022-NCSC-33]

IN THE MATTER OF C.S.

No. 90A21

Filed 18 March 2022

1. Termination of Parental Rights—grounds for termination—neglect—past neglect—other parent's conduct

The trial court did not err by determining that a father's parental rights in his son were subject to termination on the grounds of neglect where the showing of past neglect was based on the mother's (rather than the father's) conduct.

2. Termination of Parental Rights—best interests of the child—relevant factors—bond between parent and child

The trial court did not abuse its discretion in determining that termination of a father's parental rights was in his son's best interests where, contrary to the father's argument on appeal, the court made findings concerning all relevant factors—specifically, the bond between the father and son, by finding that the father obviously loved the son but that their bond was outweighed by the son's need for a safe, nurturing, stable environment.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) (2019) from an order entered on 8 December 2020 by Judge Clinton Rowe in District Court, Carteret County. This matter was calendared for argument in the Supreme Court on 18 February 2022 but determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

Stephanie Sonzogni for petitioner-appellee Carteret County Department of Social Services; and William L. Esser IV for appellee Guardian ad Litem.

Jeffrey L. Miller for respondent-appellant father.

BARRINGER, Justice.

¶ 1 Respondent appeals from an order terminating his parental rights to the minor child C.S. (Carl).[1] After careful review, we hold that the trial

1. A pseudonym is used in this opinion to protect the juvenile's identity and for ease of reading.

court did not err in finding past neglect or in determining that there was a likelihood of future neglect and that terminating respondent's rights was in Carl's best interests. Accordingly, we affirm the trial court's order terminating respondent's parental rights.

I. Factual and Procedural Background

¶ 2 When Carl was born, although Carl's mother was married, her estranged husband denied paternity. Subsequent genetic testing excluded the estranged husband as Carl's biological father.

¶ 3 A social worker from Carteret County Department of Social Services (DSS) visited the family and found that Carl appeared thin. The social worker scheduled a weight check at Carteret General Hospital. At the weight check, Carl weighed 12.5% less than he did at birth. Carl was hospitalized and quickly gained weight, causing the doctor to opine that his failure to thrive was due to receiving insufficient calories. However, Carl's mother refused to nurse, pump, or wake up at night to feed him. DSS filed a juvenile petition alleging that Carl was neglected and dependent. Additionally, DSS obtained nonsecure custody of Carl and placed him in foster care.

¶ 4 Carl's mother identified respondent as the potential father of Carl. A paternity test confirmed that respondent was Carl's biological father. The trial court entered a consent adjudication order, signed by respondent and his attorney, as well as the other relevant parties, adjudicating Carl a neglected and dependent juvenile. Carl's mother later relinquished her parental rights to Carl.

¶ 5 Following a hearing that respondent did not attend, the trial court established a primary plan for Carl of reunification with a secondary plan of adoption. Respondent was ordered to refrain from using nonprescribed and illegal substances; submit to random drug screens; complete a substance abuse assessment and follow all recommendations; complete a parenting assessment/psychological evaluation and follow all recommendations; complete parenting classes; maintain stable housing; provide proof of employment and a budget; keep his social worker updated with pertinent information; and sign necessary releases to allow DSS to access information from the required assessments and related records. The trial court granted respondent one hour of weekly supervised visitation with Carl.

¶ 6 Respondent failed to attend the initial review hearing held on 14 June 2019. In the resulting order, the trial court noted that respondent was failing to engage in the reunification plan, was failing to consistently

attend visitations, had not been communicating with his social worker, and had missed a scheduled Child and Family Team Meeting. Afterwards, respondent continued to not follow through with any of the services outlined in his reunification plan and, on 25 June 2019, was arrested for violating a domestic violence protective order. On 28 August 2019, the trial court changed Carl's primary permanent plan to adoption with a secondary plan of reunification with respondent.

¶ 7 Respondent finally attended his first Child and Family Team meeting after the trial court changed Carl's permanent plan to adoption. Additionally, after the permanent plan changed, respondent started to attend visitations with Carl more consistently. Yet, at the visits, respondent spent considerable time viewing and taking pictures of Carl's genitals and bottom during diaper changes. After being instructed to refrain from photographing Carl's genitals, respondent complained and stopped changing Carl's diaper during visitations. Respondent also ignored the social worker's attempts to redirect or instruct him regarding Carl's needs and often failed to provide appropriate food or supplies at visits. After several weeks of visitations during which the social worker attempted to instruct him on appropriate behaviors and interactions with Carl, respondent engaged less with Carl during the visits.

¶ 8 In a subsequent permanency-planning-review order, the trial court again found respondent had failed to make sufficient progress towards reunification. The trial court found that respondent had recently been charged with rape; had taken photographs of his son's genital area on numerous visitations; had failed to complete the recommended mental health and substance abuse treatment or to complete a parenting evaluation; lacked safe, stable, and long-term housing; had failed to provide DSS with a current address, employment verification, or a budget; and had otherwise failed to maintain consistent contact with DSS. The trial court concluded that it was in Carl's best interests that the primary plan be adoption with a secondary plan of reunification and that termination of parental rights was required to effectuate this plan.

¶ 9 On 19 November 2019, DSS filed a motion to terminate respondent's parental rights to Carl on the grounds of neglect, failure to pay a reasonable portion of the costs of care for Carl for the preceding six months, and dependency. *See* N.C.G.S. § 7B-1111(a)(1), (3), (6) (2021). The trial court entered an order terminating respondent's parental rights on 8 December 2020. In the order, the trial court adjudicated that a ground existed to terminate respondent's parental rights for neglect under N.C.G.S. § 7B-1111(a)(1). The trial court further determined that terminating respondent's rights was in Carl's best interests.

¶ 10 Respondent appealed. On appeal, respondent challenges the trial court's adjudication that the ground of neglect existed to terminate his parental rights pursuant to N.C.G.S. § 7B-1111(a)(1) as well as the trial court's determination that termination was in Carl's best interests.

II. Analysis

A. Standard of Review

¶ 11 The North Carolina Juvenile Code sets out a two-step process for termination of parental rights: an adjudicatory stage and a dispositional stage. N.C.G.S. §§ 7B-1109 to -1110 (2021). At the adjudicatory stage, the trial court takes evidence, finds facts, and adjudicates the existence or nonexistence of the grounds for termination set forth in N.C.G.S. § 7B-1111. N.C.G.S. § 7B-1109(e). If the trial court adjudicates that one or more grounds exist, the trial court then proceeds to the dispositional stage where it determines whether termination of parental rights is in the juvenile's best interests. N.C.G.S. § 7B-1110(a).

¶ 12 Appellate courts review a trial court's adjudication to determine whether the findings are supported by clear, cogent, and convincing evidence and whether the findings support the conclusions of law. *In re N.P.*, 374 N.C. 61, 62–63 (2020). In doing so, we limit our review to "only those findings necessary to support the trial court's determination that grounds existed to terminate respondent's parental rights." *In re T.N.H.*, 372 N.C. 403, 407 (2019). "A trial court's finding of fact that is supported by clear, cogent, and convincing evidence is deemed conclusive even if the record contains evidence that would support a contrary finding." *In re B.O.A.*, 372 N.C. 372, 379 (2019). Further, "[f]indings of fact not challenged by respondent are deemed supported by competent evidence and are binding on appeal." *In re T.N.H.*, 372 N.C. at 407. We review the trial court's conclusions of law de novo. *In re C.B.C.*, 373 N.C. 16, 19 (2019).

¶ 13 "The [trial] court's assessment of a juvenile's best interest at the dispositional stage is reviewed only for abuse of discretion." *In re A.R.A.*, 373 N.C. 190, 199 (2019). "[A]buse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *Id.* (alteration in original) (quoting *In re T.L.H.*, 368 N.C. 101, 107 (2015)).

B. Neglect

¶ 14 **[1]** The trial court concluded that a ground existed to terminate respondent's parental rights to Carl for neglect under N.C.G.S. § 7B-1111(a)(1). The Juvenile Code authorizes the trial court to terminate parental rights

if "[t]he parent has abused or neglected the juvenile" as defined in N.C.G.S. § 7B-101. N.C.G.S. § 7B-1111(a)(1). A neglected juvenile is defined, in pertinent part, as a juvenile "whose parent . . . [d]oes not provide proper care, supervision, or discipline . . . [or c]reates or allows to be created a living environment that is injurious to the juvenile's welfare." N.C.G.S. § 7B-101(15) (2021). "[I]f the child has been separated from the parent for a long period of time, there must be a showing of past neglect and a likelihood of future neglect by the parent." *In re D.L.W.*, 368 N.C. 835, 843 (2016). "A parent's failure to make progress in completing a case plan is indicative of a likelihood of future neglect." *In re M.A.*, 374 N.C. 865, 870 (2020) (cleaned up).

¶ 15 Respondent asserts that the trial court had no foundation for finding past neglect in finding of fact one—that "[respondent] has neglected the juvenile." According to respondent, the trial court could not have found past neglect when there was no evidence that respondent had custody of Carl in the past or was responsible for any neglect Carl experienced. Respondent argues that the trial court wrongly considered respondent's incompletion of his case plan as evidence of past neglect. Without a finding of past neglect, respondent further contends that the trial court could not have relied on the incompletion of his case plan to determine that there was a likelihood of future neglect.

¶ 16 This Court has long recognized that "evidence of neglect by a parent prior to losing custody of a child—including an adjudication of such neglect—is admissible in subsequent proceedings to terminate parental rights." *In re Ballard*, 311 N.C. 708, 715 (1984). In subsequent cases, we clarified that "[i]t is . . . not necessary that the parent whose rights are subject to termination be responsible for the prior adjudication of neglect." *In re J.M.J.-J.*, 374 N.C. 553, 565 (2020). Here, there was a prior adjudication of neglect. The trial court both took judicial notice of this prior adjudication of neglect and admitted it into evidence. Respondent never objected, either to the original adjudication or to its admission into evidence. Accordingly, the trial court did not err in finding past neglect in this case.

¶ 17 Outside of arguing that a trial court cannot determine that there is a likelihood of future neglect without first finding that the respondent himself neglected the child in the past, respondent does not otherwise challenge the trial court's determination in this case that there was a "substantial probability of a repetition of neglect." Having overruled respondent's arguments concerning past neglect, there remains no other challenge to the trial court's determination that there was a likelihood

of future neglect. Therefore, we affirm the trial court's adjudication that the ground of neglect existed in this case.

C. Best Interests

¶ 18 **[2]** At the dispositional stage of a termination proceeding, the trial court determines whether terminating the parent's rights is in the child's best interests. N.C.G.S. § 7B-1110(a). "The [trial] court may consider any evidence, including hearsay evidence as defined in [N.C.]G.S. [§] 8C-1, Rule 801, that the [trial] court finds to be relevant, reliable, and necessary to determine the best interests of the juvenile." *Id.*

¶ 19 Additionally, the trial court must

> consider the following criteria and make written findings regarding the following that are relevant:
>
> (1) The age of the juvenile.
>
> (2) The likelihood of adoption of the juvenile.
>
> (3) Whether the termination of parental rights will aid in the accomplishment of the permanent plan for the juvenile.
>
> (4) The bond between the juvenile and the parent.
>
> (5) The quality of the relationship between the juvenile and the proposed adoptive parent, guardian, custodian, or other permanent placement.
>
> (6) Any relevant consideration.

Id. Although the statute requires the trial court to consider each of the statutory factors, the trial court is only required to make written findings regarding those factors that are relevant. *In re A.R.A.*, 373 N.C. at 199. A factor is relevant if there is conflicting evidence concerning that factor. *Id.* If supported by the evidence received during the termination hearing or not specifically challenged on appeal, the trial court's dispositional findings are binding on appeal. *In re S.C.C.*, 379 N.C. 303, 2021-NCSC-144, ¶ 22.

¶ 20 Respondent argues that the trial court abused its discretion in terminating his parental rights because it failed to make findings concerning all of the factors relevant to Carl's best interests; specifically, a finding regarding respondent's bond with Carl pursuant to N.C.G.S. § 7B-1110(a)(4). Respondent argues that there was conflicting evidence in this case concerning the bond between respondent and Carl.

¶ 21 Here, the trial court explicitly found that "[respondent] obviously loves [Carl]." This finding shows that the trial court considered respondent's bond with Carl. Moreover, this finding was made in the context of the trial court considering other relevant facts. The trial court found that "[Carl] would benefit from the stability and love of a permanent family. While [respondent] obviously loves [Carl], he is not in a position to meet [Carl's] needs in a safe, nurturing, and stable environment." This Court has previously held that the trial court adequately addresses the parent-child bond when it finds "that any previous bond or relationship with the [respondent parent i]s outweighed by [the child's] need for permanence." *In re A.R.A.*, 373 N.C. at 200. Here, the trial court found that Carl had a "very" strong bond with his foster parents, having spent most of his life with them. These findings reflect that the trial court considered Carl's bond with his father, and the trial court did not abuse its discretion in determining it was in Carl's best interests to terminate respondent's parental rights.

III. Conclusion

¶ 22 The trial court did not err when it adjudicated that a ground existed to terminate respondent's parental rights pursuant to N.C.G.S. § 7B-1111(a)(1). Nor did the trial court abuse its discretion when it determined that the termination of respondent's parental rights was in Carl's best interests. Accordingly, we affirm the order terminating respondent's parental rights.

AFFIRMED.

IN RE D.D.M.

[380 N.C. 716, 2022-NCSC-34]

IN THE MATTER OF D.D.M.

No. 249A21

Filed 18 March 2022

Termination of Parental Rights—grounds for termination—failure to make reasonable progress—medical neglect of child—parent's untreated mental illness

The trial court properly terminated respondent-mother's rights in her son for failure to make reasonable progress to correct the conditions leading to the child's removal (N.C.G.S. § 7B-1111(a)(2)), which mainly consisted of respondent-mother's failure to seek necessary medical care for the child, who was born prematurely with a heart defect and severe lung problems. Respondent-mother did not comply with treatment recommendations for her various mental health issues, including bipolar disorder, despite receiving a psychological evaluation (which she had continually put off completing for two years) confirming the detrimental effect that these issues had on her ability to attend to her son's medical needs. Further, the court did not impermissibly terminate respondent-mother's rights on account of her poverty where social workers had made several efforts throughout the case to help respondent-mother complete her case plan despite her insufficient finances.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) (2019) from an order entered on 27 May 2021 by Judge Clifton H. Smith in District Court, Catawba County. This matter was calendared for argument in the Supreme Court on 18 February 2022 but determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

Maranda W. Stevens for petitioner-appellee Catawba County Department of Social Services.

Michelle FormyDuval Lynch for appellee Guardian ad Litem.

Richard Croutharmel for respondent-appellant mother.

EARLS, Justice.

¶ 1 Respondent-mother appeals from the trial court's order terminating her parental rights to her minor child D.D.M. (Damion).[1] She argues that the trial court committed reversible error in concluding that grounds existed to terminate her parental rights based on neglect and willful failure to make reasonable progress in correcting the conditions that led to removal under N.C.G.S. § 7B-1111(a)(1) and N.C.G.S. § 7B-1111(a)(2). After careful review of the record and consideration of the briefs of counsel, we affirm the trial court's order terminating respondent-mother's parental rights.

I. Factual and Procedural Background

¶ 2 Damion was born to respondent-mother on 14 August 2016 in Mecklenburg County. Damion was born at thirty-five weeks gestation with a heart defect and lung problems that required multiple corrective surgeries and resulted in Damion's extended need for oxygen and his intolerance of oral feedings, which required him to have a feeding tube. In October 2016, the Mecklenburg County Department of Social Services (MCDSS) received a child protective services report alleging that Damion was suffering from medical neglect under the care and custody of respondent-mother, as respondent-mother was allegedly not meeting his needs during his hospitalization and there had been an altercation between respondent-mother and Damion's father at the hospital. Hospital staff first expressed concerns about respondent-mother's ability to care for Damion upon his release from the hospital in November 2016 following his birth. After Damion's release from the hospital, respondent-mother was inconsistent with Damion's medical care. He missed multiple appointments with his various medical providers and missed in-home services including nursing and occupational therapy. On 8 December 2016, MCDSS received another child protective services report alleging respondent-mother's sustained medical neglect of Damion. The allegations in the report mirrored those that were raised in the October report.

¶ 3 In February 2017, the case was transferred to family in-home services through the Catawba County Department of Social Services (CCDSS) when respondent-mother relocated to Hickory, North Carolina. Special services were instituted to assist respondent-mother with Damion's care, and despite having access to these services, respondent-mother continued to be inconsistent in meeting Damion's medical needs. Damion's

1. This is a pseudonym used to protect the juvenile's identity. The father's parental rights to Damion were also terminated, but he did not participate in this appeal.

condition did not improve. On 22 June 2017, respondent-mother delayed bringing Damion to the hospital for fifteen hours after she was told by healthcare providers that he needed to be seen immediately because his feeding tube was dislodged following an altercation between respondent-mother and Damion's grandmother. When Damion was admitted to the hospital, his blood sugar was extremely low because he had not received any nourishment for approximately fifteen hours. Respondent-mother's delay in taking Damion to the hospital placed him at risk of a seizure, and when he was finally dropped off for admittance, medical providers did not see respondent-mother again until Damion was ready to be discharged seven days later.

¶ 4 On or about 12 July 2017, Damion's pediatrician contacted the hospital where he had received care and expressed continued concerns regarding his weight loss. Damion was immediately referred to the emergency department for evaluation, and he was ultimately admitted to an inpatient unit. Upon his readmission to the hospital, Damion had lost considerable weight from his discharge weight on 29 June 2017. As had been the case in June, no family was present to accompany Damion or provide physicians with his medical history, nor was respondent-mother present to receive education about how to properly care for Damion's medical needs. Damion's medical providers attributed his limited progress to respondent-mother's inability to appropriately meet his healthcare needs and they also raised concerns that respondent-mother suffered from untreated mental health diagnoses. While hospitalized, Damion's weight improved. Medical providers ultimately concluded that Damion's ongoing weight loss and lack of weight gain was related to the poor care that he had been receiving while in respondent-mother's home. Medical providers determined that Damion could not be safely released to respondent-mother following his readmission to the hospital in July.

¶ 5 On 27 July 2017, CCDSS filed a petition alleging that Damion was a neglected and dependent juvenile. The District Court, Catawba County granted non-secure custody of Damion to CCDSS on 28 July 2017. Thereafter, Damion was placed in a foster home where he received proper medical care, began to steadily gain weight, and caught up with age-appropriate developmental milestones. Meanwhile, respondent-mother failed to follow through with a mental health evaluation and treatment, stormed out of a scheduled appointment with a counselor after she did not receive medication, and obstructed efforts made by social services to obtain her signature for a case plan for Damion. Between the filing of the petition and the adjudication hearing in March,

April, and May of 2018, respondent-mother had exercised only sporadic visitation with Damion and attended just seven of the thirty visits that were made available to her after Damion was placed in foster care.

¶ 6 After a hearing on 30 May 2018, Damion was adjudicated a neglected and dependent juvenile. The trial court awarded CCDSS legal custody of Damion and respondent-mother was allowed supervised visitation with him for four hours per month. The trial court also ordered respondent-mother to enter into and comply with a case plan for reunification purposes. The trial court ordered that respondent-mother:

> a. Complete comprehensive medical training to meet the medical needs of her infant son;
> b. Complete a full psychological evaluation and follow recommendations;
> c. Provide and maintain stable housing;
> d. Maintain employment; and
> e. Consistently show the capacity to attend all scheduled appointments and meet all medical needs of her minor child.

Respondent-mother was also ordered to provide the court at the next hearing with evidence of efforts she had made to improve her transportation situation. Social workers continued to make efforts to help respondent-mother comply with her case plan. By the next hearing date on 17 September 2018, respondent-mother had only visited with Damion three times, despite the social worker's efforts to arrange transportation for the visits.

¶ 7 Over the next year, from October 2018 to October 2019, the trial court continued to enter permanency-planning orders as to Damion with the same case plan requirements. Between 2018 and 2019, the trial court found that overall, respondent-mother failed to make reasonable progress on correcting the conditions that led to Damion's removal, and that she did not follow through on complying with many of the requirements of her case plan.

¶ 8 On 17 December 2019, CCDSS moved to terminate respondent-mother's parental rights to Damion for neglect pursuant to N.C.G.S. § 7B-1111(a)(1), failure to make reasonable progress pursuant to N.C.G.S. § 7B-1111(a)(2), and failure to pay a reasonable portion of Damion's cost of care pursuant to N.C.G.S. § 7B-1111 (a)(3). After a hearing on the motion, the trial court concluded that grounds existed to terminate respondent-mother's parental rights to Damion under N.C.G.S.

§ 7B-1111(a)(1) and (a)(2) and determined that termination was in Damion's best interests. Respondent-mother appeals.

II. Analysis

¶ 9 On appeal, respondent-mother challenges the trial court's adjudication that grounds existed to terminate her parental rights for willful failure to make reasonable progress to correct the conditions that led to Damion's removal. Our standard of review is well-established:

> When reviewing the trial court's adjudication of grounds for termination, we examine whether the court's findings of fact are supported by clear, cogent[,] and convincing evidence and whether the findings support the conclusions of law. Any unchallenged findings are deemed supported by competent evidence and are binding on appeal. The trial court's conclusions of law are reviewed de novo.

In re Z.G.J., 378 N.C. 500, 2021-NCSC-102, ¶ 24 (cleaned up). The trial court's findings of fact that are supported by clear, cogent, and convincing evidence are deemed conclusive even when some evidence supports contrary findings. *In re Helms*, 127 N.C. App. 505, 511 (1997).

¶ 10 Here, the trial court concluded that respondent-mother willfully left Damion in foster care or a placement outside the home for more than twelve months without showing to the court's satisfaction that she made reasonable progress to rectify the conditions that led to his removal under N.C.G.S. § 7B-1111(a)(2). Respondent-mother does not dispute adjudicatory findings of fact 1 through 23. Those findings specify the ways that respondent-mother failed to make reasonable progress on correcting the conditions which led to Damion's removal during the forty-six months that he spent in foster care before her parental rights were terminated. Among other things, respondent-mother was specifically ordered to complete a full psychological evaluation and follow any recommendations, which may have aided in her capacity to adequately manage Damion's extensive and serious medical needs.

¶ 11 After respondent-mother completed a mental health assessment, she was diagnosed with adjustment disorders, including mixed anxiety and depressed mood. Consequently, respondent-mother's evaluating clinician recommended that she participate in therapy up to two times per week, submit to a psychiatric evaluation, and obtain crisis services to reduce the risk of harm to herself and others. Respondent-mother failed to follow through with the recommended outpatient therapy and did not

obtain the recommended psychiatric evaluation until almost two years after Damion was placed into CCDSS's custody. After respondent-mother finally completed the court-ordered evaluation, which resulted in a diagnosis of bipolar I disorder, her mental illness remained untreated. Respondent-mother's evaluating clinician, Dr. Jennifer Cappelletty, emphasized that respondent-mother's "untreated mental illness has contributed to her overall instability, poor judgment, unhealthy interpersonal relationships, and emotional dysregulation that have negatively impacted her capacity to effectively parent her children."

¶ 12 Throughout the history of this case respondent-mother's untreated mental health disorders caused Damion's doctors to be concerned that her illnesses contributed to her inability to properly attend to Damion's medical needs, and ultimately, respondent-mother's mental health challenges led to Damion's removal for neglect. The undisputed findings of fact in the trial court's order are based on the clear, cogent, and convincing evidence that respondent-mother failed to obtain treatment for her mental illness even though she received a psychiatric evaluation confirming the detrimental effect of her illness on her parenting abilities and recommending that she receive treatment. Respondent-mother's failure in this regard ultimately prevented her from making reasonable progress under the circumstances to correct the conditions which led to Damion's removal within the meaning of N.C.G.S. § 7B-1111(a)(2). Because respondent-mother does not contest these findings of fact on appeal, they are deemed to be supported by sufficient evidence. *In re Clark*, 159 N.C. App. 75, n.5 (2003) (citing *In re Caldwell*, 75 N.C. App. 299, 301 (1985)).

¶ 13 Respondent-mother argues that the trial court impermissibly terminated her parental rights based on N.C.G.S. § 7B-1111(a)(2) because it failed to consider the extent to which her inability to care for Damion was due to her being impoverished. The applicable statute requires that "[n]o parental rights, however, shall be terminated for the sole reason that the parents are unable to care for the juvenile on account of their poverty." N.C.G.S. § 7B-1111(a)(2) (2021). Here, it was respondent-mother's failure to make reasonable efforts to complete her case plan, rather than her lack of financial resources, that was the basis of the trial court's order. For example, social workers who attempted to engage with respondent-mother consistently offered her transportation to Damion's medical appointments and visitations, and when respondent-mother moved to Durham County she was given the option of participating in virtual visitations if in-person visitations became infeasible. Additionally, the trial court found that respondent-mother did

not demonstrate the sustained behavioral change that was necessary for Damion to be safely returned to her care.

¶ 14 Furthermore, respondent-mother had difficulty maintaining consistent employment while Damion was placed elsewhere. She quit her job at Taco Bell in January 2019 and then began working at an assisted living facility in May 2019. But at the time of the trial court's order terminating her parental rights, respondent-mother had been unemployed since the birth of her youngest child in or around March 2020. On balance, the trial court's findings demonstrate that respondent-mother could have sought to comply with the requirements of her case plan even while experiencing otherwise insufficient monetary resources.

¶ 15 We therefore hold that the trial court properly determined grounds existed to terminate respondent-mother's parental rights pursuant to N.C.G.S. § 7B-1111(a)(2). "[A]n adjudication of any single ground in N.C.G.S. § 7B-1111(a) is sufficient to support a termination of parental rights," and it is not necessary to address the sufficiency of the trial court's conclusions of law or findings of fact relative to any other ground. *In re E.H.P.*, 372 N.C. 388, 395 (2019); *see also In re T.N.H.*, 372 N.C. 403, 413 (2019). Thus, we decline to reach the question of whether the trial court properly terminated respondent-mother's parental rights for neglect pursuant to N.C.G.S. § 7B-1111(a)(1).

III. Conclusion

¶ 16 We conclude that the trial court did not err in adjudicating the existence of grounds for termination of respondent-mother's parental rights in Damion. Respondent-mother does not challenge the trial court's determination that termination of her parental rights was in Damion's best interests. We therefore hold that the trial court based its findings of fact and conclusions of law on sufficient evidence and appropriately terminated respondent-mother's parental rights under N.C.G.S. § 7B-1111(a)(2) and that termination was in Damion's best interest. In light of the foregoing, the order terminating respondent-mother's parental rights must be affirmed.

AFFIRMED.

IN RE D.I.L.

[380 N.C. 723, 2022-NCSC-35]

IN THE MATTER OF D.I.L.

No. 268A21

Filed 18 March 2022

Termination of Parental Rights—grounds for termination—neglect—likelihood of repetition of neglect—parental fitness at time of proceeding

In a private termination of parental rights matter, where petitioners had obtained custody of the child pursuant to a civil custody order, the trial court properly terminated the father's parental rights in the child on grounds of neglect (N.C.G.S. § 7B-1111(a)(1)). Although the father could not regain custody under the civil order without a substantial change in his parenting skills and ability to care for the child, the court did not err in determining that a substantial likelihood of repetition of neglect existed where, under the applicable statutes, that determination depends not on the parent's fitness to regain custody of the child but rather on the parent's fitness to care for the child at the time of the termination proceeding.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) (2019) from an order entered on 1 June 2021 by Judge David V. Byrd in District Court, Yadkin County. This matter was calendared for argument in the Supreme Court on 18 February 2022 but determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

J. Clark Fischer for petitioner-appellees.

No brief for Guardian ad Litem.

Peter Wood for respondent-appellant father.

BARRINGER, Justice.

¶ 1 Respondent appeals from the order terminating his parental rights to his minor child D.I.L. (Daniel).[1] The trial court concluded that both

1. A pseudonym is used in this opinion to protect the juvenile's identity and for ease of reading.

respondent and Daniel's biological mother (mother)[2] had neglected Daniel and that there was a substantial likelihood of repetition of neglect of Daniel by respondent and the mother. Hence, the trial court found that the ground of neglect pursuant to N.C.G.S. § 7B-1111(a)(1) existed to terminate respondent's parental rights. The trial court further concluded that it was in the best interests of Daniel that respondent's and the mother's parental rights be terminated and thus terminated their parental rights.

¶ 2 On appeal, respondent challenges the trial court's determination that there was a substantial likelihood of repetition of neglect if Daniel was returned to respondent's care. Respondent contends this determination was erroneous because petitioners had custody pursuant to a civil custody order, rendering respondent unable to obtain custody without a substantial change in his ability to care for Daniel and his parenting skills. Since we conclude that this argument has no merit, we affirm the trial court's order terminating the parental rights of respondent to Daniel.

I. Background

¶ 3 When Daniel resided with his mother and respondent, Daniel witnessed them sticking themselves with needles and selling drugs. They also instructed Daniel to obtain their "happy medicine," which involved needles. Respondent overdosed once, necessitating emergency medical services, and had an ongoing drinking problem. As respondent and the mother passed out frequently from their substance use, Daniel's older half-brother had to feed Daniel. The home was dirty and infested with roaches.

¶ 4 Eventually, the Wilkes County Department of Social Services (DSS) became involved with the family because of illegal drug activity in respondent and the mother's home. Respondent and the mother approached petitioners about taking care of Daniel's older half-brother, and petitioners came to learn of Daniel's situation through DSS.

¶ 5 Thereafter, on 24 February 2016, petitioners took Daniel and Daniel's half-brother into their care. Daniel arrived with educational deficits for his age, food insecurity, clothing infested with roaches and contaminated by intravenous needles, unprescribed medicine, and fears of corporal punishment if he was caught lying.

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

¶ 6 DSS subsequently filed a petition alleging that Daniel was a neglected juvenile. The trial court adjudicated Daniel a neglected juvenile by order entered on 20 July 2016. Thereafter, on 7 September 2016, in a civil custody proceeding, the trial court granted petitioners primary legal and physical custody of Daniel. The order provided respondent with monthly supervised visitation.

¶ 7 Respondent initially utilized some of his visitation rights but did not interact with Daniel very much during the visits. Respondent visited with Daniel approximately eight times between 2016 and 2017. During this time period, respondent provided Daniel a bike, some clothes, and some toys. However, at a visit in 2016, respondent arrived high and could barely walk or talk, and at a visit in 2017, respondent smelled of alcohol and drank from a container in a brown bag. The visit in August 2017 was the last time respondent visited with Daniel or petitioners. Respondent did not contact petitioners to arrange subsequent visits and ceased calling petitioners. Respondent also had not written or sent any cards to Daniel since 2015.

¶ 8 Respondent filed a motion to modify custody on 17 September 2018. On 2 October 2018, petitioners filed a petition to terminate respondent's and the mother's parental rights, alleging neglect and willful abandonment pursuant to N.C.G.S. § 7B-1111(a)(1) and (a)(7). Petitioners subsequently amended the petition on 8 April 2019 to attach the custody orders referenced in the petition.

¶ 9 A termination-of-parental-rights hearing occurred over the course of three days. At the time, respondent was on probation. Respondent previously had been convicted of driving while impaired and one or more drug offenses, including maintaining a dwelling for purposes of controlled substances. Respondent was employed, had health insurance, resided in a two-bedroom mobile home, and paid child support for one of his children. However, he had not paid child support for Daniel (or any of his other children) or added Daniel to his health insurance plan despite its availability. Respondent acknowledged that he chose not to pay child support for Daniel's care.

¶ 10 The trial court found that a ground existed to terminate respondent's parental rights pursuant to N.C.G.S. § 7B-1111(a)(1) and that termination was in Daniel's best interests. Accordingly, the trial court terminated respondent's parental rights. Respondent appealed.

II. Substantial Likelihood of Repetition of Neglect

¶ 11 On appeal, respondent argues that the trial court committed prejudicial error for one reason: the trial court found a substantial likelihood

of repetition of neglect when there was no chance for respondent to obtain custody of Daniel unless respondent showed a substantial change in his parenting skills and ability to care for Daniel. Respondent argues that this showing would be required for him to obtain custody because petitioners already had custody pursuant to a civil custody order.

¶ 12 Petitioners contend that the existence of a civil custody order does not bar a determination of a substantial likelihood of repetition of neglect. Petitioners argue that this Court's decision in *In re B.T.J.*, 377 N.C. 18, 2021-NCSC-23, directs the trial court to assess the fitness of the parent to care for the child *at the time of the termination-of-parental-rights proceeding* when determining a probability of repetition of neglect. Thus, according to petitioners, the custody order is irrelevant. Further, petitioners raise that respondent's contention ignores the definitions of neglect and neglected juvenile under the applicable statutes, N.C.G.S. § 7B-1111(a)(1) and N.C.G.S. § 7B-101(15).

¶ 13 We agree that respondent's argument is contrary to this Court's prior decisions. For several decades, this Court has recognized that in addition to evidence of prior neglect by the parents prior to losing custody of the juvenile, including an adjudication of neglect,

> [t]he trial court must also consider any evidence of changed conditions in light of the evidence of prior neglect and the probability of a repetition of neglect. The determinative factors must be the best interests of the child and the fitness of the parent to care for the child *at the time of the termination proceeding*.

In re Ballard, 311 N.C. 708, 715 (1984) (cleaned up); *see also In re B.T.J.*, ¶ 13.

¶ 14 Further, the applicable statutes do not deem the fitness necessary for a parent to regain custody of a child relevant to a determination of neglect under N.C.G.S. § 7B-1111(a)(1). Pursuant to N.C.G.S. § 7B-1111(a)(1), a trial court "may terminate . . . parental rights upon a finding [that] . . . [t]he parent *has* . . . neglected the juvenile." N.C.G.S. § 7B-1111(a) (2021) (emphasis added). And subsection 7B-101(15) of the General Statutes of North Carolina defines neglected juvenile to include "[a]ny juvenile less than 18 years of age . . . whose parent, guardian, custodian, or caretaker *does* not provide proper care, supervision, or discipline." N.C.G.S. § 7B-101(15) (2019) (emphasis added); *see also* N.C.G.S. § 7B-101(15) (2021) (defining neglected juvenile as "[a]ny juvenile less than 18 years of age . . . whose parent, guardian, custodian, or caretaker *does* any of the following: . . . [d]oes not provide proper care,

supervision, or discipline" (emphasis added)). Notably, the applicable statutes use the present or present perfect tense—not the future—and make no mention of the fitness necessary for a parent to regain custody of his or her child.

¶ 15 Thus, we conclude that the trial court did not err.

III. Conclusion

¶ 16 Having addressed the one issue respondent identified on appeal[3] —whether "[t]he trial court committed prejudicial error by finding a probability of future neglect when there was no risk of future neglect because Daniel could not be returned to [respondent] under the civil custody order unless a court found there was no risk to the child"—and having found no merit to the argument, we affirm the trial court's order terminating respondent's parental rights.

AFFIRMED.

3. Respondent stated in his brief that he "dispute[d] conclusions of law six and seven." However, respondent offered no argument or reason to support this statement other than the one issue that he identified on appeal, which we hold has no merit. Thus, we have addressed the issue presented to the Court. All other issues are deemed abandoned. *See* N.C. R. App. P. 28(a), (b)(6).

IN RE H.R.S.

[380 N.C. 728, 2022-NCSC-36]

IN THE MATTER OF H.R.S.

No. 227A21

Filed 18 March 2022

Termination of Parental Rights—best interests of the child—placement with foster mother—consideration of relatives

The trial court did not abuse its discretion by concluding that termination of a mother's parental rights was in her daughter's best interests and by placing the child with her nonrelative foster mother. The court's unchallenged findings addressed statutory dispositional factors, including that the child had an extremely strong bond with the foster mother and that there was a high likelihood of adoption, and gave relevant consideration to family members who were identified late in the proceedings as being available for placement. The trial court was not required to prioritize placement with a relative, and its findings indicated an appropriate balancing of competing goals.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) (2019) from orders entered on 28 April 2021 by Judge Thomas B. Langan in District Court, Stokes County. This matter was calendared for argument in the Supreme Court on 18 February 2022 but determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

Jennifer Oakley Michaud for petitioner-appellee Stokes County Department of Social Services.

James N. Freeman Jr. for appellee Guardian ad Litem.

Robert W. Ewing for respondent-appellant mother.

NEWBY, Chief Justice.

IN RE H.R.S.

[380 N.C. 728, 2022-NCSC-36]

¶ 1 Respondent-mother appeals from the trial court's orders terminating her parental rights[1] to H.R.S. (Heather).[2] After careful review, we affirm the trial court's orders.

¶ 2 Heather was born on 15 August 2017 in Forsyth County. On 10 April 2019, the Stokes County Department of Social Services (DSS) received a child protective services report regarding Heather due to a domestic violence incident and concerns regarding respondent's substance abuse. At the time, respondent and Heather lived in the home of Heather's maternal grandparents with several relatives. In the days leading up to the incident, respondent "exhibited signs of hallucinations"—claiming "that she was speaking with a deceased individual"—and also "exhibited paranoia that those in the home were going to injure her." On 10 April 2019, respondent came home with Heather and appeared to be under the influence of drugs or alcohol. The maternal great-grandmother came outside and asked respondent to leave. Ignoring the maternal great-grandmother, respondent went inside and stabbed the maternal grandfather repeatedly. Respondent was arrested and charged with attempted first-degree murder and felony assault with a deadly weapon with intent to kill inflicting serious injury.

¶ 3 That same day, the social worker assigned to Heather's case learned that respondent did not want Heather to remain in the home with the maternal grandparents. Respondent wanted Heather to be placed with Heather's paternal grandparents. After an investigation, however, the social worker determined that Heather's paternal grandparents could not serve as a placement due to their criminal history. That day, the social worker placed Heather with her maternal uncle; Heather and her maternal uncle were to reside at a neighbor's home.

¶ 4 On 11 April 2019, the social worker contacted Heather's father, who was incarcerated at the Forsyth County Jail.[3] Heather's father was

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1. Respondent also noticed an appeal from the trial court's permanency planning order resulting from a hearing on 21 January 2021, but she does not present any argument as to that order in her brief. Thus, this argument is waived. *See In re E.S.*, 378 N.C. 8, 2021-NCSC-72, ¶ 19 (holding that an argument was waived under N.C. R. App. P. 28(a) because the respondent did not present or discuss that argument in the brief).

2. A pseudonym is used in this opinion to protect the juvenile's identity and for ease of reading.

3. The trial court also terminated the parental rights of Heather's father, but he did not appeal the trial court's order. Thus, we only recount the actions of Heather's father as relevant to respondent's arguments.

concerned because he was "aware of [respondent] and [Heather's maternal uncle] using [m]ethamphetamines together at the neighbor's home." DSS then filed a juvenile petition alleging that Heather was a neglected juvenile because she "live[d] in an environment injurious to [her] welfare."[4] The trial court entered a nonsecure custody order which gave custody of Heather to DSS and authorized her placement with a foster parent. Thus, Heather was removed from the care of her maternal uncle on 11 April 2019 and placed in a foster home. On 16 April 2019, the trial court ordered DSS to perform a kinship assessment on Heather's maternal great-aunt and great-uncle; Heather was placed with them on 22 April 2019.

¶ 5 Over the next month, DSS continued working with respondent's family to find an appropriate relative placement. The maternal grandparents "completed a home study in May [of 2019] and were in the process of being considered for placement." Heather's maternal grandfather ultimately refused to submit to a hair follicle test and told the social worker on 31 May 2019 that he and the maternal grandmother "wished to withdraw from consideration of their home as a potential placement." After a social worker requested that Heather's maternal uncle undergo a drug screen, he also withdrew from consideration the same day. As noted in a DSS court report filed on 29 July 2019,

> [d]uring the course of [31 May 2019], [Heather's] current placement provider was having chest pains and admitted into the hospital. They requested respite care for [Heather] over the weekend. The following Monday, [the social worker] took [Heather] to the pediatrician where she was diagnosed with the viral infection of hand[,] foo[t,] and mouth. [The social worker] . . . then traveled to [Heather's] maternal great[-]aunt and [great-]uncle's home to discuss [the] most recent decisions by [Heather's maternal uncle]. Both adults were visibly upset while expressing their love for [Heather] and wanting what is best for her. The placement providers were upfront and honest in the beginning [of the placement] about their inabilities to do this long term. [Heather's maternal great-aunt and great-uncle] were adamant they only wanted what was best for [Heather] and that being with a foster parent was in her best interest.

4. The juvenile petition also alleged that Heather was a dependent juvenile. DSS voluntarily dismissed the dependency allegation without prejudice on 25 July 2019.

Having already determined that Heather's paternal grandparents were not an appropriate placement, DSS returned Heather to her previous foster placement on 31 May 2019. Heather remained in this placement throughout the remainder of the proceedings.

¶ 6 While incarcerated, respondent was charged with assault on a government official and resisting a public officer and was placed on suicide watch. After the trial court held a hearing regarding the juvenile petition on 25 July 2019, the trial court found that Heather was a neglected juvenile because she "was exposed to substance abuse and therefore lived in an environment injurious to her welfare." The trial court set the permanent plan for Heather as reunification with her parents, with a concurrent plan of adoption. The trial court concluded that visitation with respondent was "not in [Heather]'s best interests, as [respondent] remain[ed] incarcerated." Moreover, the trial court ordered respondent to "enter into a case plan and comply with its terms." Respondent entered into her case plan on 30 January 2020. On 21 September 2019, respondent was convicted of assault on a government official and resisting a public officer. On 22 October 2019, respondent was convicted of attempted first-degree murder and assault with a deadly weapon with intent to kill inflicting serious injury. Respondent will remain in prison until at least October of 2023.

¶ 7 K.T.,[5] a cousin of Heather's father, and her husband J.T. became involved in the case in January of 2020. K.T. and J.T. live in Hagerstown, Maryland, in a three-bedroom ranch house on at least an acre of land. J.T. is a sergeant with the Maryland State Police; he is a shift commander responsible for other troopers. On 1 January 2020, several months after Heather was returned to her foster placement, K.T. and J.T. learned from a relative that Heather was in DSS custody; Heather's father did not initially inform them. That day, K.T. called DSS several times but was unable to make contact because DSS was closed. During January and February of 2020, K.T. and J.T. spoke with DSS employees on the phone and visited North Carolina. DSS informed K.T. and J.T. that DSS was not "seeking any placement with family outside the state because the primary goal was supposed to be reunification." After March of 2020, K.T. and J.T. did not speak with DSS again for several months. In May of 2020, while visiting North Carolina, K.T. spoke with Heather's father, who was "very optimistic that he was getting [Heather] back at that time."

¶ 8 After a review hearing on 16 July 2020, the trial court changed Heather's primary permanent plan to termination of parental rights

5. Initials are used for these relatives to further protect the juvenile's identity.

and adoption, with a secondary plan of reunification. DSS filed a motion to terminate respondent's parental rights on 17 September 2020 on the grounds of neglect, willfully leaving the juvenile in foster care while failing to make reasonable progress, and dependency. *See* N.C.G.S. § 7B-1111(a)(1), (2), and (6) (2021). On 22 December 2020, Heather's father filed a "Motion for Expedited Inquiry of Placement" which requested the trial court to "[o]rder DSS to complete an expedited inquiry into placement with" Heather's paternal grandmother or K.T. In its order denying the father's motion, the trial court found:

> 6. The juvenile has never met [K.T.], who resides in Maryland. Placement with [Heather's paternal grandmother] was evaluated and determined to be against [Heather's] best interests, earlier in the case.
>
> . . . .
>
> 8. [K.T.] lives in Maryland, and an Interstate Compact Home Study would be required to investigate her suitability for placement. Because of the affinity between [K.T.] and the juvenile, the case does not qualify for an expedited home study.
>
> . . . .
>
> 12. [K.T. and J.T.] did not contact the Stokes [County] Department of Social Services prior to the initial disposition of the case. The father contacted the Stokes [County] Department of Social Services regarding [K.T. and J.T. on] 12/9/2020 for the first time.

The trial court therefore concluded that "[i]t is contrary to the best interests of the juvenile to be taken from her foster home, where she has lived for 20 months, and placed with relatives." Thus, the trial court denied the father's motion.

¶ 9 The motion to terminate respondent's parental rights was heard on 10 February 2021 and 26 February 2021. In a written order entered on 28 April 2021, the trial court determined that grounds existed to terminate respondent's parental rights under N.C.G.S. § 7B-1111(a)(1) and (2). In a separate written order entered the same day, the trial court concluded it was in Heather's best interests to terminate respondent's parental rights. Accordingly, the trial court terminated respondent's parental rights. Respondent appeals.

¶ 10 A termination of parental rights proceeding consists of an adjudicatory stage and a dispositional stage. N.C.G.S. §§ 7B-1109, -1110 (2021); *In re Montgomery*, 311 N.C. 101, 110, 316 S.E.2d 246, 252 (1984). Respondent does not challenge the grounds for termination adjudicated by the trial court under N.C.G.S. § 7B-1111(a), nor does respondent challenge the findings of fact in the trial court's disposition order. Rather, respondent argues the trial court erred by concluding that terminating her parental rights was in Heather's best interests.

¶ 11 "A trial court's determination concerning whether termination of parental rights would be in a juvenile's best interests 'is reviewed solely for abuse of discretion.' " *In re S.D.C.*, 373 N.C. 285, 290, 837 S.E.2d 854, 858 (2020) (quoting *In re A.U.D.*, 373 N.C. 3, 6, 832 S.E.2d 698, 700 (2019)). "Under this standard, we defer to the trial court's decision unless it is 'manifestly unsupported by reason or one so arbitrary that it could not have been the result of a reasoned decision.' " *In re A.K.O.*, 375 N.C. 698, 701, 850 S.E.2d 891, 894 (2020) (quoting *In re Z.A.M.*, 374 N.C. 88, 100, 839 S.E.2d 792, 800 (2020)). When determining whether termination of a parent's rights is in a child's best interests,

> [t]he court may consider any evidence, including hearsay evidence as defined in [N.C.]G.S. [§] 8C-1, Rule 801 [(2021)], that the court finds to be relevant, reliable, and necessary to determine the best interests of the juvenile. In each case, the court shall consider the following criteria and make written findings regarding the following that are relevant:
>
> (1) The age of the juvenile.
>
> (2) The likelihood of adoption of the juvenile.
>
> (3) Whether the termination of parental rights will aid in the accomplishment of the permanent plan for the juvenile.
>
> (4) The bond between the juvenile and the parent.
>
> (5) The quality of the relationship between the juvenile and the proposed adoptive parent . . . .
>
> (6) Any relevant consideration.

N.C.G.S. § 7B-1110(a). This Court is "bound by all uncontested dispositional findings." *In re E.F.*, 375 N.C. 88, 91, 846 S.E.2d 630, 632 (2020) (citing *In re Z.L.W.*, 372 N.C. 432, 437, 831 S.E.2d 62, 65 (2019)).

¶ 12 In its disposition order, the trial court found the following facts relating to Heather's bond with her foster mother:

> 5. The juvenile's current placement is pre-adoptive, and as such the likelihood of adoption of the juvenile is exceptionally high. [Heather's foster mother] has expressed an interest and a desire in adopting the juvenile.
>
> 6. The juvenile has been in the custody of Stokes County DSS for six-hundred and eighty-six days as of today's hearing.
>
> 7. That the juvenile has been in the care of her current foster mother . . . for six-hundred [and] fifty-seven days.
>
> 8. That the juvenile had behavioral issues when she came into care. She would not hug and refused to be hugged. She banged her head [and] would stick her fingers in her ears. She has since become an affectionate a[nd] loving child who is excited and happy.
>
> 9. In May of 2019, the juvenile cried and was not able to look at the social worker but is now excited to see her.
>
> 10. That the juvenile is now verbal and has friends within her community in North Carolina.
>
> 11. A strong, loving bond exists between [the foster mother] and the juvenile. The juvenile calls [her foster mother], "Mommy", and turns to [her foster mother] when the juvenile is upset. This bond is of a very high quality.

Moreover, the trial court found the following facts as to K.T. and J.T.:

> 30. That [K.T. and J.T.] have the ability to effectuate a relationship between the minor child's half-sibling and other biological family members of the minor child that reside in Maryland.
>
> 31. That [K.T. and J.T.] are willing to provide a permanent placement for the minor child, including adoption.

> 32. That but for the bond between the juvenile and [the foster mother], [K.T. and J.T.] would make suitable caretakers and custodians of the juvenile.
>
> . . . .
>
> 39. That the father indicated to [K.T. and J.T.] as late as the summer of 2020 that it was likely or that he hoped for reunification with the juvenile.
>
> 40. That the father did not contact [K.T. and J.T.] until later in the year of 2020 to see if they would be willing to be considered for placement of the juvenile.
>
> 41. That counsel for the father proffered [K.T. and J.T.] . . . as a placement option in December of 2020.
>
> 42. During the time the underlying abuse, neglect, [and] dependency case was pending, [K.T. and J.T.] never asked to visit the juvenile and have still never met the juvenile.
>
> 43. That the father knew as early as May of 2020 that [K.T. and J.T.] were willing to offer themselves as placement options.
>
> . . . .
>
> 46. That the father's lack of participation in this case resulted in not communicating the interest of [K.T. and J.T.] as a placement option prior to at the earliest November of 2020.

Respondent does not challenge these dispositional findings; thus, they are binding on appeal. *In re A.K.O.*, 375 N.C. at 702, 850 S.E.2d at 894 ("Dispositional findings not challenged by respondents are binding on appeal.").

¶ 13 Respondent contends that "DSS failed to inform the trial court that there were relatives who were willing and able to provide for Heather's proper care and supervision." Thus, respondent argues, "[t]he trial court was not able to consider the paternal relative[s] as Heather's 'first' placement as required by . . . N.C.[G.S.] § 7B-903(a1)." Moreover, respondent contends that the trial court's factual findings did not support

the conclusion that terminating respondent's parental rights was in Heather's best interests. This is especially so, respondent contends, because the trial court also found that Heather had family members who could be a suitable placement.

¶ 14 During the initial abuse, neglect, and dependency stage of a juvenile proceeding, the Juvenile Code requires a trial court "to consider whether a relative placement is available." *In re S.D.C.*, 373 N.C. at 290, 837 S.E.2d at 858; *see also* N.C.G.S. § 7B-900 (2021) ("If possible, the *initial approach* should involve working with the juvenile and the juvenile's family in their own home . . . ." (emphasis added)); N.C.G.S. § 7B-903(a1) (2021) ("In placing a juvenile in *out of home* care under this section, the court shall first consider whether a relative of the juvenile is willing and able to provide proper care and supervision of the juvenile in a safe home."). Under N.C.G.S. § 7B-1110(a), however, "the trial court is not expressly directed to consider the availability of a relative placement in the course of deciding a termination of parental rights proceeding." *In re K.A.M.A.*, 2021-NCSC-152, ¶ 14 (quoting *In re S.D.C.*, 373 N.C. at 290, 837 S.E.2d at 858). Rather, if the record contains evidence tending to show a relative can provide care for the juvenile, the trial court "may treat the availability of a relative placement as a 'relevant consideration' " under N.C.G.S. § 7B-1110(a)(6). *Id.* (quoting *In re S.D.C.*, 373 N.C. at 290, 837 S.E.2d at 858). Moreover, " 'the availability of a relative [placement] during the dispositional phase' . . . is not determinative." *In re C.A.D.*, 247 N.C. App. 552, 564, 786 S.E.2d 745, 752 (2016) (quoting *In re M.M.*, 200 N.C. App. 248, 258, 684 S.E.2d 463, 469 (2009)). In such a case, "the trial court should make findings of fact addressing 'the competing goals of (1) preserving the ties between the children and their biological relatives; and (2) achieving permanence for the children as offered by their prospective adoptive family.' " *In re S.D.C.*, 373 N.C. at 290, 837 S.E.2d at 858 (quoting *In re A.U.D.*, 373 N.C. at 12, 832 S.E.2d at 703–04).

¶ 15 Here the trial court appropriately balanced these competing goals. At the beginning of the case, in April and May of 2019, DSS attempted to place Heather with her various relatives. Early in the case, DSS determined that Heather's paternal grandparents would not be an appropriate placement due to their criminal history. On the day respondent stabbed Heather's maternal grandfather, Heather was initially placed with her maternal uncle. After Heather was removed from the care of her maternal uncle due to his suspected use of methamphetamines, Heather was briefly placed with her foster mother while DSS investigated other family members as placement options. Prioritizing relatives, DSS then

placed Heather with her maternal great-aunt and great-uncle, although this placement was only temporary. Heather's maternal great-aunt and great-uncle subsequently encountered health problems that prevented them from continuing to care for Heather. Moreover, the maternal uncle and the maternal grandparents withdrew from consideration as relative placements on 31 May 2019. Thus, Heather was returned to her foster mother that day. At no time during this initial portion of the case, when DSS was looking for relative placements, was DSS informed of K.T. and J.T. Rather, DSS was informed of K.T. and J.T. as a placement option in November of 2020 at the earliest, well after Heather was returned to the care of her foster mother.

¶ 16 Moreover, the trial court properly treated the availability of K.T. and J.T. as a "relevant consideration" under N.C.G.S. § 7B-1110(a)(6). The trial court found that K.T. and J.T. "would make suitable caretakers and custodians of the juvenile." The trial court also found, however, that Heather's likelihood of adoption by her foster mother was "exceptionally high" and that "[a] strong, loving bond exists between [the foster mother] and the juvenile," a bond that "is of a very high quality." The trial court further found that Heather "had behavioral issues when she came into care" and found that those issues improved while living with her foster mother. Thus, the trial court balanced the goal of preserving Heather's ties with her relatives against the goal of achieving permanence for Heather. The trial court was not required to prioritize placement with K.T. and J.T. Therefore, the trial court did not abuse its discretion by determining that termination of respondent's parental rights was in Heather's best interests. Accordingly, we affirm the trial court's orders.

AFFIRMED.

IN RE J.C.

[380 N.C. 738, 2022-NCSC-37]

IN THE MATTER OF J.C. AND D.C.

No. 166A21

Filed 18 March 2022

Termination of Parental Rights—standard of proof—clear, cogent, and convincing—not stated in open court or in written order—appropriate remedy

In a termination of parental rights proceeding, the trial court's failure to state that it was utilizing the standard of proof of clear, cogent, and convincing evidence, either orally in open court or in its written order terminating both parents' rights to their children—and in fact stating the wrong standard of proof in its order (preponderance of the evidence)—was in violation of N.C.G.S. § 7B-1109(f). Where the record evidence was not so clearly insufficient as to make further review futile, the termination order was reversed and the matter remanded for reconsideration under the correct standard of review.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) (2019) from an order entered on 29 March 2021 by Judge Kristina Earwood in District Court, Swain County. This matter was calendared for argument in the Supreme Court on 18 February 2022 but determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

Justin B. Greene for petitioner-appellee Swain County Department of Social Services.

Womble Bond Dickinson (US) LLP, by Jonathon D. Townsend and Theresa M. Sprain, for appellee Guardian ad Litem.

Edward Eldred for respondent-father.

J. Lee Gilliam for respondent-mother.

MORGAN, Justice.

¶ 1 Respondent-parents appeal from an order terminating their parental rights to two of their children: "Dylan," born on 15 February 2009

and "Julia," born on 23 September 2005.[1] Under our legal precedent, it is clear that the order filed by the trial court in this case contains an incorrect statement of the applicable standard of proof, leaving for this Court's resolution only the issue of the proper remedy for this error. After reviewing the pertinent precedent, we conclude that the trial court order must be reversed and that the case should be remanded to the trial court for further proceedings.

I. Factual and Procedural Background

¶ 2 Respondents are the parents of three children, including Dylan and Julia, who are the subjects of the termination of parental rights order under review in this matter. The Swain County Department of Social Services (DSS) became involved with respondents' family household and investigated it in the spring of 2015 and January 2016 based upon concerns regarding the sanitary conditions of the family home and the children's receipt of an appropriate education after the children were withdrawn from their schools. These case investigations were closed with no services recommended for respondents or their children. However, DSS became involved with respondents and their household again after concerns were registered about the welfare of the child of another family who began to reside in respondents' home. In early 2016, respondents allowed three minor siblings unrelated to respondents—"Ryan," "Charlotte," and "Ava"—to live in respondents' household in order to help those children's parents to improve their ability to care for their children. One of the parents was dealing with a substance abuse issue and the other parent was a registered sex offender. On 4 April 2016, Ryan, who at the time was four years of age, was admitted to a hospital emergency room with life-threatening, non-accidental injuries which required his transport to a pediatric intensive care unit. When brought to the hospital, Ryan was alleged to have been "unresponsive," with a temperature of 87 degrees, a pulse rate of 40, and to have been "covered with bruises, cuts and lesions." Ryan "was given Narcan for overdose symptoms[ ] and immediately responded to th[at] treatment." During various interactions and interviews which were conducted as part of the investigation which DSS undertook subsequent to Ryan's hospital admission, respondents' three children described a number of incidents which could be deemed to constitute physical assaults and sexual abuse

1. All children mentioned in this opinion are identified by pseudonyms to protect their privacy.

by respondents against all of the children who were residing in respondents' home: respondents' children, Ryan, and Ryan's siblings.[2]

¶ 3 As a result of Ryan's injuries and resulting condition, on 5 April 2016 DSS filed petitions alleging, *inter alia*, that Ryan was an abused juvenile and that Ryan, Ryan's two siblings and respondents' three children—including Dylan and Julia—were neglected juveniles. DSS also took custody of all six children who were living in respondents' home at the time. On 20 July 2017, the trial court entered an order which, *inter alia*,[3] adjudicated respondents' children as neglected juveniles. On 22 January 2018, the trial court entered an initial order of disposition which established various components of respondents' case plans with which they were to comply, relieved DSS of further efforts to reunify the children with respondents and continued the children's placement outside respondents' home. In November 2018, upon appeal by respondents, the Court of Appeals affirmed the adjudication order but reversed the disposition order in part, specifically to the extent that it relieved DSS of further reunification efforts and eliminated reunification from the children's permanent plan and remanded the matter to the trial court for further proceedings. *See In re D.C.*, 262 N.C. App. 372 (2018) (unpublished). Following a hearing upon remand in July 2019, the trial court entered a new disposition order setting the primary permanent plan as reunification with a secondary plan of adoption; conducted permanency planning hearings; and entered subsequent permanency planning orders. In December 2019, DSS requested that Julia's and Dylan's primary plans be changed to adoption. At a permanency planning hearing in January 2020, the trial court announced that it would change Julia's and Dylan's permanent plans to adoption.[4]

¶ 4 On 10 June 2020, DSS filed a petition to terminate respondents' parental rights to Dylan and Julia.[5] The petition advanced three grounds to support the termination of respondents' parental rights to these juveniles: neglect, a willful failure to make progress correcting removal

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2. Respondents were subsequently indicted for, *inter alia*, felony child abuse against Ryan.

3. The adjudication order also adjudicated Ryan as an abused and neglected juvenile and his siblings as neglected juveniles.

4. For unknown reasons, the written order formally making the change was not filed until 2 February 2021. In any event, the order was not appealed.

5. Respondents' third child was also the subject of a TPR petition, but that petition was dismissed by DSS prior to the hearing because the juvenile was expected to reach the age of eighteen before the conclusion of the matter.

conditions, and a willful failure to pay the costs of care. *See* N.C.G.S. § 7B-1111(a)(1), (2), (3) (2021). Among other contentions, the petition alleged that: (1) respondents' criminal charges remained pending; (2) respondents had not completed their case plans; (3) both children were diagnosed with post-traumatic stress disorder as a result of their time spent with respondents; and (4) the children's therapists recommended no contact between the children and respondents. DSS asked the trial court to find that grounds existed to terminate the parental rights of respondents "beyond a reasonable doubt."

¶ 5 Following a hearing on the petition for termination of parental rights on 2 February 2021, the trial court directed DSS to make findings of fact "based upon the evidence presented," and the trial court announced that it would find "grounds one and two, specifically neglect and traumas and foster care." At the end of the disposition phase of the proceedings, the trial court again directed DSS to make findings of fact "based upon the evidence presented" and the trial court announced that it would find "it is in the best of to terminate [sic] the parental rights of the respondents." The trial court did not state at any point during the hearing or during the trial court's announcement of its determination that grounds existed to terminate respondents' parental rights that it was employing the "clear, cogent, and convincing" standard of proof which applies in termination of parental rights proceedings. The trial court subsequently entered a written order on 29 March 2021 which terminated respondents' parental rights to Dylan and Julia. The trial court's written order included a statement that the trial court made its findings of fact "by a preponderance of the evidence." Respondents appeal.[6]

II. Analysis

¶ 6 The Juvenile Code in North Carolina mandates that a trial court's adjudicatory findings of fact in a termination of parental rights order "shall be based on clear, cogent, and convincing evidence." N.C.G.S. § 7B-1109(f) (2021); *see also In re B.L.H.*, 376 N.C. 118, 124 (2020). Clear, cogent, and convincing evidence is an intermediate standard of

6. Counsel for DSS filed a motion in this Court on 28 September 2021 seeking leave to file a motion to "correct" the termination of parental rights order at issue here by means of remand to the trial court for a "correction" of the statement regarding the trial court's standard of proof employed in making findings of fact. Counsel for DSS stated that, at the direction of the trial court, counsel drafted the judgment for termination of parental rights by "copying and pasting" passages from prior orders and thereby inadvertently included references in the trial court's order which stated that "preponderance of the evidence" was the standard of proof employed in these termination proceedings. This Court denied the DSS motion on 20 December 2021.

proof which is "greater than the preponderance of the evidence standard required in most civil cases." *In re Montgomery*, 311 N.C. 101, 109–10 (1984) (citing *Santosky v. Kramer*, 455 U.S. 745, 769 (1982)). The statutory burden of proof by clear, cogent, and convincing evidence as provided in N.C.G.S. § 7B-1109(f) also protects a parent's constitutional due process rights as enunciated by the United States Supreme Court in *Santosky*. 455 U.S. at 747–48 ("Before a State may sever completely and irrevocably the rights of parents in their natural child, due process requires that the State support its allegations by at least clear and convincing evidence."); *see also Adams v. Tessener*, 354 N.C. 57, 63 (2001) (holding that a trial court's determination that "a parent's conduct is inconsistent with his or her constitutionally protected status must be supported by clear and convincing evidence."). Although the "clear, cogent, and convincing" burden of proof in termination of parental rights proceedings is a firmly rooted standard, this Court has necessarily addressed the considerations which a trial court must employ and incorporate in its determinations so as to demonstrate the trial court's compliance with the "clear, cogent, and convincing evidence" principle enunciated in N.C.G.S. § 7B-1109(f).

¶ 7 In *In re B.L.H.*, this Court held "that a trial court does not reversibly err by failing to explicitly state the statutorily-mandated standard of proof in the written termination order if . . . the trial court explicitly states the proper standard of proof in open court at the termination hearing." 376 N.C. at 120–21. In reaching this result, we examined the statutory language utilized in N.C.G.S. § 7B-1109(f) that "all findings of fact shall be based on clear, cogent, and convincing evidence" and concluded "that the statute implicitly includes a requirement that the trial court announce the standard of proof it is applying in making findings of fact in a termination proceeding," both to avoid rendering portions of the statute "useless" and to permit a reviewing court to ensure that the proper standard of proof was utilized by the trial court. *Id.* at 122–24. We expressly declined, however, to extend this requirement that a trial court "announce" the proper standard of proof to a mandate that the standard be explicitly stated in the trial court's written termination of parental rights order. *Id.* at 126. Thus, "the trial court satisfies the announcement requirement of N.C.G.S. § 7B-1109(f) so long as it announces the 'clear, cogent, and convincing' standard of proof *either* in making findings of fact in the written termination order or in making such findings in open court." *Id.*

¶ 8 In *In re M.R.F.*, another case involving a termination of parental rights appeal, this Court considered the circumstance in which the trial

court did not make an announcement either in its written order or in open court about the standard of proof that it applied to make findings of fact. *In re M.R.F.*, 378 N.C. 638, 2021-NCSC-111, ¶ 10. Citing our decision in *In re B.L.H.*, this Court held that the trial court failed to comply with the statutory mandate, while observing that

> due to petitioner's failure to present sufficient evidence to support any of the alleged grounds for the termination of the parental rights of respondent-father, we are compelled to simply, *without remand*, reverse the trial court's order. *See Arnold v. Ray Charles Enters., Inc.*, 264 N.C. 92, 99 (1965) ("To remand this case for further findings, however, when defendants, the parties upon whom rests the burden of proof here, have failed to offer any evidence bearing upon the point, would be futile."); *Cnty. of Durham v. Hodges*, 257 N.C. App. 288, 298 (2018) ("Since there is no evidence to support the required findings of fact, we need not remand for additional findings of fact. Instead, we reverse.").

Id. at ¶ 12 (extraneity omitted).

¶ 9 All of the parties in the present case agree that the trial court here, unlike the trial court in *In re B.L.H.*, did not announce in open court that it was applying the correct standard of proof. Moreover, unlike the trial court's written order in *In re M.R.F.* which was silent on the burden of proof utilized by the trial court, the trial court's written order purporting to terminate respondents' parental rights here did not simply fail to state the standard of proof, but overtly states the *wrong* standard of proof—a standard which is not only lesser than that required by statute but one which has also been held to be constitutionally insufficient to support the permanent severance of a parent-child relationship. For this reason, each respondent argues that the termination of parental rights order cannot stand. Likewise, the guardian ad litem candidly acknowledges that "the trial court's order would not be sufficient under due process or state statutory requirements to terminate the parental rights of [r]espondents" to Dylan and Julia.

¶ 10 However, DSS argues that "[w]hile the written order setting forth the grounds for termination of parental rights states that the court's findings were made upon a preponderance of the evidence, *it appears from examination of the record that the court applied a higher standard in*

reaching its decision . . . ." (Emphasis added). Specifically, DSS contends that

> the [trial] court's incorporation of the adjudication order's findings of fact and the [trial] court's finding that termination of the respondent[s'] parental rights was in the best interest of the juveniles, "beyond a reasonable doubt," indicate that the [trial] court applied a higher standard of proof than that set forth in [the] opening decree of the written order.
>
> . . .
>
> The [trial] court . . . applied the higher "beyond a reasonable doubt" standard when it determined that termination of parental rights was in the juveniles' best interest, and specifically mentioned that it had found that two grounds existed for the termination of parental rights, *within the same sentence*.

Thus, according to DSS, "[w]hen viewed in its entirety, the record indicates that the [trial] court applied a higher standard of proof than what is reflected in the order setting forth termination grounds." A gaping omission in the assertions of DSS is the agency's failure to explain the correctness of its position in the face of this Court's holding in *In re B.L.H.* that a trial court must "announce[ ] the 'clear, cogent, and convincing' standard of proof *either* in making findings of fact in the written termination order or in making such findings in open court." 376 N.C. at 126. Conversely, DSS cites no legal authority supporting any latitude that this Court possesses to allow us to infer an announcement by the trial court in the case proceedings or the termination order that it applied the clear, cogent, and convincing standard of proof when such an announcement plainly did not occur. DSS also fails to directly address the arguments by respondents—or the candid concession by the guardian ad litem—that our holdings in *In re B.L.H.* and *In re M.R.F.* make clear that the trial court's written order here is insufficient to terminate respondents' parental rights and therefore cannot be affirmed. As a result, pursuant to the precedent established by this Court, the trial court committed statutory error and the termination of parental rights order in the instant case cannot stand.

¶ 11 Having determined that we must set aside the trial court's termination of parental rights order due to its mistaken employment of the wrong standard of proof, this Court turns to the matter which consequently

arises concerning the appropriate means by which to implement corrective measures. The parties differ in their positions regarding the appropriate remedy. Respondents both contend that the termination of parental rights order should be vacated, thus ending this case. The GAL and DSS[7] maintain that the proper action for this Court is to remand the matter to the trial court for the entry of findings of fact which are made by the correct standard of clear, cogent, and convincing evidence, or for the trial court to clarify the standard of proof employed in making its findings of fact.

¶ 12 In support of their request for this Court to vacate the termination of parental rights order, respondents concede that where a trial court makes findings of fact without announcing the standard of proof employed to consider the evidence, the proper disposition is to vacate the order and remand for findings of fact under the proper standard, *see David N. v. Jason N.*, 359 N.C. 303, 307 (2005) ("The trial court, however, failed to apply the clear and convincing evidence standard . . . , and therefore this case must be remanded for findings of fact consistent with this standard of evidence."), unless the petitioner has failed to present evidence which could potentially support such findings of fact under the proper standard of proof, such that remand would be futile. *See In re M.R.F.*, 378 N.C. 638, 2021-NCSC-111, ¶ 10. Respondents cite *Santosky* for the proposition that, where a trial court "makes findings of fact based on an affirmatively-stated, constitutionally-deficient standard of proof, the remedy is to simply vacate the order" and further contend that the trial court's error here prejudiced respondents. *See Santosky*, 455 U.S. at 770.

¶ 13 The GAL and DSS, citing, *inter alia*, *In re M.R.F.*, contend that the record here would fully support the findings of fact contained in the termination of parental rights order even under the proper standard of "clear, cogent, and convincing" evidence and that therefore the proper action for this Court to take is to remand the matter for the entry of findings of fact made under the statutory standard.

¶ 14 We first address respondent-father's reliance on *Santosky*. In that case, the United States Supreme Court majority, in holding that the "clear and convincing" evidence standard of proof was necessary to comply with federal due process protections, did not discuss the

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7. In addition to its primary position that the trial court's termination of parental rights order should be affirmed, DSS, in a conclusory fashion, asks in the alternative that, if this Court concludes that the order cannot be affirmed, then the matter should be remanded to the trial court for, *inter alia*, clarification of the trial court's standard of proof.

evidence before the New York state court which was considering the termination of parental rights matter from which the appeal was taken.[8] We therefore find that *Santosky* does not control the specific issue regarding the disposition in this case, because the present case fully falls within the parameters of North Carolina case law precedent which has been generated pursuant to N.C.G.S. § 7B-1109(f) regarding the pivotal impact that the record evidence under appellate review has in the resolution of an appeal where a trial court has committed error regarding the standard of proof. *See In re M.R.F.*, 378 N.C. 638, 2021-NCSC-111, ¶ 26 (holding that "the evidence in the record of this case is insufficient to support findings which are necessary to establish any of the statutory grounds for termination . . . . upon which the trial court could expressly announce the proper application of the standard of proof upon remand to it by this Court"); *see also In re Church*, 136 N.C. App. 654, 658 (2000) (holding that where the standard of proof is not announced by the trial court but the record contains evidence which *could* support findings of fact supporting a ground for termination of parental rights under the appropriate standard, the case should be remanded for application of the proper standard of proof by the trial court). We further note that under *In re M.R.F.*, for this Court to remand in a termination of parental rights matter, the record should reflect that the trial court has "a sufficient foundation upon which the trial court could expressly announce the proper application of the standard of proof." *In re M.R.F.*, 378 N.C. 638, 2021-NCSC-111, ¶ 26.

¶ 15 In fashioning the remedy to rectify the trial court's erroneous termination order, it is worthy of reiteration that in *In re M.R.F.*, the trial court did not announce the standard of proof that it was utilizing in its determination, while in the current case, the trial court announced the employment of a standard of proof which happened to be incorrect. Despite the difference, in either circumstance, upon remand a trial court must review and reconsider the record before it by applying the clear, cogent, and convincing standard to make findings of fact. Accordingly, we conclude that remand of this case to the trial court for such an exercise is appropriate, unless "the record of this case is insufficient to support findings which are necessary to establish *any* of the statutory grounds for termination." *See id.*

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8. The dissenting opinion—in holding, *inter alia*, that the due process protections contained in the federal constitution did not mandate the "clear and convincing" standard in termination of parental rights proceedings—did look to the evidence in the case at bar and appears to suggest that the parents could not have prevailed even under the "clear and convincing" standard. *Santosky*, 455 U.S. at 781–85 (Rehnquist, J. dissenting).

¶ 16 Resultingly, we lastly consider whether the record here could support the grounds for termination of parental rights contained in the petition filed by DSS. Without commenting on the amount, strength, or persuasiveness of the evidence contained in the record, we merely conclude that we cannot say that remand of this case for the trial court's consideration of the evidence in the record utilizing the proper "clear, cogent, convincing" standard of proof would be "futile," *In re M.R.F.*, 378 N.C. 638, 2021-NCSC-111, ¶ 12 (quoting *Arnold*, 264 N.C. at 99), so as to compel us to conclude that "the record of this case is insufficient to support findings which are necessary to establish *any* of the statutory grounds for termination." *Id.* at ¶ 26. Therefore, we reverse the trial court's order terminating respondents' parental rights to Dylan and Julia and remand the matter to the trial court for its consideration of the record before it in order to determine whether DSS has demonstrated by clear, cogent, and convincing evidence that one or more statutory grounds exist to permit termination of parental rights.

REVERSED AND REMANDED.

IN THE MATTER OF J.I.G. AND A.M.G.

No. 154A21

Filed 18 March 2022

Child Abuse, Dependency, and Neglect—dependency—incapability to parent—cognitive defects and mental illness

The trial court properly terminated a father's parental rights in his children on grounds of dependency (N.C.G.S. § 7B-1111(a)(6)) where clear, cogent, and convincing evidence—along with the court's unchallenged findings of fact—supported a determination that, at the time of the termination hearing, the father was incapable of providing proper care and supervision of the children and there was a reasonable probability that this incapability would continue for the foreseeable future. Among other things, the father suffered from severe cognitive defects and mental illnesses (including bipolar disorder, attention deficit hyperactivity disorder, and an unspecified intellectual disability) that impaired his ability to reason, exercise judgment, or problem solve, and that there was no evidence showing that his mental condition was expected to change.

IN RE J.I.G.

[380 N.C. 747, 2022-NCSC-38]

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) (2019) from an order entered on 19 March 2021 by Judge Denise Hartsfield in District Court, Forsyth County. This matter was calendared for argument in the Supreme Court on 18 February 2022 but determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

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

Mary V. Cavanagh and Jordan P. Spanner for appellee Guardian ad Litem.

Robert W. Ewing for respondent-appellant father.

MORGAN, Justice.

¶ 1 The trial court in this case terminated the parental rights of respondent-father to two juveniles, James and Amy[1], after finding that clear, cogent, and convincing evidence supported the existence of three grounds for the termination of parental rights as enumerated in N.C.G.S. § 7B-1111(a) (2021). Respondent-father challenges the evidentiary basis for the trial court's adjudication of the existence of each of the three grounds but does not challenge the trial court's conclusion that termination of respondent-father's parental rights served the best interests of the juveniles. Because we determine that clear, cogent, and convincing evidence supports the trial court's findings of fact which support the determination that respondent-father "is incapable of providing for the proper care and supervision of the juvenile, such that the juvenile is a dependent juvenile within the meaning of [N.C.G.S. §] 7B-101, and that there is a reasonable probability that the incapability will continue for the foreseeable future" as required by N.C.G.S. § 7B-1111(a)(6), the trial court's order terminating respondent-father's parental rights is affirmed.

I. Factual and Procedural Background

¶ 2 On 5 May 2017, 9-week-old James was admitted to the intensive care unit of Brenner Children's Hospital in Forsyth County after James's mother called the telephone emergency number 911 to report that the juvenile was limp and appeared to have ceased breathing. The attending

1. In accord with the regular practice of our appellate courts, pseudonyms have been utilized in lieu of the actual names of the children to protect their identities.

physician determined that James was in critical condition due to extensive non-accidental trauma which included approximately 67 fractures to the infant's bones throughout his body. The mother told the attending physician that she had left James propped upon the edge of a bed with a bottle and had left the room. When the juvenile's mother returned to the room, James was nonresponsive on the floor. A Forsyth County Department of Social Services (DSS) social worker interviewed James's mother at the hospital. The mother provided vacillating stories regarding the circumstances which existed at the time that the juvenile suffered his injuries. First, the child's mother represented that she was the only person who provided care for James and his three-year-old sister Amy, and that Amy must have been the one to hurt James because Amy was "hyper." Initially, the mother refused to reveal the identity of the father of James and Amy. Eventually, the mother revealed that respondent-father was the father of James and Amy, along with the disclosure that he had been residing in the same home as the children at the time of James's injuries. The mother explained that respondent-father would look after the children while she worked, and that respondent-father had been taking care of James and Amy while the mother worked on the night before James was admitted to the hospital for the infant's injuries. The DSS social worker interviewed the juvenile Amy on the following day. The social worker asked Amy if she knew how her brother James had been injured, and the three-year-old affirmatively nodded her head. Amy volunteered that "Mommy threw the baby on the floor" and that "Mommy was mad and shoved brother in [sic] the floor," as recorded by the DSS social worker. DSS also interviewed respondent-father who, like the mother, could not offer a plausible explanation for the cause of the injuries to James. While respondent-father instead repeatedly admitted that he had dropped James on the floor, the attending physician explained that respondent-father's story could not account for the extent of the infant's injuries.

¶ 3 On 9 May 2017, Forsyth County DSS filed juvenile petitions which alleged that both James and Amy were neglected and dependent juveniles, and that James was also an abused juvenile. The trial court entered orders granting nonsecure custody of both children to DSS on the same day based on the allegations contained within the petitions. On 13 September 2017, an adjudication hearing was held concerning the petitions. Respondent-father stipulated to the factual basis contained within the petitions, resulting in the trial court adjudicating James to be an abused, neglected, and dependent juvenile, and adjudicating Amy to be a neglected and dependent juvenile. Respondent-father was actively engaged in satisfying his case plan by attending the majority of his assigned

parenting classes, visitation sessions, and court-ordered mental health and substance abuse assessments. However, respondent-father was arrested on 7 November 2017 and charged with four counts of felony child abuse based upon the injuries sustained by James in May 2017. Respondent-father remained incarcerated throughout the pendency of this case due to his inability to secure funds to post his assigned bond on the felony charges.

¶ 4 On 6 December 2019, Forsyth County DSS filed a motion to terminate the parental rights of the mother and respondent-father. However, due to COVID-19, issues with notice, and the illness of counsel, the trial court dismissed the termination motion without prejudice. DSS subsequently filed a second motion on 13 November 2020 to terminate the parental rights of the children's mother and respondent-father, alleging that grounds existed to terminate respondent-father's parental rights to both James and Amy under N.C.G.S. § 7B-1111(a)(1) (neglect) and (6) (incapacity), and additionally as to James alone under N.C.G.S. § 7B-1111(a)(1) (abuse). The TPR motions in this case were heard on 22 February 2021. At the hearing, the trial court received testimony from DSS social workers, the Guardian ad Litem for the juveniles, the mother of the juveniles, and respondent-father. On 19 March 2021, the trial court entered an order pursuant to this hearing which terminated the parental rights of the mother and respondent-father to both James and Amy.

¶ 5 Based on previous adjudication orders entered in this case, DSS's investigation, and the testimony provided at the TPR hearing, the trial court entered findings in the termination of parental rights order which reflect that respondent-father has "severe cognitive defects" which present themselves as deficits in reasoning, problem solving, planning, and judgment. Further, respondent-father has an IQ of 61 and has been diagnosed with unspecified intellectual disability, bipolar disorder, and ADHD. Respondent-father has received SSI disability payments since he was seven years old due to his mental health and cognitive issues, and respondent-father has used these funds in the past to help to satisfy the basic needs of James and Amy. Respondent-father was ordered to complete a parenting capacity evaluation in order to assess his ability to parent, but he has declined an assessment arranged by DSS while he has been incarcerated.

¶ 6 In light of the refusal of both parents to explain the source of James's extensive injuries, the trial court found that both the mother and respondent-father were responsible for having abused their son. The trial court found that "there is no evidence presented that the Father's cognitive defects and abilities . . . are expected to change." Due to

respondent-father's profound mental impairment, the trial court further found that respondent-father "lacks the ability to independently care for the minor children" and "the capacity to parent." The trial court went on to find that clear, cogent, and convincing evidence supported the determination that grounds existed to terminate respondent-father's parental rights to James and Amy under N.C.G.S. § 7B-1111(a)(1) (neglect) and (6) (incapacity), and additionally as to James alone under N.C.G.S. § 7B-1111(a)(1) (abuse). The trial court concluded that the termination of the parental rights of respondent-father to James and Amy would serve the best interests of the juveniles. Respondent-father timely filed notice of appeal.[2]

II. Analysis

¶ 7 Before this Court, respondent-father contends that the trial court's findings of fact fail to establish that he lacked the capacity to parent, that James and Amy were neglected juveniles, and that James was an abused juvenile at the hands of respondent-father. Regarding the existence of the ground of dependency as memorialized in N.C.G.S. § 7B-1111(a)(6), respondent-father cites evidence in the record which he submits would support a finding that he would have the capacity to parent the juveniles once respondent-father is released from incarceration. Respondent-father also challenges the trial court's finding of fact that expresses respondent-father's incapacity to parent.

¶ 8 Respondent-father's appeal represents a challenge to the trial court's adjudication of the existence of each ground for the termination of respondent-father's parental rights contained within the order terminating his parental rights entered on 19 March 2021. Upon appeal, this Court is governed by the following principles:

> We review the trial court's adjudication under N.C.G.S. § 7B-1111(a) to determine whether the findings are supported by clear, cogent and convincing evidence and the findings support the conclusions of law. Unchallenged findings of fact are deemed supported by competent evidence and are binding on appeal. Moreover, we review only those findings needed to sustain the trial court's adjudication.
>
> The issue of whether a trial court's findings of fact support its conclusions of law is reviewed de novo. However, an adjudication of any single ground

2. The mother is not a party to this appeal.

> for terminating a parent's rights under N.C.G.S. § 7B-1111(a) will suffice to support a termination order. Therefore, if this Court upholds the trial court's order in which it concludes that a particular ground for termination exists, then we need not review any remaining grounds.

In re B.J.H., 378 N.C. 524, 2021-NCSC-103, ¶ 11 (quoting *In re J.S.*, 374 N.C. 811, 814–815 (2020)) (extraneity omitted).

¶ 9 Being cognizant of both respondent-father's challenge to each of the grounds adjudicated to exist by the trial court and the settled rule that "the determination of the existence of any statutory ground which is duly supported is sufficient to sustain a termination order," *Id.* at ¶ 12, we begin by reviewing the trial court's adjudication under N.C.G.S. § 7B-1111(a)(6), which allows for the termination of parental rights if

> the parent is incapable of providing for the proper care and supervision of the juvenile, such that the juvenile is a dependent juvenile within the meaning of G.S. 7B-101, and that there is a reasonable probability that the incapability will continue for the foreseeable future. Incapability under this subdivision may be the result of substance abuse, intellectual disability, mental illness, organic brain syndrome, or any other cause or condition that renders the parent unable or unavailable to parent the juvenile and the parent lacks an appropriate alternative child care arrangement.

N.C.G.S. § 7B-1111(a)(6). The ground of dependency requires that the petitioner show by clear, cogent, and convincing evidence that (1) the parent lacks the capacity to provide proper care and supervision of the juvenile such that the juvenile meets the definition of a dependent juvenile as found in N.C.G.S. § 7B-101(9), (2) "there is a reasonable probability that such incapacity will continue for the foreseeable future," and (3) "the parent lacks an appropriate child care arrangement." *In re Z.G.J.*, 378 N.C. 500, 511, 2021-NCSC-102 ¶ 31.

¶ 10 Here, the trial court entered the following relevant findings of fact in its 19 March 2021 order terminating respondent-father's parental rights:

> 79. [Respondent-father] reported to [DSS], as was found by the Court at Adjudication, that he receives SSI for "mental retardation, ADHD, and bipolar disorder."

> 80. [Respondent-father] has mental health conditions which include Bipolar Disorder and Attention Deficit Hyperactivity Disorder. [Respondent-father] has also been diagnosed with Unspecified Intellectual Disability.
>
> 81. [Respondent-father] has severe cognitive deficits, with an IQ of 61, and due to his deficits in reasoning, problem solving, planning, abstract thinking, and judgment, he is a vulnerable person.
>
> 82. There is no evidence presented that [respondent-father's] cognitive defects and abilities as described herein are expected to change.
>
> . . .
>
> 86. Testimony from the Respondent Mother, the Social Worker, and the Guardian ad Litem was consistent that [respondent-father] lacks the ability to independently care for the minor children.
>
> 87. Based upon all of the foregoing, [respondent-father] is unable to provide appropriate care and supervision for the minor children's needs, this incapacity is expected to continue for the foreseeable future, and he lacks an appropriate alternative child-care arrangement, such that the minor children are dependent juveniles within the meaning of [N.C.G.S. § 7B-101(9)].
>
> 88. . . . [Respondent-father] is not able to provide the care and supervision that the minor children require.

¶ 11 Respondent-father's sole argument in his exception to the trial court's finding of the ground of dependency is that "the trial court's findings of fact and conclusions that [respondent-father's] mental illness rendered him incapable of parenting his children at the time of the termination hearing was [sic] not supported by the competent evidence." While respondent-father expressly challenges only Finding of Fact 86, Finding of Fact 87 is also implicitly challenged by its inclusion of the trial court's ultimate finding as to respondent-father's ability to parent. All other findings of the trial court are unchallenged by respondent-father regarding the ground of dependency. These unchallenged findings are therefore "deemed supported by competent evidence and are binding on appeal." *In re T.N.H.*, 372 N.C. 403, 407 (2019).

¶ 12 In support of his specific contention, respondent-father admits that the DSS social worker testified that respondent-father had not demonstrated to DSS his ability to parent, but argues that the social worker's testimony also established that respondent-father had exercised all of his scheduled visitations with the children during which he demonstrated safe parenting skills. Respondent-father further argues that the trial court's findings concerning his incapacity to parent could not be supported by the testimony of the children's Guardian ad Litem because, while the Guardian ad Litem testified that respondent-father was incapable of parenting, the Guardian ad Litem did not observe any of the visitations or review the DSS record of the visitations.

¶ 13 Respondent-father's acknowledgement of the evidence offered by the social worker and Guardian ad Litem regarding their respective observations that respondent-father was incapable of parenting, when juxtaposed against more favorable testimony regarding other aspects of respondent-father's displayed parenting skills, illustrate that the question posed to us in this regard is not whether the trial court's findings of fact were supported by clear, cogent, and convincing evidence, but whether the trial court assigned the proper weight and credibility to the evidence before it. The assignment of weight and evaluation of the credibility of the evidence resides solely within the purview of the trial court, and the trial court's factual determinations which are supported by clear, cogent, and convincing evidence, including the testimony of the social worker and Guardian ad Litem in the case at bar, are binding on appeal "notwithstanding evidence to the contrary." *In re J.R.F.*, 2022-NCSC-5, ¶ 34.

¶ 14 Respondent-father also notes that the testimony of the children's mother could not support the trial court's findings related to his inability to parent because, at the termination of parental rights hearing, the mother abruptly exited the hearing by withdrawing from the virtual meeting prior to being subjected to cross-examination by respondent-father's counsel. We agree with respondent-father that the mother's opinion about his ability to parent should not factor into the trial court's determination of the existence of grounds in light of the adversarial nature of the *adjudicatory phase* of termination of parental rights proceedings. *Compare In re R.D.*, 376 N.C. 244, 253 (2020) ("While it is axiomatic that cross-examination of an adverse witness is an essential right in adversarial proceedings, the dispositional stage of a termination proceeding is not adversarial." (citation omitted)), *with* N.C.G.S. § 7B-1109(f) (2021) ("The rules of evidence in civil cases shall apply" at the adjudication phase.). Concomitantly, we do not find the mother's opinion or the trial court's consideration of her opinion to be particularly salient on

the point of respondent-father's incapacity to parent, and "we limit our review to those challenged findings that are necessary to support the trial court's determination that respondent-father's parental rights should be terminated." *In re N.G.*, 374 N.C. 891, 900 (2020). The portion of the trial court's Finding of Fact 86 which refers to testimony of the mother is thereby discarded in our analysis of the trial court's order. *Id.* at 901 (disregarding portion of finding of fact not supported by the evidence.).

¶ 15 Even after addressing respondent-father's challenges to the trial court's adjudication of grounds to terminate his parental rights under N.C.G.S. § 7B-1111(a)(6), there remain ample unchallenged findings of fact supported by clear, cogent, and convincing evidence to support a finding of dependency. The trial court found that respondent-father suffered from severe mental infirmities which demonstrably impaired his ability to reason, plan, exercise judgment, think abstractly, and problem solve. Respondent-father had a tenuous grasp of the concept of dates as evidenced by his provision of random, inaccurate birthdates of his children and his initial testimony that the children were last in his care years prior to James's birth. Respondent-father testified that "it shouldn't be that long" before he would be able to complete the parenting capacity evaluation and parenting classes despite being incarcerated awaiting trial on felony charges with an unknown release date. The trial court considered such evidence and incorporated its determinations regarding the information in a manner which is supported by the record and appropriately assessed by the trial court.

¶ 16 Contrary to respondent-father's contention that the trial court's findings were "not based on the evidence at the time of the termination proceeding" because the trial court did not consider his participation in mental health and parenting services prior to his incarceration, the trial court's uncontested findings establish that, at the time of the termination hearing, respondent-father suffered from debilitating mental infirmities which rendered him incapable of providing care for James and Amy such that the juveniles were dependent as defined by N.C.G.S. § 7B-101(9). The trial court's further uncontested findings establish that the juveniles "lack[ed] an appropriate alternative child-care arrangement" and that respondent-father's "incapacity is expected to continue for the foreseeable future." Therefore, the trial court's order contains sufficient findings of fact, which are in turn supported by clear, cogent, and convincing evidence, to support the trial court's ultimate determination that grounds existed under N.C.G.S. § 7B-1111(a)(6) to terminate respondent-father's parental rights. Because we conclude that at least one of the alleged grounds for the termination of respondent-father's

parental rights was supported by findings of fact based on clear, cogent, and convincing evidence, we need not address respondent-father's further challenges regarding the remaining grounds of abuse or neglect. *In re B.J.H.*, 378 N.C. at 529.

III. Conclusion

¶ 17 The trial court order terminating respondent-father's parental rights as to James and Amy reflected the trial court's finding that respondent-father's incapacity to parent rendered the juveniles dependent as defined by N.C.G.S. § 7B-101(9), and that there was a reasonable probability that the incapability would continue for the foreseeable future. This finding was supported by other uncontested findings of fact or by clear, cogent, and convincing evidence on the record. Respondent-father does not appeal the trial court's dispositional conclusion that termination of respondent-father's parental rights would serve the best interests of the children. We therefore determine that there is no error in the trial court's order entered on 19 March 2021 which terminated the parental rights of respondent-father.

AFFIRMED.

IN THE MATTER OF K.N.L.P., T.L.S.P., AND R.W.P.

No. 301A21

Filed 18 March 2022

Termination of Parental Rights—best interests of the child—sufficiency of findings—statutory factors

The trial court did not abuse its discretion by concluding that termination of a father's parental rights was in his son's best interests, where the dispositional findings were supported by sufficient evidence—including findings regarding the father's minimal role in the son's upbringing, the son's significant behavioral improvements since entering social services' custody, the bond between the father and son, and the son's interest in and likelihood of adoption. Furthermore, the court properly considered the statutory factors in N.C.G.S. § 7B-1110(a) and performed a reasoned analysis in reaching its conclusion.

IN RE K.N.L.P.

[380 N.C. 756, 2022-NCSC-39]

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) (2019) from an order entered on 13 May 2021 by Judge Emily G. Cowan in District Court, Henderson County. This matter was calendared for argument in the Supreme Court on 18 February 2022 but determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

Sara H. Player for petitioner-appellee Henderson County Department of Social Services.

Sloan L. E. Carpenter and C. Kyle Musgrove for appellee Guardian ad Litem.

Edward Eldred for respondent-appellant father.

BARRINGER, Justice.

¶ 1 Respondent appeals from an order terminating his parental rights to three of his children. However, respondent has only presented arguments concerning the termination of parental rights as to R.W.P. (Rob).[1] After careful review, we affirm the trial court's order.

I. Background

¶ 2 In August 2019, a physical altercation occurred between Rob's mother's[2] boyfriend and Rob's half-brother, resulting in the involvement of law enforcement. Rob and his two siblings had been subject to continued exposure to methamphetamine, and they tested positive for methamphetamine a few weeks after the altercation. Shortly thereafter, the Henderson County Department of Social Services (DSS) filed a juvenile petition alleging that Rob and his two siblings were neglected juveniles. Pursuant to court order, DSS then took nonsecure custody of the three children.

¶ 3 At the time of DSS's intervention, the mother cared for the children, and the paternity of Rob was uncertain. Rob's birth certificate did not list a legal father. Respondent was incarcerated during the fall of 2019 and had been for two years. In August 2017, a jury convicted respondent of possession of a schedule II controlled substance, and in March 2019,

1. Pseudonyms are used in this opinion to protect the juveniles' identities and for ease of reading.

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

respondent was convicted of possession of a controlled substance on the premises of a penal institution.

¶ 4 On 21 November 2019, the trial court filed a consent adjudication order, which found Rob and his two siblings to be neglected juveniles. Then, on 13 December 2019, respondent was released from prison. Subsequently, respondent submitted to genetic testing, which determined that the probability of paternity was 99.9%. The trial court then entered an order establishing that respondent is the paternal father of Rob.

¶ 5 Despite being required under his case plan to submit to random drug screens, respondent refused to submit to most of the requested drug screens throughout the course of the proceedings. On two occasions, he admitted to the social worker that his drug screens, if completed, would be positive for marijuana. Respondent's lack of contact with DSS from November 2020 to March 2021 further prevented additional drug screens. Since respondent did not provide the necessary drug screens, respondent did not successfully complete the substance abuse intensive outpatient program also required by his case plan. Respondent further did not report any substance abuse or mental health treatment after August 2020. Thus, the trial court found that respondent had failed to correct the conditions that led to the juveniles' removal from the home.

¶ 6 On 5 January 2021, DSS filed a motion to terminate respondent's and the mother's parental rights to all three children. Following a hearing on 8 April 2021, the trial court found that grounds existed for termination of respondent's and the mother's parental rights to all three children for neglect, N.C.G.S. § 7B-1111(a)(1) (2021), and failure to make reasonable progress, N.C.G.S. § 7B-1111(a)(2), and that such termination of respondent's and the mother's parental rights was in the children's best interests.

¶ 7 Respondent appealed. On appeal, respondent does not challenge the trial court's conclusion that grounds for termination existed under N.C.G.S. § 7B-1111(a) or any findings of fact supporting this conclusion. Rather, respondent alleges that the trial court abused its discretion in its best interests determination as to Rob.

II. Analysis

¶ 8 A termination-of-parental-rights proceeding consists of an adjudicatory stage and a dispositional stage. N.C.G.S. §§ 7B-1109 to -1110 (2021). At the adjudicatory stage, the trial court "adjudicate[s] the existence or nonexistence of any of the circumstances set forth in [N.C.]G.S. [§] 7B-1111 which authorize the termination of parental rights

of the respondent." N.C.G.S. § 7B-1109(e). If the trial court adjudicates that one or more grounds for terminating a parent's rights exist, the trial court proceeds to the dispositional stage where it determines "whether terminating the parent's rights is in the juvenile's best interest." N.C.G.S. § 7B-1110(a).

¶ 9 When reviewing a trial court's actions at the dispositional stage, appellate courts review the trial court's assessment of a juvenile's best interests solely for an abuse of discretion. *In re S.D.C.*, 373 N.C. 285, 290 (2020). "Under this standard, we defer to the trial court's decision unless it is manifestly unsupported by reason or one so arbitrary that it could not have been the result of a reasoned decision." *In re A.K.O.*, 375 N.C. 698, 701 (2020) (cleaned up).

¶ 10 When assessing whether termination of a parent's rights is in a juvenile's best interests, "[t]he [trial] court may consider any evidence, including hearsay evidence as defined in [N.C.]G.S. [§] 8C-1, Rule 801, that the [trial] court finds to be relevant, reliable, and necessary to determine the best interests of the juvenile." N.C.G.S. § 7B-1110(a). Further, the trial court considers the following criteria and makes written findings regarding those that are relevant:

> (1) The age of the juvenile.
>
> (2) The likelihood of adoption of the juvenile.
>
> (3) Whether the termination of parental rights will aid in the accomplishment of the permanent plan for the juvenile.
>
> (4) The bond between the juvenile and the parent.
>
> (5) The quality of the relationship between the juvenile and the proposed adoptive parent, guardian, custodian, or other permanent placement.
>
> (6) Any relevant consideration.

N.C.G.S. § 7B-1110(a).

¶ 11 The trial court's dispositional findings are binding on appeal if supported by the evidence received during the termination hearing or not specifically challenged on appeal.[3] *In re S.C.C.*, 379 N.C. 303, 2021-NCSC-144, ¶ 22.

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3. In past cases, we have used the term "competent evidence" when describing the standard of review applicable to the dispositional findings of fact in a termination-of-parental-rights order. *See, e.g.*, *In re K.N.K.*, 374 N.C. 50, 57 (2020). In some contexts,

¶ 12 Here, the trial court concluded that termination of respondent's parental rights was in the best interests of all three children and made the following dispositional findings of fact:

> 1. The juvenile [Tom] is thirteen (13), the juvenile [Kate] is twelve (12), and the juvenile [Rob] is ten (10).
>
> 2. The father has never been the primary caretaker for the juveniles. He had a friendship with the neighbor of the family and would see the juveniles but was not involved in their upbringing. The juveniles were primarily raised by the mother and the maternal grandmother, who has since passed away.
>
> 3. All three juveniles love their parents and identify their biological parents as their parents. [Tom] and [Kate] have a bond with their parents but the parents' long-term substance abuse issues have affected the juveniles' relationship with their parents. Both [Tom] and [Kate] are more attached to their mother but worry a lot about both parents. [Rob] has more of an attachment to the mother than [Tom] or [Kate].
>
> 4. All of the juveniles have struggled with what they want and have expressed a desire to go home but only if the parents could be sober and provide a safe home. They have grown and matured since being in foster care and are able to see what a stable home looks like and are able to enjoy their childhood. The older juveniles are doing well academically and are involved in extracurricular activities.

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competent evidence means admissible evidence pursuant to the rules of evidence. *See Evidence*, *Black's Law Dictionary* (11th ed. 2019). However, N.C.G.S. § 7B-1110(a) makes clear that the evidence that the trial court receives and considers when determining the best interests of the juvenile need not be admissible under the North Carolina Rules of Evidence. Further, our precedent and the Rules of Appellate Procedure dictate when we can review the admissibility of evidence admitted by the trial court. Accordingly, for clarity, we are avoiding the phrase "competent evidence" in the context of determinations of a juvenile's best interests in termination-of-parental-rights orders in favor of using the language the statute itself employs: "evidence."

5. The juvenile [Rob's] behavioral issues have improved significantly since coming [in]to [DSS] custody. He is now receiving regular therapy to address trauma from his life before foster care, as are his siblings.

6. The likelihood of the juveniles' adoption is high, particularly for [Tom] and [Kate] who are in a kinship placement that is a pre-adoptive home. [Rob] has been in his therapeutic foster home since December 2020 but that foster family adopted another ten-year-old child so [DSS] is hopeful that [Rob] may be adopted also. All three juveniles have indicated a desire to be adopted.

7. This [c]ourt has previously adopted a permanency plan of adoption for these juveniles, and termination of the parental rights as ordered herein will aid in the accomplishment of this plan.

8. The juveniles [Tom] and [Kate] have a strong and loving bond with the [foster] family and are very attached to the couple. The couple has been meeting the needs of the juveniles, involving the juveniles in activities, and helping them with their schoolwork. The older juveniles take pride in their schoolwork now.

¶ 13 Respondent concedes that dispositional findings of fact one, four, seven, and eight are supported by evidence before the trial court but challenges in part dispositional findings two, three, five, and six as they relate to Rob. DSS and the guardian ad litem disagree, arguing that evidence supports the four dispositional findings of fact.

A. Dispositional Finding of Fact Number Two

¶ 14 As to dispositional finding of fact number two, respondent objects to the definitiveness of the trial court's finding that respondent was *never* the primary caretaker and was *not* involved in Rob's upbringing. However, as acknowledged by respondent, one of the social workers testified that respondent "hasn't been a primary caretaker of the children." That social worker also testified that the children had "been raised by their mom and their maternal grandmother the majority of their lives." While the social worker clarified that her statement was based on her own knowledge and that respondent saw the kids "a

lot" because respondent had a relative living next door to the maternal grandmother, the social worker's testimony is evidence supporting the trial court's dispositional finding of fact. When there is evidence to support the trial court's dispositional finding, the finding is binding on this Court. *In re S.C.C.*, ¶ 22. It is the duty of the trial court—not an appellate court—to determine the weight and veracity of the evidence and the reasonable inferences to be drawn therefrom. *In re A.R.A.*, 373 N.C. 190, 196 (2019). Therefore, we hold that dispositional finding of fact number two is supported by the evidence.

B. Dispositional Finding of Fact Number Three

¶ 15 Next, respondent argues "there is no evidence to support the *sub silentio* finding that Rob does not have a bond with [respondent]." (Emphasis added.) Yet a *sub silentio* finding is an unexpressed finding. *See Sub Silentio*, *Black's Law Dictionary* (11th ed. 2019). The trial court's order does not contain a dispositional finding of fact that Rob does not have a bond with respondent. Instead, the binding, unchallenged part of finding of fact three addressing the bond between Rob and respondent is that he loves his parents and identifies his biological parents as his parents. Thus, there is no dispositional finding of fact for this Court to review as it relates to this argument, but we are bound to the trial court's finding concerning Rob and respondent's bond, specifically that Rob loves respondent and identifies respondent as his parent. *Cf. In re A.R.A.*, 373 N.C. at 199 (recognizing that a trial court need not make a finding concerning a factor that is not placed at issue by virtue of conflicting evidence presented to the trial court).

¶ 16 Similarly, respondent argues "there was no evidence to support a finding that substance [ab]use affected [respondent's] relationship *with Rob*, to the exten[t] the trial court even made that finding." Here, as well, respondent challenges a finding that does not exist in the termination-of-parental-rights order. The trial court found that "[Rob's older siblings, Tom and Kate,] have a bond with their parents[,] but the parents' long-term substance abuse issues have affected the juveniles' relationship with their parents." Thus, there is no dispositional finding of fact for this Court to review as it relates to this argument.

C. Dispositional Finding of Fact Number Five

¶ 17 Respondent then contests the finding that Rob's behavioral issues "have improved significantly since coming [in]to [DSS] custody." However, as identified by DSS and the guardian ad litem, the evidence and unchallenged adjudicatory findings of fact support a finding of significant improvement.

¶ 18 When Rob came into DSS custody, he was nine, had aggressive and violent tendencies, and had been suspended from school and riding the bus. He was diagnosed with attention deficit hyperactivity disorder. While Rob was initially placed with his siblings at his aunt and uncle's home, his aunt and uncle could not meet Rob's needs as they had a two-year-old child, and the aunt was pregnant with twins.

¶ 19 Thereafter, Rob was placed with a distant maternal cousin, who was a special education teacher. This cousin helped Rob make significant progress with his behaviors. However, due to a family member needing hospice care in the cousin's home, the cousin could not continue to care for Rob. Thus, Rob was moved to a foster family.

¶ 20 Thereafter, Rob was moved to a therapeutic foster home, where he received trauma-focused therapy. When asked whether Rob's behavior stabilized after being transferred to a therapeutic foster home, one of the social workers answered in the affirmative. The social worker explained that the first couple of months went really well and that most of Rob's behavioral issues have been school related. Rob also got along well with a ten-year-old child at his therapeutic foster home. Additionally, Rob had not been suspended from school since he came into foster care. Given this evidence, the trial court could find that Rob's behavioral issues "have improved significantly since coming [in]to [DSS] custody." *See In re D.W.P.*, 373 N.C. 327, 330 (2020) ("The trial judge's decisions as to the weight and credibility of the evidence, and the inferences drawn from the evidence are not subject to appellate review.").

¶ 21 Respondent also challenges the finding that Rob's therapy addressed "trauma from his life before foster care" when there was only testimony that Rob's therapy switched to being "more trauma-focused." We agree that the testimony in the record does not expressly reflect that his therapy addressed trauma from his life before foster care, but this is a reasonable inference by the trial court based on the evidence it received at the termination-of-parental-rights hearing. The unchallenged adjudicatory findings of fact reflect Rob's continued exposure to methamphetamine when in the care of his mother, which resulted in him testing positive for methamphetamine in 2019; that a physical altercation occurred between Rob's half-brother and his mother's boyfriend; and the absence of respondent due to his incarceration for felony drug convictions. Therefore, in light of the evidence before the trial court, we are bound to this finding and cannot disturb it on appeal.

D. Dispositional Finding of Fact Number Six

¶ 22 Respondent further argues that there is no evidence supporting the finding that the likelihood of adoption for Rob was high. Respondent argues that this finding is flatly contradicted by the social worker's testimony that to her knowledge the therapeutic foster family had not expressed an interest in adopting Rob and that there was no proposed adoptive placement.

¶ 23 However, DSS argues that respondent overlooks other testimony from the social worker. The social worker identified that Rob's paternal grandmother had expressed interest in having Rob stay with her, a home study of the paternal grandmother's home had been requested, and Rob's paternal grandmother would be able to apply to adopt Rob. Additionally, based on the social worker's testimony, the trial court found that "[Rob] has been in his therapeutic foster home since December 2020 but that foster family adopted another ten-year-old child so [DSS] is hopeful that [Rob] may be adopted also." Respondent has not challenged this finding. Thus, there is evidence supporting the trial court's finding that the likelihood of Rob's adoption is high. "[F]indings of fact are binding 'where there is some evidence to support those findings, even though the evidence might sustain findings to the contrary.' " *In re R.D.*, 376 N.C. 244, 258 (2020) (quoting *In re Montgomery*, 311 N.C. 101, 110–11 (1984)).

¶ 24 Finally, while conceding that there is testimony from the social worker affirmatively answering yes to the question of whether "[Rob has] expressed whether he would like to be adopted recently," respondent contends it cannot support the finding by the trial court that Rob "indicated a desire to be adopted." We disagree. The trial court does not have to adopt verbatim the wording of the testifier; instead, the finding needs to be supported by evidence. Here, the social worker's testimony is evidence supporting the trial court's dispositional finding.

E. Abuse of Discretion

¶ 25 Respondent concludes by arguing that the trial court abused its discretion in making its best interests determination as to Rob because the trial court relied on two dispositional findings of fact that were not supported by the evidence. Specifically, respondent cites the implied finding that Rob was not bonded with respondent and the finding that Rob was likely to be adopted. However, we have rejected the arguments concerning these dispositional findings. Evidence supported the finding that Rob's likelihood of adoption was high, and the trial court found, and respondent has not challenged, that Rob loved respondent and identified respondent as his parent. Thus, these dispositional findings of fact

relating to Rob's bond with respondent and his likelihood of adoption are binding on this Court.

¶ 26 We also have repeatedly recognized that "the bond between parent and child is just one of the factors to be considered under N.C.G.S. § 7B-1110(a), and the trial court is permitted to give greater weight to other factors." *In re Z.L.W.*, 372 N.C. 432, 437 (2019); *see also*, *e.g.*, *In re A.M.*, 377 N.C. 220, 2021-NCSC-42, ¶ 30. The fact that Rob loved respondent and identified respondent as his parent does not render the trial court's determination that termination of respondent's parental rights was in Rob's best interests an abuse of discretion.

¶ 27 Additionally, while, in this matter, the trial court found as supported by the evidence that the likelihood of adoption was high, we have recognized that "[t]he trial court is not required to find a likelihood of adoption in order for termination to be in a child's best interests." *In re G.G.M.*, 377 N.C. 29, 2021-NCSC-25, ¶ 25.

¶ 28 Here, the trial court's order reflects that it considered the statutory factors identified in N.C.G.S. § 7B-1110(a) when reaching its conclusion that terminating respondent's parental rights was in Rob's best interests and performed a reasoned analysis to reach this conclusion. *See In re Z.A.M.*, 374 N.C. 88, 101 (2020). Respondent has not shown that the trial court's conclusion is manifestly unsupported by reason or so arbitrary that it could not have been the result of a reasoned decision. Thus, we cannot conclude that the trial court abused its discretion by concluding that termination of respondent's parental rights was in Rob's best interests.

III. Conclusion

¶ 29 The trial court did not abuse its discretion by concluding that termination of respondent's parental rights was in Rob's best interests. Accordingly, we affirm the trial court's order terminating respondent's parental rights to his children.

AFFIRMED.

IN RE L.D.

[380 N.C. 766, 2022-NCSC-40]

IN THE MATTER OF L.D., A.D.

No. 155A21

Filed 18 March 2022

Termination of Parental Rights—grounds for termination—failure to make reasonable progress—continued drug use—lack of contact with DSS

An order terminating a mother's parental rights to two children was affirmed where the trial court's findings—that one of the children was born cocaine-positive, that the mother continued to use drugs and gave birth to another drug-positive baby during the pendency of this case, that she did not provide proof of employment or of completion of a rehabilitation program, that she maintained a relationship with the children's father despite his abuse of the children's sibling, and that she failed to cooperate or remain in contact with DSS—supported the conclusion that the mother willfully left the children in placement outside the home for more than twelve months without making reasonable progress to correct the conditions that led to their removal.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) (2019) from orders entered on 4 February 2021 by Judge Christopher Rhue in District Court, Scotland County. This matter was calendared for argument in the Supreme Court on 18 February 2022 but determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

Quintin Byrd for petitioner-appellee Scotland County Department of Social Services.

Michelle FormyDuval Lynch for appellee Guardian ad Litem.

Wendy C. Sotolongo, Parent Defender, and Jacky Brammer, Assistant Parent Defender, for respondent-appellant mother.

NEWBY, Chief Justice.

IN RE L.D.

[380 N.C. 766, 2022-NCSC-40]

¶ 1 Respondent, the mother of L.D. (Larry) and A.D. (Amy),[1] appeals from the trial court's order terminating her parental rights. After careful review, we affirm.

¶ 2 Larry was born on 16 November 2016.[2] The Scotland County Department of Social Services (DSS) received a report on 7 February 2018 that Larry's eleven-week-old sibling, Lisa, was admitted into the emergency room at Scotland Memorial Hospital. She was diagnosed with acute bleeding on the brain and a subdural hematoma. Lisa also had fractures on her ribs, which were healing, along with other injuries, including a circular burn the size of a cigarette on her lower right leg. Respondent and the father[3] claimed that Lisa was injured by falling off the couch. Medical professionals at the hospital, however, believed this explanation was "inconsistent with the type of injuries that [Lisa] ha[d] sustained." Later testing "revealed retinal hemorrhaging in both eyes, indicative of Shaken Baby Syndrome." On 9 February 2018, DSS filed a petition alleging that Larry was a neglected juvenile. Larry was initially placed in kinship care with his maternal grandmother.

¶ 3 On 16 February 2018, the trial court entered an order granting DSS nonsecure custody of Larry. That same day, DSS filed an amended juvenile petition adding allegations that the father had shaken Lisa and that he was incarcerated on charges of felonious child abuse. DSS further alleged that Larry's maternal grandmother "was allowing [Larry to have] contact with the respondent mother in violation of a safety assessment," and that respondent was incarcerated on charges of misdemeanor larceny and shoplifting. Respondent tested positive for cocaine, benzodiazepines, and methadone on 23 March, 9 April, and 11 June 2018. Respondent refused drug screens on 23 April, 3 May, 30 May, 27 June, and 27 July 2018. On 13 June 2018, respondent "made a case plan with DSS," but did not sign it. That plan

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1. Pseudonyms are used in this opinion to protect the juveniles' identities and for ease of reading.

2. Only two children, Larry and Amy, are at issue in this case. There are five children in total. Respondent is not the mother of the biological father's oldest child, J.B. Respondent and the children's biological father are the parents of, in order: L.D. (Larry); the sibling who was abused (Lisa); A.D. (Amy); and the last child born on 9 October 2019 (Alex).

3. The trial court also terminated the parental rights of the father to both Larry and Amy. The father, however, did not appeal the trial court's order and is not a party to this appeal.

> found that the issues that needed to be addressed were substance abuse and recommended treatment, appropriate supervision and discipline, including parenting classes, establishing a stable home and employment, cooperating with [DSS], and maintaining contact with [DSS] at least once per week, and visiting the juvenile a[nd] supporting placement of the juvenile.

¶ 4 Amy was then born on 7 October 2018; her father is the same as Larry's father. On 9 October 2018, DSS filed a juvenile petition alleging that Amy was neglected and obtained nonsecure custody of Amy. The petition alleged that Amy tested positive for cocaine at birth and respondent tested positive for cocaine and methadone when Amy was born. Respondent admitted to using cocaine two days before the delivery. DSS also alleged respondent "ha[d] not been compliant with completing needs identified on her case plan, and continue[d] to test positive for illegal substances."

¶ 5 Following a hearing on 18 October 2018, the trial court determined with the parties' consent that Larry was neglected. This determination was memorialized in an adjudication order entered on 25 February 2019 in which respondent stipulated to facts consistent with the allegations in DSS's amended petition. In a separate disposition order, the trial court directed that Larry remain in DSS custody.

¶ 6 Following a hearing on 10 January 2019, the trial court entered a second consent adjudication order on 25 February 2019 determining that Amy was neglected. The court also found in a separate disposition order that respondent had failed to address any of the issues identified in her case plan. Respondent had again tested positive for cocaine on 4 January 2019. The trial court ruled that further reunification efforts would be unsuccessful and inconsistent with Amy's needs based on Lisa's non-accidental injuries and the parents' failure to address the issues that led to Amy's removal. The trial court ordered that Amy remain in DSS custody and relieved DSS of further reunification efforts. The court also discontinued respondent's visits with Amy pending guidance from a therapist about the appropriateness of visitation. After a review hearing on 10 January 2019, the trial court entered a review order in Larry's case on 25 February 2019. The trial court found reunification efforts would also be unsuccessful and inconsistent with Larry's needs. The trial court ordered that Larry remain in DSS custody, relieved DSS of further reunification efforts, and discontinued respondent's visits with Larry.

¶ 7 Following a permanency planning hearing on 7 February 2019, the trial court entered orders on 27 February 2019 setting the permanent plan for the children as custody with a relative with a concurrent plan of reunification. The trial court held another permanency planning hearing on 28 March 2019 and entered review orders on 6 June 2019. The trial court found that respondent was enrolled at the Black Mountain inpatient substance abuse treatment center and was scheduled to complete the program in May 2019. The trial court further found that respondent still was not employed, did not have stable housing, and had not enrolled in parenting classes. The trial court changed the permanent plan to adoption with a concurrent plan of reunification and ordered DSS to proceed with the plan.

¶ 8 The trial court held another permanency planning hearing on 30 May 2019 and entered review orders on 24 June 2019. The trial court found that respondent completed the Black Mountain program on 3 May 2019 but had not participated in any additional substance abuse treatment. Respondent was pregnant with another child as the possible result of her continuing relationship with the father, and she had not contacted DSS. The trial court found that respondent "spent the Memorial Day Weekend with [the father] at a hotel in Myrtle Beach, South Carolina."

¶ 9 After the next permanency planning hearing on 25 July 2019, in orders entered on 28 August 2019, the trial court found that "[s]ince the last permanency planning hearing, the respondent mother has had no contact with DSS" and was not present for the hearing. The trial court also found that respondent had not provided any financial support for the children. The trial court again ordered that respondent not have visitation with the children "due to the severity of injuries suffered by the juvenile's sibling" and because respondent was "failing to successfully address the issues which led to removal." Following a permanency planning hearing on 19 December 2019, the trial court entered orders finding that respondent still had no contact with DSS; had not provided financial support for her children; had given birth to Alex in October of 2019, who tested positive for cocaine; and was "residing in a Drug Addiction Treatment Center in Smithfield, North Carolina." The court ordered DSS "to proceed with [the] permanent plan" of adoption for both children.

¶ 10 On 24 January 2020, DSS filed petitions to terminate respondent's parental rights to Larry and Amy on the grounds of neglect, *see* N.C.G.S. § 7B-1111(a)(1) (2021); willfully leaving the children in a placement outside the home while failing to make reasonable progress, *see id.* § 7B-1111(a)(2) (2021); and willful abandonment, *see id.* § 7B-1111(a)(7) (2021). In orders filed on 4 February 2021, the trial court determined

that grounds existed to terminate respondent's parental rights under N.C.G.S. §§ 7B-1111(a)(1), (2), and (7). The trial court concluded that terminating respondent's parental rights was in the children's best interests. *See id.* § 7B-1110(a) (2021). Accordingly, the trial court terminated respondent's parental rights to Larry and Amy. Respondent appeals.

¶ 11 On appeal respondent contends the trial court erred by determining grounds existed to terminate her parental rights. Respondent argues several of the trial court's findings of fact are not supported by clear, cogent, and convincing evidence. Respondent then contends the trial court's findings of fact do not support its conclusion of law that she willfully failed to make reasonable progress.

¶ 12 A termination of parental rights proceeding consists of an adjudicatory stage and a dispositional stage. N.C.G.S. §§ 7B-1109, -1110 (2021).

> "We review a trial court's adjudication under N.C.G.S. § 7B-1111 'to determine whether the findings are supported by clear, cogent and convincing evidence and the findings support the conclusions of law.' " *In re E.H.P.*, 372 N.C. 388, 392, 831 S.E.2d 49, 52 (2019) (quoting *In re Montgomery*, 311 N.C. 101, 111, 316 S.E.2d 246, 253 (1984)); *see also* N.C.G.S. § 7B-1109(f) (2019). Unchallenged findings are deemed to be supported by the evidence and are "binding on appeal." *In re Z.L.W.*, 372 N.C. 432, 437, 831 S.E.2d 62, 65 (2019). "Moreover, we review only those [challenged] findings necessary to support the trial court's determination that grounds existed to terminate respondent's parental rights." *In re T.N.H.*, 372 N.C. 403, 407, 831 S.E.2d 54, 58–59 (2019).

In re L.M.M., 2021-NCSC-153, ¶ 10 (quoting *In re K.N.K.*, 374 N.C. 50, 53, 839 S.E.2d 735, 737–38 (2020) (alteration in original)). The trial court's supported findings are "deemed conclusive even if the record contains evidence that would support a contrary finding." *In re B.O.A.*, 372 N.C. 372, 379, 831 S.E.2d 305, 310 (2019).

¶ 13 Here the trial court concluded that a ground existed to terminate respondent's parental rights under N.C.G.S. § 7B-1111(a)(2). A trial court may terminate parental rights if "[t]he parent has willfully left the juvenile in foster care or placement outside the home for more than 12 months without showing to the satisfaction of the court that reasonable progress under the circumstances has been made in correcting

those conditions which led to the removal of the juvenile." N.C.G.S. § 7B-1111(a)(2).

> Termination under this ground requires the trial court to perform a two-step analysis where it must determine by clear, cogent, and convincing evidence whether (1) a child has been willfully left by the parent in foster care or placement outside the home for over twelve months, and (2) the parent has not made reasonable progress under the circumstances to correct the conditions which led to the removal of the child.

In re Z.A.M., 374 N.C. 88, 95, 839 S.E.2d 792, 797 (2020). A parent's reasonable progress "is evaluated for the duration leading up to the hearing on the . . . petition to terminate parental rights." *In re J.S.*, 374 N.C. 811, 815, 845 S.E.2d 66, 71 (2020) (quoting *In re A.C.F.*, 176 N.C. App. 520, 528, 626 S.E.2d 729, 735 (2006)).

> [A] respondent's prolonged inability to improve her situation, despite some efforts in that direction, will support a finding of willfulness regardless of her good intentions, and will support a finding of lack of progress . . . sufficient to warrant termination of parental rights under section 7B-1111(a)(2).
>
> [P]arental compliance with a judicially adopted case plan is relevant in determining whether grounds for termination exist pursuant to N.C.G.S. § 7B-1111(a)(2).

Id. (citations and quotation marks omitted) (alterations in original).

¶ 14 In its order concluding grounds existed to terminate respondent's parental rights as to Larry, the trial court made the following findings of fact:

> 21. That [DSS] assumed non-secure[ ] custody on February 15, 2018 . . . .
>
> . . . .
>
> 23. That the minor child . . . was adjudicated to be a neglected juvenile on October 18, 2018 via a stipulation that he did not receive proper care, supervision or environment from his parents or custodians, and lived in an environment injurious to his welfare . . . .

. . . .

25. That the initial Family Services Case Plan for [respondent] found that the issues that needed to be addressed were substance abuse and recommended treatment, appropriate supervision and discipline, including parenting classes, establishing a stable home and employment, cooperating with [DSS], and maintaining contact with [DSS] at least once per week, and visiting the juvenile a[nd] supporting [the] placement of the juvenile.

26. That during the pendency of this case [respondent] failed to make substantial progress on [her] Family Services Case Plan.

. . . .

28. That [the] [o]rder from the January 10, 2019 [review hearing] released [DSS] of reasonable efforts towards the reunification with [respondent] due to [her] noncompliance with [her] Family Services Case Plan, and continuing to test positive for controlled substances.

29. That on January 4, 2019 [respondent] tested positive for cocaine.

30. That on January 10, 2019 [respondent] was not employed, did not have stable housing, and has gone to very few parenting classes.

. . . .

33. That the [c]ourt, on January 10, 2019 found that due to the very serious and life-threatening injuries sustained by the juvenile's younger sibling [Lisa,] which were injuries no[t] the result of an accident, in addition to the parents' failure to address the issues which led to removal, including the birth of a drug positive infant in 2018, that further reunification efforts would be futile and inconsistent with the juvenile's health, safety and need for a safe and permanent home within a reasonable period of time, and it would be in the best interest of the juvenile for [DSS] to be

> relieved of further reunification efforts and proceed with a permanent plan for the juvenile.
>
> . . . .
>
> 35. That [respondent] over the pendency of this matter has continuously used controlled substances for which she does not have a prescription and has given birth to two controlled[-]substances[-]positive children during the pendency of this matter.
>
> . . . .
>
> 40. That [respondent] ha[s] only sporadically made contact with [DSS] to check on the status or welfare of [her] minor child.
>
> . . . .
>
> 43. That the minor child has been out of the home for more than 32 months at the time of this hearing.

Then, in a section titled "Ultimate Findings of Fact," the trial court found the following:

> 2. That . . . [respondent] ha[s] made no attempts to correct any conditions that led to the removal.
>
> 3. That [respondent] did not timely participate in substance abuse treatment, did not find suitable housing, and did not find suitable employment.
>
> 4. That [respondent] d[oes] not provide care or sustenance for [her] minor child, and ha[s] not visited on a regular basis.
>
> 5. That [respondent] did not make inquiries on [her] minor child on a consistent basis. And ha[s] not made regular contact with [DSS] to determine which actions [she] needed to take to regain custody of [her] minor child.
>
> 6. That [respondent] . . . has made little to no efforts to correct the conditions that led to the removal of her child, and has made no contact with [DSS] to ascertain what she must do to correct those

> conditions, and has made no regular visits with her child.
>
> . . . .
>
> 8. That [respondent] ha[s] willfully left the juvenile, [Larry,] in foster care for more than twelve months without showing to the satisfaction of the Court that reasonable progress under the circumstances has been made in correcting those conditions which led to the removal of the juvenile.

¶ 15 The trial court entered a separate order concluding that grounds existed to terminate respondent's parental rights to Amy. Many of the trial court's findings in that order are identical to those in the order terminating respondent's rights to Larry. The following are the findings of fact in the order regarding Amy that differ from those in the order regarding Larry:

> 21. That [DSS] assumed non-secure[ ] custody on October 9, 2018 because [DSS] received a report on October 8, 2018 regarding the juvenile. The juvenile was born on October 7, 2018, and tested positive for cocaine. [Respondent] tested positive for cocaine and methadone at the time of the juvenile's birth.
>
> 22. That [respondent] admitted that she had used cocaine two days before she gave birth to [Amy].
>
> 23. That [DSS] had recent child protective services history in that three of the juvenile's siblings were currently in foster care due to the physical abuse of an infant child, substance abuse, and mental health concerns. [Respondent] has not been compliant with meeting the needs identified on her Family Services Case Plan and continued to test positive for illegal substances.
>
> . . . .
>
> 25. That the minor child, [Amy,] was adjudicated to be a neglected juvenile on October 10, 2019 via a stipulation that she lived in an environment injurious to her welfare . . . .

> 26. That [respondent] does not have stable housing, and gave birth to another cocaine-positive infant in October 2019.
>
> . . . .
>
> 44. That the minor child has been out of the home for more than 24 months at the time of this hearing.
>
> . . . .
>
> 47. That the mother attended Black Mountain Recovery Center in 2019, and left said program early without sufficient explanation.
>
> 48. That [respondent] ha[s] failed to provide any form of substantial support for the minor child.
>
> 49. That [respondent] and [the] father still have an active relationship.
>
> . . . .
>
> 51. That [respondent] indicated that she would consume controlled substances as a way of coping.

¶ 16 Respondent argues that several findings of fact are unsupported by the evidence. Respondent contests finding of fact 47 in Amy's order, which states that she "attended Black Mountain Recovery Center in 2019, and left said program early without sufficient explanation." She asserts this finding is contrary to the court's own findings in its 24 June 2019 permanency planning order. In that order the trial court found that respondent "completed the Black Mountain inpatient substance abuse treatment center . . . program on May 3, 2019" and that "[s]he completed the program early as she [was] pregnant." Robbie Lowery, a foster care supervisor at DSS, testified that respondent stayed at Black Mountain for less than ninety days and left early "due to her pregnancy, but they let her leave and didn't have any concerns." Respondent also testified that she left Black Mountain early because she was pregnant. Accordingly, we disregard the portion of finding of fact 47 stating that respondent left the "[Black Mountain] program early without sufficient explanation." *See In re N.G.*, 374 N.C. 891, 901, 845 S.E.2d 16, 24 (2020) (disregarding findings not supported by the evidence).

¶ 17 Respondent also challenges finding of fact 49 in Amy's order, which states that she and the father "still have an active relationship." Respondent contends that because she last saw the father in October

of 2019, she did not have an active relationship with him at the time of the hearing. Amy was born on 7 October 2018 as a result of respondent's ongoing relationship with the father. In its review order filed on 24 June 2019, the trial court found that respondent "maintains a relationship with the . . . father as she spent the Memorial Day Weekend with him at a hotel in Myrtle Beach, South Carolina." On 9 October 2019, respondent gave birth to Alex, whose father is the same as Larry's and Amy's. Accordingly, substantial evidence supported the finding that respondent maintained an active relationship with the father.

¶ 18 Respondent next challenges the findings that she "had not been in regular contact with [DSS]." Respondent contends that the findings are unsupported but also suggests it was "unreasonable" for her to continue contacting DSS because she already knew the contents of her case plan; one of the social workers was not responsive to her calls; and once reunification efforts were ceased, DSS said it would not "hold [her] hand." Regardless of these arguments, respondent's case plan required her to "cooperat[e] with [DSS]" and to "maintain[ ] contact with [DSS] at least once per week." After respondent was released from the Black Mountain program in May of 2019, she did not contact DSS. Moreover, one of the social workers, Laura Gardner, testified that from August of 2019 until July of 2020, the period when she was assigned to the family, respondent never contacted DSS. Robbie Lowery testified that from July of 2020 onward, respondent did not call DSS to inquire about the welfare of her children. In her own testimony, respondent admitted she did not stay in regular contact with DSS. Thus, substantial evidence supports these findings.

¶ 19 Respondent also contends that the trial court's findings related to her case plan progress "are wholly unsupported by the other findings and the evidence." The trial court found that respondent "failed to make substantial progress," "made no attempts to correct any conditions that led to the removal," and "did not timely participate in substance abuse treatment, did not find suitable housing, and did not find suitable employment." Respondent contends, however, that her actions in the spring and summer of 2020—specifically, completing another substance abuse treatment program, obtaining a job, and securing a two-bedroom apartment—indicate that she made reasonable progress on her case plan.

¶ 20 In so doing, respondent erroneously relies in part on evidence presented at the disposition stage of the proceeding. *See In re Z.J.W.*, 376 N.C. 760, 2021-NCSC-13, ¶ 17 (holding that the trial court erroneously "relied upon . . . dispositional evidence as support for its adjudicatory finding"). Moreover, respondent relies on her own testimony at the

adjudicatory stage detailing her progress in the spring and summer of 2020. Robbie Lowery, however, testified respondent had not followed through on any of her case plan requirements and never presented proof of employment. Laura Gardner testified that respondent did not attempt to show she was addressing her substance abuse issues and made no requests for DSS to inspect a new residence. Although respondent informed Laura Gardner in April 2020 that she was employed, had entered another rehabilitation program, and was expected to graduate in June 2020, respondent never provided evidence of her employment or completion of the rehabilitation program. The trial court weighed this competing evidence and found the testimony from DSS staff to be more credible than respondent's testimony. *See In re C.A.H.*, 375 N.C. 750, 759, 850 S.E.2d 921, 927 (2020) (noting that the trial court, given its unique position, is the proper entity to make credibility determinations). Accordingly, we conclude that the findings that respondent did not make progress on her case plan are supported by the evidence.

¶ 21 The trial court's findings of fact support its conclusion that respondent's parental rights were subject to termination based on N.C.G.S. § 7B-1111(a)(2). Larry was removed from respondent's care on or about 7 February 2018. Amy was removed from respondent's care on or about 9 October 2018. Both children had remained continuously in their placements outside of respondent's care when the termination of parental rights petitions were filed on 24 January 2020. Thus, both children were in a placement outside respondent's care for more than twelve months preceding the filing of the petitions.

¶ 22 Moreover, the evidence showed that respondent exhibited a prolonged inability to improve her situation. Larry was originally removed from respondent's care because the father abused Lisa. Nonetheless, respondent continuously maintained a relationship with the father throughout these proceedings. Moreover, respondent did not improve her substance abuse. From March until July of 2018, respondent repeatedly either tested positive for controlled substances or refused drug screens. Then on 7 October 2018, Amy tested positive for cocaine when she was born, and respondent admitted to using cocaine two days before the birth. Respondent tested positive for cocaine again on 4 January 2019. The trial court ceased efforts toward reunification with respondent in part because respondent "continue[d] to test positive for illegal substances." Although respondent completed the Black Mountain treatment program in May of 2019, her last child, born in October of 2019, also tested positive for cocaine at birth. Respondent "was not employed, did not have stable housing, and ha[d] gone to very few parenting classes."

Respondent also consistently failed to cooperate and remain in contact with DSS. Thus, the trial court's findings of fact support its conclusion of law that respondent willfully left the children in a placement outside the home and failed to make reasonable progress. Accordingly, the trial court properly terminated respondent's parental rights under N.C.G.S. § 7B-1111(a)(2).

¶ 23 Respondent also argues the trial court erred in terminating her parental rights under N.C.G.S. §§ 7B-1111(a)(1) and (7). Because we conclude the trial court properly terminated respondent's parental rights based on N.C.G.S. § 7B-1111(a)(2), we do not address respondent's remaining arguments. *See In re Moore*, 306 N.C. 394, 404, 293 S.E.2d 127, 133 (1982) (stating that an appealed order should be affirmed when any one of the grounds found by the trial court is supported by findings of fact based on clear, cogent, and convincing evidence); *see also* N.C.G.S. § 7B-1111(a) ("The court may terminate the parental rights upon a finding of one or more [grounds for termination.]"). Thus, we affirm the trial court's orders.

AFFIRMED.

IN THE MATTER OF M.S.L. A/K/A M.S.H.

No. 215A21

Filed 18 March 2022

1. Termination of Parental Rights—jurisdiction—sufficiency of findings

In a termination of parental rights matter, the trial court's general finding that it had jurisdiction over the parties and the subject matter of the action was supported by the record and met the jurisdictional requirements of N.C.G.S. § 7B-1101.

2. Termination of Parental Rights—grounds for termination—neglect—stipulations to factual circumstances—sufficiency of findings

The trial court properly terminated a father's parental rights to his daughter based on neglect after making findings that, although respondent was not responsible for the child's initial removal from the home (which was based on her testing positive for controlled

substances at birth), he had a long-standing drug addiction, he continued to use drugs after he came forward as the child's father, and he lied to the court about his drug use. Although the court's findings were limited due to respondent having stipulated to the factual circumstances underlying the grounds for termination, the findings were supported by competent evidence and were in turn sufficient to support the court's conclusions of law.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) (2019) from an order entered on 9 March 2021 by Judge Denise S. Hartsfield in District Court, Forsyth County. This matter was calendared for argument in the Supreme Court on 18 February 2022 but determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

Theresa A. Boucher for petitioner-appellee Forsyth County Department of Social Services.

Parker Poe Adams & Bernstein LLP, by Maya Madura Engle, for Guardian ad Litem.

Benjamin J. Kull for respondent-appellant.

NEWBY, Chief Justice.

¶ 1 Respondent-father appeals from the trial court's order terminating his parental rights to M.S.L. a/k/a M.S.H. (Monica).[1] Because we hold the trial court did not err in terminating respondent's parental rights, we affirm the trial court's order.

¶ 2 Monica was born on 2 March 2019. Monica's biological mother, who is not a party to this appeal, has an extensive history of drug use, including during her pregnancy with Monica. At birth Monica tested positive for substances due to her mother's drug use. On 13 March 2019, the Forsyth County Department of Social Services (DSS) obtained custody of Monica. That same day she was placed in a foster home, where she has remained.

¶ 3 Initially Monica's mother identified C. Hall as Monica's father. Hall signed an affidavit of paternity. Paternity tests later revealed, however,

1. A pseudonym is used in this opinion to protect the juvenile's identity and for ease of reading.

that he was not Monica's biological father. On 21 November 2019, respondent reported to DSS that he believed he was Monica's father. Respondent and Monica's mother had met years earlier when respondent was dating Monica's maternal grandmother. Respondent later revealed to the social worker that their relationship was "not something that was in the open" and was a "dirty old man type of thing."

¶ 4 After respondent reported he might be Monica's father, his paternity tests were rescheduled multiple times, partially attributable to respondent. Ultimately, respondent's 21 January 2020 paternity test confirmed he was Monica's father. Respondent met with DSS in early March of 2020. While at first respondent reported that he did not use drugs with the mother, shortly thereafter respondent admitted that he and the mother had "gotten high together" before she was pregnant. Respondent also told the social worker that the mother had texted him a few weeks before the meeting about "getting . . . drugs." Respondent stated that though his "drug of choice" was cocaine, he had not used drugs in the six months preceding March of 2020.

¶ 5 The trial court held a hearing in the case on 24 June 2020. In the resulting juvenile order dated 22 July 2020, the trial court found that respondent, who has five older children, had history with Child Protective Services in both Illinois and Virginia relating to his older children from when he lived in those states. Respondent also reported that he had spent five months imprisoned in Illinois for leaving the state with his children without their mother's consent. At the time of the hearing, respondent was on probation for a Level 5 DWI. Respondent also had previous convictions for DWIs, which resulted in the loss of his driver's license, as well as convictions for possession of drug paraphernalia. Additionally, respondent had prior convictions in Virginia for soliciting for prostitution and using a vehicle to promote prostitution.

¶ 6 Respondent reported that he had completed a substance abuse assessment sometime in or before 2019, but he refused a drug screen on 11 June 2020. Though the court had not ordered visitation, the court found that DSS had arranged weekly visits via video conference. Respondent had only attended (or logged in to) three of the nine total video visits.

¶ 7 In that same order, however, the trial court established the primary plan as reunification with respondent and the secondary plan as adoption. To achieve reunification, the trial court ordered respondent to (1) complete a mental health and substance abuse assessment and follow all recommendations, (2) comply with random hair and urine drug

screens, and (3) enter into an out-of-home family services agreement and a visitation plan with DSS. The court provided respondent with weekly visitation via phone or video.

¶ 8 The trial court entered another juvenile order on 22 October 2020. In that order, the trial court found the following: the day after the 24 June 2020 hearing, respondent submitted to hair and urine drug screens, both of which returned positive results indicating cocaine use.[2] Shortly thereafter, respondent admitted that he had used 11 days prior to the 25 June 2020 screening. On 5 August 2020, respondent reported that he had continued using cocaine because he was stressed.

¶ 9 On 6 August 2020, respondent took a urine screen, which was negative for substances. On 18 August 2020, respondent completed a clinical assessment and was diagnosed with cocaine use disorder. Respondent indicated at that time he had been clean for three weeks. Toward the end of August, respondent completed part of his psychological evaluation/parenting capacity assessment. Dr. Bennett, who conducted the assessment, concluded respondent had difficulty acknowledging the nature of his substance use problem, struggled with defensiveness, impulse control, and poor judgment, and presented with "significant grandiosity and [had] limited insight into his short period of recovery." Dr. Bennett concluded that respondent's actions did not support his readiness to be a parent. Dr. Bennett made six recommendations: he concluded that respondent should (1) complete all random drug tests and have no refused tests, or those would count as positive tests; (2) attend counseling; (3) complete a substance use disorder assessment and follow treatment recommendations, including staying in contact with a treatment provider and attending substance abuse support groups; (4) obtain, maintain, and document stable housing and finances; (5) participate in treatment for substance use disorder; and (6) continue to be involved in Monica's life.

¶ 10 The trial court additionally found that respondent had attended seven virtual visits, failed to attend one visit, and that three visits were rescheduled because respondent did not confirm the visits in advance. Because of respondent's positive test in June of 2020 and his later admissions, the court concluded that respondent had previously provided false testimony to the court about his drug usage. Based upon all of the evidence, the trial court changed the permanent plan to adoption with the secondary plan as reunification with the father. The trial court

2. Between the date of respondent's 25 June 2020 drug screen and 6 August 2020 drug screen, on 22 July 2020, the court terminated the mother and Hall's rights to the child. Neither the mother nor Hall are parties to this appeal.

ordered DSS to file a petition to terminate respondent's parental rights within 60 days.

¶ 11 On 5 November 2020, DSS filed a petition to terminate respondent's parental rights pursuant to N.C.G.S. § 7B-1111(a)(1) (2021) (neglect), N.C.G.S. § 7B-1111(a)(2) (willfully leaving the child outside the home without making reasonable progress), and N.C.G.S. § 7B-1111(a)(5) (failure to legitimate). Respondent filed an answer wherein he admitted all of the allegations in the complaint. Respondent, however, requested to be heard regarding the best interests determination and stated that based on the best interests factors set forth in N.C.G.S. § 7B-1110 (2021), the trial court should not terminate respondent's parental rights.

¶ 12 On 10 February 2021, the trial court held a hearing on the termination petition. When questioned at the hearing, respondent "agreed . . . that [DSS] ha[d] enough evidence to go forward and prevail" on the grounds asserted for termination in the termination petition. Respondent confirmed that he had not come to the hearing to be heard on the grounds for termination but wanted to be heard on the best interests determination. In an order entered 9 March 2021, the trial court recognized respondent's stipulation as to the circumstances supporting the grounds for termination, made findings of fact consistent with those alleged in the termination petition to which respondent stipulated, and concluded that grounds existed to terminate respondent's rights based on all three grounds alleged in the petition. The trial court also determined that terminating respondent's rights was in Monica's best interests. Therefore, the trial court terminated respondent's parental rights.

¶ 13 On appeal respondent argues (1) that the trial court erred by failing to make a sufficient finding that it had subject matter jurisdiction, and (2) that the findings of fact do not support the conclusions of law that grounds exist to terminate respondent's parental rights. We address each argument in turn.

I. Jurisdiction

¶ 14 **[1]** Respondent first argues that the trial court did not make a finding pursuant to N.C.G.S. § 7B-1101 that it had jurisdiction, meaning the court could not exercise jurisdiction over the matter here. Respondent concedes that the record supports a conclusion that the trial court had jurisdiction over the matter. Respondent also recognizes that in the termination order, the trial court stated that "[t]he Court has jurisdiction over the parties and subject matter of this action." Nevertheless, respondent argues that the juvenile code, set forth in the North Carolina

General Statutes, requires a specific finding of jurisdiction, and that the trial court failed to satisfy that statutory requirement here.

¶ 15 N.C.G.S. § 7B-1101 provides, in part,

> The court shall have exclusive original jurisdiction to hear and determine any petition or motion relating to termination of parental rights to any juvenile who resides in, is found in, or is in the legal or actual custody of a county department of social services or licensed child-placing agency in the district at the time of filing of the petition or motion. The court shall have jurisdiction to terminate the parental rights of any parent irrespective of the age of the parent. *Provided, that before exercising jurisdiction under this Article, the court shall find that it has jurisdiction to make a child-custody determination under the provisions of G.S. 50A-201, 50A-203, or 50A-204.*

N.C.G.S. § 7B-1101 (2021) (emphasis added). This Court has previously determined that compliance with the juvenile code does not require a finding that explicitly mirrors the relevant statutory language. *See In re K.N.*, 378 N.C. 450, 2021-NCSC-98, ¶ 22 (concluding that the trial court had subject matter jurisdiction over the case where the trial court only made a general finding that it had jurisdiction and the record supported such a determination), *petition for reh'g denied*, No. 459A20 (N.C. Sept. 24, 2021) (order).

¶ 16 Here the trial court stated that it "has jurisdiction over the parties and the subject matter of this action." The record here supports the trial court's finding and a conclusion that the trial court had both subject matter and personal jurisdiction in this case. Given that Monica resided in North Carolina since her birth, North Carolina is her "home state." As respondent concedes, while the case here was pending, this Court rejected the same argument that respondent has raised, *see In re K.N.*, ¶¶ 18–22. Thus, because the trial court's finding and the record support a conclusion that the trial court had subject matter jurisdiction here, respondent's argument is overruled.

II. Grounds for Termination

¶ 17 **[2]** Respondent next asserts that the trial court improperly relied on respondent's stipulation at the hearing, which amounted to an

impermissible stipulation to conclusions of law.[3] Additionally, respondent asserts that the trial court's findings of fact do not support a conclusion of law that respondent neglected Monica, and thus his parental rights were not subject to termination on this ground. Respondent argues that because Monica was placed into DSS custody based upon the mother's neglect of the child, the findings do not show that respondent neglected the child. Respondent asserts that any conclusion that allows for termination of parental rights here, where he was not responsible for the initial neglect, undermines the legislature's stated intent in N.C.G.S. § 7B-1111(a)(1).

¶ 18 "The court may terminate the parental rights upon a finding . . . [t]he parent has abused or neglected the juvenile. The juvenile shall be deemed to be abused or neglected if the court finds the juvenile to be . . . a neglected juvenile within the meaning of G.S. 7B-101." N.C.G.S. § 7B-1111(a)(1). A neglected juvenile is defined in pertinent part as a juvenile "whose parent, guardian, custodian, or caretaker does not provide proper care, supervision, or discipline; or who has been abandoned; . . . or who lives in an environment injurious to the juvenile's welfare." N.C.G.S. § 7B-101(15) (2019). "To terminate parental rights based on neglect, 'if the child has been separated from the parent for a long period of time, there must be a showing of past neglect and a likelihood of future neglect by the parent.' " *In re D.L.A.D.*, 375 N.C. 565, 567, 849 S.E.2d 811, 814 (2020) (quoting *In re D.L.W.*, 368 N.C. 835, 843, 788 S.E.2d 162, 167 (2016)).

> This Court has repeatedly stated that "[w]hen determining whether a child is neglected, the circumstances and conditions surrounding the child are what matters, not the fault or culpability of the

3. In addition to the ground discussed below, respondent also contends that the trial court erred by concluding that his parental rights were subject to termination based on N.C.G.S. § 7B-1111(a)(2) (willfully leaving the child outside the home without making reasonable progress) and N.C.G.S. § 7B-1111(a)(5) (failure to legitimate). Because the trial court properly terminated respondent's parental rights based on N.C.G.S. § 7B-1111(a)(1) as we discuss hereinafter, we need not address these arguments. *See In re Moore*, 306 N.C. 394, 404, 293 S.E.2d 127, 133 (1982) (holding that an appealed order should be affirmed when any one of the grounds of the trial court is supported by findings of fact based on clear, cogent, and convincing evidence); *see also* N.C.G.S. § 7B-1111(a) ("The court may terminate the parental rights upon a finding of one or more [grounds for termination.]").

Notably, though respondent only challenged the trial court's best interests determination at the trial court proceeding, respondent abandoned any argument related to best interests on appeal. Moreover, though respondent stipulated to the circumstances supporting the alleged grounds for termination at the trial court, now, for the first time on appeal, respondent challenges the alleged grounds for termination.

> parent." *In re Z.K.*, 375 N.C. 370, 373, 847 S.E.2d 746, 748–49 (2020); *see also In re S.D.*, 374 N.C. 67, 75, 839 S.E.2d 315, 322 (2020) ("[T]here is no requirement that the parent whose rights are subject to termination on the grounds of neglect be responsible for the prior adjudication of neglect."); *In re J.M.J.-J.*, 374 N.C. 553, 564, 843 S.E.2d 94, 104 (2020) (rejecting the respondent's argument "that the trial court's conclusion of neglect was erroneous because he was not responsible for the conditions that resulted in [his daughter's] placement in DSS custody").

In re M.Y.P., 378 N.C. 667, 2021-NCSC-113, ¶ 16 (alterations in original). Additionally, "[a] parent's failure to make progress in completing a case plan is indicative of a likelihood of future neglect." *In re M.A.*, 374 N.C. 865, 870, 844 S.E.2d 916, 921 (2020) (quoting *In re M.J.S.M.*, 257 N.C. App. 633, 637, 810 S.E.2d 370, 373 (2018)); *see also In re W.K.*, 376 N.C. 269, 278–79, 852 S.E.2d 83, 91 (2020) (noting that "[b]ased on respondent-father's failure to follow his case plan and the trial court's orders and his continued abuse of controlled substances, the trial court found that there was a likelihood the children would be neglected if they were returned to his care").

¶ 19 After respondent stipulated to the circumstances surrounding the grounds to terminate his parental rights, the trial court made the following findings and conclusions:

> 7. [Respondent], the biological father of [Monica] has neglected her.
>
> 8. On May 20, 2019, [Monica] was adjudicated to be a neglected child within the meaning of N.C.G.S. 7B-101.
>
> 9. [Monica] has been in the nonsecure and legal custody of the Forsyth County Department of Social Services since March 13, 2019. Since that time, [respondent] has neglected his daughter and has failed to demonstrate to the Juvenile Court that he can provide a safe home for the child pursuant to the provisions of N.C.G.S. 7B-101(19).
>
> 10. [Respondent] is the biological father of the child. He presented himself to the Forsyth County Department of Social Services, the legal custodian of the child on

> November 21, 2019 stating that he believed himself to be the father of [Monica]. [Respondent] delayed taking a paternity test multiple times and paternity was not confirmed until January 21, 2020.
>
> 11. [Respondent] has continued to neglect [Monica] by failing to engage in efforts in order to provide a safe home for the child and demonstrate that he can meet her basic needs.
>
> 12. [Respondent] has failed to comply with substance abuse treatment and he has continued to use controlled substances.
>
> 13. [Respondent] has failed to comply with the recommendations of his Parenting Capacity Psychological assessment.
>
> 14. Return of [Monica] to the care, custody and control of [respondent] will result in a strong likelihood of repeated of [sic] neglect of the child.
>
> . . . .
>
> 17. The grounds alleged in N.C.G.S. 7B-1111(a)(1), (2) and (5) as they relate to [respondent] were stipulated to and have been proven by clear, cogent and convincing evidence.

Additionally, the trial court found that respondent had a long-standing substance abuse addiction, had previously lied to the court about his substance use, and that he continued to test positive for cocaine use after 11 September 2020 despite reporting that the last date of cocaine use was 11 September 2020. The trial court also found that respondent adamantly denied being an addict and adamantly denied using cocaine after 11 September 2020. The trial court found relevant that respondent has five adult children with whom he has no ongoing relationship, all of whom he had not seen in years, though he contended that he wanted Monica to know these adult children. Finally, the trial court noted that it was suspicious of respondent's "motives given his past indiscretions including a sexual relationship with [Monica's] mother and grandmother at different times."

¶ 20 While this case is somewhat unusual in that respondent admitted all allegations in the termination petition and stated that he did not wish to challenge the circumstances surrounding the grounds to terminate his

parental rights, this Court has previously recognized that an individual can stipulate to facts underlying a juvenile proceeding, even where those facts ultimately support a termination order. *See In re M.Y.P.*, 378 N.C. 667, 2021-NCSC-113, ¶ 16 (recognizing that the respondent had stipulated to findings of fact supporting an adjudication order, which ultimately supported the trial court's determination in the termination order that the child had been previously neglected). Therefore, we reject respondent's argument that the stipulation to the circumstances here was improper, as, viewed properly, respondent's stipulation related to *factual* circumstances surrounding the grounds for termination.

¶ 21 The trial court's findings as to neglect here were limited because of respondent's factual stipulations.[4] Nonetheless, they are sufficient for the trial court to conclude that respondent neglected Monica within the meaning of the statute. While respondent was not responsible for Monica's initial placement with DSS, respondent stipulated that Monica had previously been adjudicated neglected, which stemmed from Monica testing positive for controlled substances at birth. Despite this history, after respondent presented himself as Monica's father, he continued to use controlled substances, contrary to the recommendations from his parenting capacity assessment and knowing the trial court's stated plan for the juvenile. Respondent also failed to recognize the severity of his continuous drug abuse and was repeatedly dishonest with the trial court about his continued cocaine use. As such, the trial court properly terminated respondent's parental rights based upon neglect. *See In re M.A.W.*, 370 N.C. 149, 153–55, 804 S.E.2d 513, 517–18 (2017) (concluding that the trial court properly terminated the respondent's parental rights based upon neglect where, though the respondent was imprisoned at the time the child was originally adjudicated neglected, the child was placed into DSS' care based upon the mother's substance abuse and, after the respondent's release from prison, he failed to follow through with the court's directives).

¶ 22 Here the trial court's findings of fact are supported by clear, cogent, and convincing evidence, and those findings support the trial court's conclusions of law. Accordingly, we affirm the trial court's termination order.

AFFIRMED.

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4. The trial court's order here is consistent with what respondent chose to argue at the trial court given that he stipulated to the circumstances surrounding the grounds for termination, did not wish to be heard regarding those grounds, and only wished to be heard regarding the best interests determination.

IN RE S.M.

[380 N.C. 788, 2022-NCSC-42]

IN THE MATTER OF S.M.

No. 534A20

Filed 18 March 2022

Termination of Parental Rights—best interests of the child—consideration of factors—sufficiency of evidence and findings

The trial court did not abuse its discretion by concluding that terminating a mother's and father's parental rights in their eleven-year-old daughter was in the child's best interests, where the court's factual findings were supported by competent evidence and demonstrated a proper analysis of the dispositional factors set forth in N.C.G.S. § 7B-1110(a). Notably, the child—whom the parents had exposed to sexually inappropriate boundaries, inappropriate discipline, and grooming behaviors—had an unhealthy bond with her parents characterized by guilt and a distorted sense of loyalty; the parents refused to acknowledge the problems that led to the child's removal from their home, deflecting blame for the child's trauma to the "system" and the department of social services; and there was a high likelihood of adoption where, despite her history of behavioral issues, the child had shown a real improvement after finding stability in her foster home and developing a trusting relationship with her foster mother.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) (2019) from the order entered on 22 September 2020 by Judge Doretta L. Walker in District Court, Durham County. This matter was calendared in the Supreme Court on 18 February 2022 but determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

The Law Office of Derrick J. Hensley, PLLC, by Derrick J. Hensley, for petitioner-appellee Durham County Department of Social Services.

Brendan A. Bailey and Ashley A. Edwards for Guardian ad Litem.

Kathleen M. Joyce for respondent-appellant mother.

Benjamin J. Kull for respondent-appellant father.

EARLS, Justice.

¶ 1 Respondents appeal from the trial court's order terminating their parental rights to S.M. (Sarah).[1] Respondents assert that the trial court erred in concluding it was in Sarah's best interests to terminate their parental rights. After careful review, we affirm the trial court's order.

I. Background

¶ 2 On 25 May 2017, Durham County Department of Social Services (DSS) filed a juvenile petition alleging that Sarah, age eight at the time, was neglected. The petition alleged that respondent-father asked Sarah's older half-sister, Ginny, to bathe him, despite being fully capable of bathing himself. The petition further alleged respondent-father had inappropriate sexualized discussions with Ginny, had engaged in "grooming" behaviors with Ginny, and had inappropriately disciplined both Ginny and Sarah by pinching their buttocks. The petition also noted respondent-father's previous sex offense convictions for acts against his two oldest daughters, who were now adults.

¶ 3 Respondents agreed to place Sarah in an approved kinship placement. Between May and November, Sarah moved placements three times. The safety placements reported that Sarah displayed inappropriate sexualized behavior and language. In November 2017, Sarah's final kinship placement informed DSS that she could no longer remain in the home. DSS filed a subsequent petition on 28 November 2017, alleging Sarah to be neglected and dependent. Due to the lack of a safety placement, DSS was granted nonsecure custody of Sarah.

¶ 4 On 15 December 2017, Sarah was adjudicated neglected and dependent. The trial court found she was subjected to inappropriate discipline and exposed to domestic violence in the home; respondent-father "refused to adhere to normal interpersonal boundaries" with Sarah and Ginny; and respondent-mother failed to protect Sarah. The court placed Sarah in the legal custody of DSS.

¶ 5 Following a permanency planning hearing, the trial court entered an order on 6 February 2019 setting Sarah's permanent plan as reunification with an alternative plan of guardianship with a court-approved caretaker. The trial court cited respondents' failure to acknowledge or remediate the issues that led to Sarah's removal. In a subsequent permanency planning order entered in July 2019, the trial court noted respondents'

1. Pseudonyms are used in this opinion to protect the juvenile's identity and for ease of reading.

continued lack of progress and changed Sarah's permanent plan to adoption with alternative plans of guardianship and reunification. Following a permanency planning hearing on 14 October 2019, the court relieved DSS from further reunification efforts and removed reunification as an alternative permanent plan based on respondents' continued failure to engage in services or acknowledge the issues that caused Sarah to be removed from the home.

¶ 6 On 15 October 2019, DSS filed a motion to terminate respondents' parental rights on the grounds of neglect and willfully leaving Sarah in foster care for more than twelve months without a showing of reasonable progress to correct the conditions that led to Sarah's removal. *See* N.C.G.S. § 7B-1111(a)(1)–(2) (2019).

¶ 7 Following a hearing on 26 and 30 June 2020, the trial court entered an order on 22 September 2020, concluding that grounds existed to terminate respondents' parental rights in Sarah pursuant to N.C.G.S. § 7B-1111(a)(1) and (2). The court also concluded it was in Sarah's best interests that respondents' parental rights be terminated. Respondents appealed.

II. Analysis

¶ 8 Our Juvenile Code provides for a two-stage process for the termination of parental rights—an adjudicatory stage and a dispositional stage. N.C.G.S. §§ 7B-1109, -1110 (2019). At the adjudicatory stage, the petitioner bears the burden of proving by "clear, cogent, and convincing evidence" the existence of one or more grounds for termination under N.C.G.S. § 7B-1111(a). N.C.G.S. § 7B-1109(f) (2019). Here, the trial court determined there was sufficient evidence to terminate respondents' parental rights pursuant to N.C.G.S. § 7B-1111(a)(1) and (2), and neither respondent has challenged this portion of the trial court's ruling. Accordingly, we consider only the dispositional portion of the trial court's order.

¶ 9 At the dispositional hearing, "the court shall determine whether terminating the parent's rights is in the juvenile's best interest." N.C.G.S. § 7B-1110(a) (2019).

> The court may consider any evidence, including hearsay evidence as defined in G.S. 8C-1, Rule 801, that the court finds to be relevant, reliable, and necessary to determine the best interests of the juvenile. In each case, the court shall consider the following criteria and make written findings regarding the following that are relevant:

> (1) The age of the juvenile.
>
> (2) The likelihood of adoption of the juvenile.
>
> (3) Whether the termination of parental rights will aid in the accomplishment of the permanent plan for the juvenile.
>
> (4) The bond between the juvenile and the parent.
>
> (5) The quality of the relationship between the juvenile and the proposed adoptive parent, guardian, custodian, or other permanent placement.
>
> (6) Any relevant consideration.

Id. "Although the trial court must consider each of the factors in N.C.G.S. § 7B-1110(a), written findings of fact are required only 'if there is conflicting evidence concerning the factor, such that it is placed in issue by virtue of the evidence presented before the district court.' " *In re G.G.M.*, 377 N.C. 29, 2021-NCSC-25, ¶ 22 (quoting *In re A.R.A.*, 373 N.C. 190, 199 (2019)).

¶ 10 " 'The trial court's dispositional findings are binding . . . if they are supported by any competent evidence' or if not specifically contested on appeal." *In re B.E.*, 375 N.C. 730, 745 (2020) (quoting *In re E.F.*, 375 N.C. 88, 91 (2020)). The trial court's assessment of a juvenile's best interests is reviewed solely for abuse of discretion. *In re D.L.W.*, 368 N.C. 835, 842 (2016) (citing *In re L.M.T.*, 367 N.C. 165, 171 (2013); *see also In re Montgomery*, 311 N.C. 101, 110 (1984)). "Under this standard, we defer to the trial court's decision unless it is manifestly unsupported by reason or one so arbitrary that it could not have been the result of a reasoned decision." *In re J.J.B.*, 374 N.C. 787, 791 (2020) (cleaned up).

¶ 11 Here, respondents argue that there was insufficient evidence to support many of the trial court's dispositional findings and that the court abused its discretion when it determined that termination of their parental rights was in Sarah's best interests.

¶ 12 The trial court made the following findings of fact regarding the statutory criteria set forth in N.C.G.S. § 7B-1110(a):

> 82. The Court accepted into evidence the DSS court summary dispositional report, addendum, a letter from the child's psychiatrist, and the [guardian ad litem's] dispositional report.

83. [Sarah] is eleven years old . . . .

84. [Sarah] has been in Durham DSS custody for over two years.

85. The permanent plan for the child is adoption and termination of the parental rights of [respondents] will aid in the accomplishment of the permanent plan for the child.

86. Although [Sarah] is older and has behavioral challenges, she has also displayed the ability to bond and connect with her caretaker and has shown consistency in the last ten months with her current care provider. During that ten months, there has been no physical aggression against the caregiver, and supportive services have helped her find stability and reduce the number of revenge bouts she has at school. Her therapist has also identified the child's connections to her parents as holding her back from being able to develop. The child is continuing to receive mental health assistance and there is a likelihood that she could be adopted.

87. [Sarah] has shown the ability to bond with her current caretaker, who she has lived with for the last eight months. Her behaviors have dramatically improved and she has even asked if she could call the caretaker "Mom." While [Sarah] is not in a preadoptive placement, her current caretaker has committed to helping [Sarah] transfer to her forever home. [Sarah] approaches the caregiver for affection, seeks affirmations from her, and shows a desire to please her.

88. The foster parent has expressed that she is very fond of [Sarah] and sees potential in her. [Sarah] has communicated to the social worker that she enjoys time on the farm with the current foster parent and the foster parent's extended family who live beside the farm. During [Sarah's] time in the current placement, she has begun to open up regarding her anger and responsiveness to others when upset being what she has seen growing up. [Sarah] has been responsive to the structure and consistency provided in the

current home and seems somewhat trusting of the caregiver to discuss her feelings and act accordingly when redirected.

89. There is no denying that [Sarah] loves her parents and that her parents love [Sarah]. There are concerns about the parents' manipulation of [Sarah] in their feedback with her.

90. [Sarah] has an undeniable bond with her mother and father, as she has maintained a sense of loyalty to them since coming into care. Often times children who have experienced some form of trauma, feel a sense of loyalty as the control of the offender is all they know. This control has convinced them that the offender has their best interest at heart therefore making it easier for the offender to manipulate their actions and emotions. [Sarah's] experience with trauma is no different, being exposed to sexually inappropriate boundaries, inappropriate discipline, and grooming behaviors have somehow given her a sense of trust and normalcy in the home of her biological parents, thus creating negative attachments that are not conducive to her over all well-being and safety. [Sarah's] psychiatrist has expressed concern due to [Sarah's] emotional immaturity that she is more vulnerable and at risk for further mental health instability if she is not provided the opportunity to properly receive mental health treatment in a neutral setting. [Sarah] continues to demonstrate a level of guilt around the bond with her parents.

91. [Sarah's] bond with her parents inhibits her ability to trust. Trust issues have carried through the past behavior issues and prior 18 placements over the last three years.

92. [Sarah] desired to cut her hair and after months of refusal of her parents, she cut her hair herself. After receiving negative feedback from the parents regarding why she would cut her hair, [Sarah] reverted to stating that she changed her mind and no longer desired to cut her "locs" out because she did not want to upset her parents. She changed her decision after

> talking to her parents because she feared upsetting her parents, which shows guilt and loyalty.
>
> 93. [Sarah's] inability to work through her own trauma is a repetition of her guilt issues with her parents.
>
> 94. [Sarah] demonstrates a hesitancy to discuss her trauma or any event that occurred in her biological family's home prior to coming into care, stating "we don't talk about family business." Although the parent's support of [Sarah] seems appropriate in their communication to her, as they often encourage her to do her best and that she can become anything she desires when she grows up, the result ends with the parents discussing points of the case in how [Sarah's] current circumstance is not her fault but merely her response to all of the stress and trauma that the "system" and DSS has pressed upon her by placing her in foster care. This is a clear deflection of accountability of the parent's actions and that of [Sarah] over her negative behaviors. Although [Sarah] may have a bond with her parents, this bond is not healthy and hinders [Sarah's] ability to work through her trauma and grow into a healthy young adult.

To the extent respondents do not except to these findings, they are binding. *In re B.E.*, 375 N.C. at 745.

¶ 13 We begin by addressing respondent-father's exception to the statement in finding of fact 82 that the letter accepted into evidence at the dispositional hearing was prepared by Sarah's "psychiatrist"—which he contends "is simply not true." We agree with respondent-father that the only letter admitted into evidence for disposition was from Morrow Dowdle, a physician's assistant at Carolina Behavioral Health, who made clear in her letter that "my role in treating [Sarah] is limited to psychiatric medication management, and I do not claim to be a trained psychotherapist[.]" However, we conclude the trial court's mischaracterization of the letter's source is harmless. *See generally In re N.C.E.*, 379 N.C. 283, 2021-NCSC-141, ¶ 22 (applying harmless error standard to dispositional findings). Ms. Dowdle's letter states that Sarah had been her "patient" since 18 November 2019, and she was familiar with Sarah's "history, physical, and mental status examination" in addition to her psychiatric diagnoses and medications. Ms. Dowdle's observations and opinions about Sarah were based on "[her] own interactions with

[Sarah,] and reports by her foster parent and social worker" and are consistent with those of Sarah's psychiatrist and therapist, as described in DSS's written report to the court, as well as those of Sarah's guardian ad litem (GAL) and DSS social worker.

¶ 14 Respondent-mother challenges findings of fact 85–94, claiming they are based on "conjecture and erroneous, incomplete, misleading, and contradictory statements, and thus are not competent evidence to support the trial court's best interest determination." She argues the trial court abused its discretion in terminating her parental rights "when there was no plan for Sarah's adoption and serious obstacles existed to her successful placement." Respondent-father also challenges portions of these findings. He further argues that the only dispositional factor in N.C.G.S. § 7B-1110(a) weighing in favor of termination was the parent-child bond, and that the trial court therefore abused its discretion in determining it was in Sarah's best interests to terminate his rights. We consider each parent's evidentiary arguments in the context of the relevant statutory factor.

A. Age of the juvenile

¶ 15 Neither respondent challenges the trial court's finding that Sarah was eleven years old at the time of the termination hearing, but they both contend that Sarah's age should have weighed against terminating their parental rights. Respondent-mother argues Sarah's age was a possible barrier to adoption. Respondent-father adds that, because Sarah was nearly twelve at the time of the termination hearing and had expressed a preference against adoption, "the trial court knew that Sarah's age weighed against her likelihood of adoption." In her reply brief, respondent-mother adopts respondent-father's argument that the trial court's failure to consider Sarah's feelings on the matter of adoption amounts to an abuse of discretion. We disagree.

¶ 16 As a general matter, our adoption statutes require a child's consent to an adoption if she is at least twelve years of age. N.C.G.S. § 48-3-601(a)(1) (2019). Under N.C.G.S. § 48-3-603(b)(2) (2019), however, the trial court may waive this consent requirement "upon a finding that it is not in the best interest of the minor to require the consent." *In re C.B.*, 375 N.C. 556, 562 (2020) (quoting *In re M.A.*, 374 N.C. 865, 880 (2020)).

¶ 17 Here, the trial court sustained DSS's objection on relevance grounds when counsel for respondent-mother asked the social worker whether DSS would consider Sarah's feelings on adoption when she turned twelve. The court ruled the question irrelevant because "[w]hen [Sarah] turns twelve, this case will be over." Presuming, arguendo, that the court

should have permitted this line of inquiry, we conclude the ruling was harmless inasmuch as Sarah's potential objection "would not preclude [her] adoption." *In re M.A.*, 374 N.C. at 880.

B. Likelihood of adoption and whether termination will aid in the accomplishment of the permanent plan

¶ 18 Respondents raise several challenges to findings of fact 85–88 that combine arguments related to Sarah's likelihood of adoption with those disputing the trial court's finding that terminating their parental rights will aid in the accomplishment of her permanent plan. *See* N.C.G.S. § 7B-1110(a)(2), (3). We consider these arguments together.

¶ 19 Respondent-mother challenges finding of fact 85 on the ground that the evidence at the termination hearing "failed to show how the drastic step of severing the parental bond actually aided in accomplishing [Sarah's] adoption." She asserts that terminating her parental rights will bring Sarah no closer to a "forever home" given the continued mental health supports Sarah would need. Respondent-mother contends adoption would complicate the stability Sarah has found in her current foster home, noting the lack of evidence on the effect that severing the bond with her current foster mother would have on Sarah. Respondent-mother also points to the absence of evidence of an identified adoptive placement for Sarah, DSS's efforts to locate such a placement, and the possible barriers to adoption such as Sarah's age and behavioral problems.

¶ 20 While respondent-father does not expressly challenge the evidentiary support for finding of fact 85, he contends the finding fails to take account of Sarah's concurrent permanent plan of guardianship which, unlike adoption, would not require the termination of his parental rights. Respondent-mother also alludes to the trial court's failure to consider guardianship as an alternative to termination.

¶ 21 "Unquestionably, the termination of respondent[s'] parental rights was a necessary precondition of [the child's] adoption." *In re E.F.*, 375 N.C. 88, 93 (2020). Moreover, competent evidence supports the trial court's finding that termination would aid in accomplishing the permanent plan. The record confirms that adoption was Sarah's primary plan, and guardianship was the secondary plan. The GAL advised the court that Sarah's permanent plan had been "changed to [a]doption" on 10 July 2019. DSS's dispositional report also states that "[t]he permanent plan for the child currently is adoption with a secondary plan of guardianship[,]" and that "[t]ermination of parental rights will aid in the accomplishment of adoption/guardianship for the child." At the termination hearing, DSS social worker Tamika Jenkins testified that Sarah's permanent plan was

adoption and that terminating respondents' parental rights would aid in realizing the plan.

¶ 22 Respondent-father offers no authority for his assertion that N.C.G.S. § 7B-1110(a)(3) requires the trial court's order to address the secondary plan. Nor does he point to any conflicting evidence about whether terminating his parental rights would aid in achieving a guardianship for Sarah, such that written findings would have been required. *See In re G.G.M.*, 2021-NCSC-25 at ¶ 22.

¶ 23 We further find no evidence tending to show that it was in Sarah's best interests to appoint a guardian for her while leaving respondents' parental rights intact. The trial court established a primary permanent plan of adoption based on respondents' failure to acknowledge and remedy the issues that led to Sarah's removal from their home. Respondent-father argued at the hearing that the alternate permanent plan of guardianship without a termination of parental rights would allow respondents to "continue to be a positive influence on [Sarah's] life." However, the evidence showed that, despite the love Sarah and respondents had for each other, respondents were not a positive influence in her life, and adoption rather than guardianship was in her best interests. *See In re J.J.B.*, 374 N.C. 787, 795–96 (2020) (rejecting respondent-parents' argument that, "given the strong bond between themselves and [their children], the trial court should have considered other dispositional alternatives, such as guardianship").

¶ 24 Respondent-mother next challenges the portion of finding of fact 86 stating "there has been no physical aggression against [Sarah's] caregiver" during the ten months that preceded the 26 June 2020 termination hearing. We agree with respondent-mother that this finding is inconsistent with the evidence presented at the hearing and included in the record on appeal. The evidence showed Sarah had been in her current foster placement for ten months at the time of the hearing and had exhibited no physical aggression toward her foster mother since an incident on 4 October 2019—a period of almost nine months.[2] Accordingly, we disregard the extra month included in this finding for purposes of our review. *See In re J.M.J.-J.*, 374 N.C. 553, 559 (2020).

¶ 25 Respondent-mother also challenges the trial court's finding of a "likelihood that [Sarah] could be adopted" in finding of fact 86. Respondent-father does not deny the evidentiary support for the finding,

2. Likewise, the DSS disposition report dated 17 June 2020 states that "[i]n the last six months [Sarah] has maintained behavioral stability with the caregiver, as no new incidents have been reported of physical aggression against the caregiver."

but he characterizes the court's assessment of Sarah's adoptability as "[nothing] more than a mere hypothetical possibility" given Sarah's behavioral problems.

¶ 26 The finding that Sarah is likely to be adopted is supported by competent evidence. Ms. Jenkins attested to the likelihood of Sarah being adopted if she was provided continued stability and support, Ms. Jenkins acknowledged Sarah's struggles with behavioral issues, including an aggressive incident with her current foster mother, but noted improvements—mostly at home but also in school—as her living situation and mental health providers stabilized in the months leading up to the termination hearing. Ms. Jenkins also described Sarah's bond with her foster mother and how Sarah was opening up and seeking affection, something she had not done in her earlier placements. The written reports submitted by DSS and GAL also acknowledged Sarah's misbehaviors but noted they had improved during Sarah's placement with her current foster mother, with whom she had formed a positive and trusting attachment. *See generally In re M.A.*, 374 N.C. at 880 ("[T]he trial court's findings concerning the ability of the children to bond with their current caregivers did tend to support a conclusion that the children were adoptable given their ability to develop a bond with other human beings."). The foster mother expressed a willingness to serve as a "bridge" caretaker for Sarah until a pre-adoptive placement was identified. Moreover, the hearing testimony tended to show Sarah would receive additional resources for finding an adoptive placement once she was free for adoption. Therefore, it was within the trial court's discretion to view Sarah's likelihood of adoption as a fact favoring the termination of respondents' parental rights. *See In re N.C.E.*, 379 N.C. 283, 2021-NCSC-141 ¶ 30 (explaining that "it is left to the trial court's discretion to weigh the various competing factors in N.C.G.S. § 7B-1110(a) in arriving at its determination of the child's best interests").

¶ 27 Respondent-mother characterizes finding of fact 87 as "incomplete and misleading" in depicting Sarah's improved behavior in the months leading up to the termination hearing. She contends the finding "downplays the seriousness of Sarah's behavioral problems and does not account for the effect of the [COVID-19] pandemic, which . . . limited her contact with others." We find no merit to this claim. The trial court acknowledged Sarah's ongoing "behavioral challenges" in finding of fact 86. Finding 87 in no way suggests an end to these issues and is fully supported by Ms. Jenkins's testimony and the information found in the DSS and GAL's reports. Respondent-mother's conjecture about the effect of the pandemic on Sarah's behavior provides no basis to overturn the court's otherwise-supported finding.

¶ 28 Respondent-mother objects to finding of fact 87 because it states approvingly that Sarah "shows a desire to please her" foster mother, while subsequent findings describe Sarah's ongoing desire to please respondents as indicative of unresolved "guilt issues with her parents." What respondent-mother casts as an unexplained "contradiction" in the trial court's findings, we find to be a clear distinction drawn by the court between Sarah's newfound responsiveness to the care and nurturing she has received from her foster mother and the lingering effects of the manipulative, controlling relationship respondents cultivated with their daughter. We thus find no merit to respondent-mother's objections to finding of fact 87.

¶ 29 Respondent-mother next contends the account of Sarah's relationship with her current foster mother in finding of fact 88 "is not supported by competent evidence" to the extent it states Sarah "has begun to open up regarding her anger and responsiveness to others when upset *being what she has seen growing up*." (Emphasis added). We agree with respondent-mother that the italicized portion of this finding is unintelligible, likely resulting from a scrivener's error. Therefore, we disregard this portion of finding of fact 88. However, the remainder of this finding is supported by Ms. Jenkins's testimony and the written reports submitted by DSS and the GAL.

¶ 30 We find no merit to respondent-mother's argument that the DSS report does not constitute competent evidence because it "does not identify the sources for this information or provide any details to determine its reliability within the meaning of N.C.G.S. § 7B-1110(a)." *See In re R.D.*, 376 N.C. 244, 251 (2020) (concluding the GAL's report summarizing multiple interviews was properly admitted for dispositional purposes under N.C.G.S. § 7B-1110(a) even though neither the GAL nor the interviewees testified at the hearing). Respondents allowed the dispositional reports into evidence without objection and were free to cross-examine Ms. Jenkins, who signed the report, about her observations and sources.

¶ 31 In a footnote to his brief, respondent-father suggests that finding of fact 87 "overstates the level of commitment" shown by Sarah's foster mother to continue caring for Sarah until a pre-adoptive home is located. He takes issue with the trial court's statement that the foster mother "has committed to helping Sarah transfer to her forever home," when the DSS report says only that she "expressed a willingness to be a bridge caregiver for Sarah until a preadoptive placement can be identified." We find respondent-father's parsing of the trial court's language wholly unpersuasive. To the extent he contests the evidentiary basis for finding 87, we conclude competent evidence supports the finding.

C. The bond between the juvenile and the parents

¶ 32 Respondent-father claims "[t]here was no evidence that Sarah's therapist believes Sarah's relationship with her parents is 'holding her back' " as stated in finding of fact 86. We agree with respondent-father that the trial court appears to have wrongly attributed this opinion to Sarah's therapist. The evidence shows Sarah's psychiatrist, the GAL, and Ms. Dowdle shared the belief that Sarah's relationship with her parents was hindering her development. However, nothing in the record indicates that Sarah's therapist also voiced this opinion. Nevertheless, we conclude the trial court's misattribution was harmless, given that two of Sarah's mental health treatment providers and her GAL did express this view.

¶ 33 We further find no merit to respondent-father's suggestion that Ms. Dowdle's letter was the sole "evidentiary basis" for this portion of finding of fact 86. The opinions of Sarah's GAL and psychiatrist were conveyed in the written reports submitted to the court. Equally unfounded is respondent-father's speculation that the references to Sarah's psychiatrist in the DSS report were actually "mistaken reference[s] to the physician's assistant[,]" Ms. Dowdle. *See generally State v. Daughtry*, 340 N.C. 488, 517 (1995) ("We will not assume error 'when none appears on the record.' " (quoting *State v. Williams*, 274 N.C. 328, 333 (1968))). The fact that DSS conveyed the opinion of Sarah's psychiatrist in its written report—rather than obtaining a letter from the psychiatrist like the one provided by Ms. Dowdle—does not render the report unreliable for purposes of N.C.G.S. § 7B-1110(a). *See In re R.D.*, 376 N.C. at 251 (recognizing "the trial court possessed the discretion to determine that the [GAL's] report was, in fact, 'relevant, reliable, and necessary' to determine the best interests of [juvenile]" (quoting N.C.G.S. § 7B-1110(a))).

¶ 34 Both respondent-mother and respondent-father take exception to the trial court's description of their bond with Sarah in findings of fact 89 and 90. They specifically challenge the evidentiary support for the trial court's findings that "there 'are concerns about the parents' manipulation of [Sarah] in their feedback with her[,]' " that Sarah's bond with respondents reflects "negative attachments that are not conducive to her overall well-being and safety[,]"and that Sarah's "experience with trauma" is similar to other traumatized children and has left her with an unhealthy sense of loyalty toward her "offender[s,]" i.e., respondents.

¶ 35 Respondent-mother also asserts the remaining statements about the parent-child bond in findings of fact 91 through 94 are unsupported by the evidence and based on psychological speculation. She argues

"no trained psychologist or psychiatrist testified or submitted direct evidence in the case" and, therefore, there is no competent evidence to support the court's findings that (1) the parent-child bond inhibits Sarah's ability to trust; (2) Sarah changing her decision to cut her hair exhibited "guilt and loyalty" toward respondents; (3) Sarah's "inability to work through her own trauma is a repetition of her guilt issues" with respondents; and (4) respondents' "deflection of accountability" of their actions and Sarah's behavior "is not healthy and hinders [Sarah's] ability to work through her trauma and grow into a healthy young adult."

¶ 36 Respondent-father objects to finding of fact 90 on the ground that it "includes expert opinion" which the DSS social worker was not qualified to offer. He raises a similar challenge to the statement in finding of fact 91 that Sarah's "bond with her parents inhibits her ability to trust[,]" claiming the GAL who asserted as much in her written report was not qualified to render this opinion. More generally, respondent-father contends there was no evidence Sarah suffered from guilt arising from her bond with her parents as stated in findings of fact 90, 92, and 93.

¶ 37 Respondent-father also challenges the statement in finding of fact 94 that the parent-child "bond is not healthy and hinders [Sarah's] ability to work through her trauma and grow into a healthy young adult." He reiterates the position he raised in disputing finding 86 that the only the evidence for this finding was the letter written by Ms. Dowdle, the contents of which he believes were mischaracterized in the DSS report as the opinions of a psychiatrist. To the extent the DSS report conveyed the opinions of an unidentified psychiatrist rather than Ms. Dowdle, respondent-father contends this evidence amounts to "unreliable double hearsay."

¶ 38 Finally, respondents take issue with Ms. Jenkins's and the trial court's characterization of "[t]he hair-cutting incident" described in finding of fact 92. Ms. Jenkins cited this episode as an example of respondents' unhealthy manipulation of Sarah and her resulting feelings of guilt. Respondents insist it merely showed that they opposed Sarah's desire to change her hairstyle and expressed disapproval when she disregarded their wishes and cut her hair—what respondent-father deems "a mundane example of everyday parenting." Respondents also reiterate the argument raised by respondent-mother in her challenge to finding of fact 87, that the trial court portrayed Sarah's "desire to please her foster mother . . . [a]s positive" while treating her "desire to please her natural parents . . . as unhealthy[.]"

¶ 39 In their numerous challenges to the trial court's findings about the parent-child bond under N.C.G.S. § 7B-1110(a)(4), respondents tacitly

acknowledge the court's findings are consistent with Ms. Jenkins's hearing testimony, the contents of the reports prepared by DSS and the GAL, and the statements in Ms. Dowdle's letter. Despite respondents' strenuous arguments to the contrary, we conclude the findings are supported by some relevant and reliable evidence and are thus binding on appeal. *See In re B.E.*, 375 N.C. at 745.[3]

¶ 40 In her testimony for purposes of adjudication, Ms. Jenkins expressed concern about respondents' "negatively communicating to [Sarah]" at visitations. While encouraging Sarah to do better in school and in managing her behavior, respondent-father emphasized to Sarah that her behaviors were not her fault, and that DSS or "the system" was the cause of the family's problems. Respondent-father testified he always instructed Sarah not to trust strangers, including "anyone she has not been affiliated with or had been introduced solely from her parents to her"—although he denied telling Sarah not to trust DSS.

¶ 41 At disposition, Ms. Jenkins further attested to respondents instilling in Sarah an us-versus-them worldview, such that her cooperation with DSS or openness to others represented to Sarah a betrayal of her parents. Ms. Jenkins explained that Sarah's feelings of loyalty to respondents impeded her ability to develop relationships with others, as follows:

> [Sarah] has this mind set that, you know, "My family's business is my business. I can't get close to anyone. I shouldn't open up to let them get close to me." Our concern is her ability to be able to live a normal life open up and trust others and embrace peers, embrace friends, embrace those that are here, in addition to her parents and her history with her parents . . . .
>
> . . . I've seen this child begin to open up and, you know, seek nurturing, seek affirmations from caregivers, open up to even talk to me about some trainings that she has asked me not to tell her parents. And for [Sarah] that's big. She doesn't trust very easily. And so our concern is her being able to build on that. The — I don't want to say fear, but the continued concern of hers about what her parents think, and what are they going to say, I think hinders her from

3. As noted in our discussion to follow, pursuant to N.C.G.S. § 7B-1110(a), a trial court may "consider any evidence, including hearsay evidence . . . that the court finds to be relevant, reliable, and necessary to determine the best interests of the juvenile."

> growing, hinders her from being open to be receptive to be loved. . . .

In her letter, Ms. Dowdle likewise expressed a belief that Sarah "will not be able to appropriately verbalize and process her trauma as long as she continues to interact with [respondents] . . . as she is likely to experience feelings of guilt and loyalty that are typical for a child of her age and circumstances, but are likely to hinder her progress."

¶ 42 The written reports submitted by DSS and the GAL include similar observations and opinions from Ms. Jenkins, the GAL, and Sarah's psychiatrist. Ms. Jenkins, who signed the DSS report, wrote that Sarah's exposure to traumatic experiences in the home, including "sexual inappropriate boundaries, inappropriate discipline, and grooming behaviors," led her to form "negative attachments [to respondents] that are not conducive to her overall well-being and safety." Her report describes Sarah as "continu[ing] to demonstrate a level of guilt around the bond with her parents." The GAL suggested that Sarah "may be resistant to the idea of adoption due to her sense of loyalty to her parents," which "has hindered her willingness to open up and trust others," as well as her "lack of understanding as to why she is in foster care[.]" Sarah's psychiatrist expressed "concern regarding [Sarah's] ability to fully process the idea of adoption and move forward with the chapter in her life, [due] to a fear of making a decision against her parents." The psychiatrist "conclude[d] that although [Sarah] may have a bond with her parents, this bond is not healthy and hinders [her] ability to work through her trauma and grow into a healthy young adult."

¶ 43 Findings of fact 89–94 are thus consistent with the evidence received by the trial court regarding Sarah's bond with respondents and the negative impact of the relationship on Sarah's emotional development and well-being. The evidence provides ample basis for the trial court's findings that Sarah continued to experience guilt arising from a distorted sense of loyalty to respondents, who refused to acknowledge the injurious environment they created for Sarah while she was in their care. The evidence also demonstrates the distinction between Sarah's unhealthy tendency to avoid upsetting respondents and her growing openness to and desire to please her foster mother, who "provides [Sarah] with a safe, nurturing, and structured loving and structured home environment."

¶ 44 As respondents did not object to the trial court's consideration of DSS's and the GAL's written reports for purposes of disposition, their current arguments regarding the sourcing or overall reliability of these reports are not properly before us. *See* N.C. R. App. P. 10(a)(1). As

previously noted, the dispositional statute expressly permits the trial court to "consider any evidence, *including hearsay evidence* . . . , that the court finds to be relevant, reliable, and necessary to determine the best interests of the juvenile." N.C.G.S. § 7B-1110(a) (emphasis added). The trial court thus had the discretion to rely on the information contained in these reports—including the opinions of Sarah's DSS social worker and GAL, as well as those offered by Sarah's psychiatrist and therapist. *See In re R.D.*, 376 N.C. at 251 (concluding the GAL's report containing summaries of witness interviews, an analysis of the juvenile's needs, and the GAL's opinion that termination was in the juvenile's best interests was "directly related to the trial court's task during the dispositional stage" and was properly considered to "aid the trial court in determining the juvenile's best interests").

¶ 45 Ms. Jenkins's testimony also supports the account of Sarah's decision to cut her hair contained in finding of fact 92. Ms. Jenkins recalled Sarah expressing her intention to remove the locs from her hair "for weeks" to both Ms. Jenkins and her foster mother. Sarah was told respondents did not want her hair cut, but she proceeded to cut some of her locs out anyway, telling Ms. Jenkins that she did not want to have locs anymore. After a visit where respondents told Sarah that she would be "bald-headed" if she cut her locs, she became "very upset" at respondents' reaction, changed her mind, and said she would keep her locs. Ms. Jenkins saw this episode as an example of Sarah setting aside her own wishes in order to avoid upsetting respondents. Although respondents may disagree with Ms. Jenkins's view of this episode, we decline to second-guess the trial court's decision to credit the social worker's perspective, given her familiarity with the family and their interpersonal dynamics. *See generally In re T.N.H.*, 372 N.C. 403, 411 (2019) ("[I]t is the trial judge's duty to consider all the evidence, pass upon the credibility of the witnesses, and determine the reasonable inferences to be drawn from the testimony.").

¶ 46 Aside from the trial court's mistaken attribution of an opinion to Sarah's therapist in finding of fact 86, we conclude that competent evidence supports each of the findings about the parent-child bond challenged by respondents—specifically findings of fact 89–94. We further note that, in addition to the contested findings, the court made additional findings about the injurious environment respondents created in their home that led to Sarah's adjudication as neglected, as well as respondents' persistent refusal to acknowledge a problem requiring any changes if Sarah were returned to their care. The court also made findings on the unreliability of respondent-father's testimony and his lack

of credibility at the hearing. Each of these findings tends to show the deleterious nature of respondents' bond with Sarah.

D. The quality of the relationship between the juvenile and the proposed adoptive parent, guardian, custodian, or other permanent plan

¶ 47 Respondent-father emphasizes that the trial court's findings about Sarah's bond with her current foster mother do not speak to the dispositional factor in N.C.G.S. § 7B-1110(a)(5) because the placement was not expected to be permanent. However, as the court explained at the hearing, these findings were probative on the likelihood of Sarah's eventual adoption and were properly considered under N.C.G.S. § 7B-1110(a)(2). *See In re M.A.*, 374 N.C. at 880.

E. Determination of Sarah's best interests

¶ 48 Respondent-mother argues the trial court abused its discretion under N.C.G.S. § 7B-1110(a) in terminating her parental rights "when there was no plan for Sarah's adoption and serious obstacles existed to her successful placement." Respondent-father also objects to the trial court's "decision that turns Sarah into a legal orphan[.]" Though he acknowledges it is not this Court's prerogative to reweigh the factors, respondent-father spends considerable time arguing that the weight of the factors does not support termination.[4]

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4. We find no merit to respondent-father's assertion that "the General Assembly made a fundamental change" to the dispositional statute in 2005, "the magnitude [of which] cannot be overstated." According to respondent-father, "[b]efore the 2005 change, there existed in the Juvenile Code a preference in favor of terminating the parent-child relationship if the grounds to do so had been established[,]" and "[b]y explicitly removing that preference for termination, the General Assembly clearly indicated that it no longer believed such a preference was appropriate."

Prior to 2005, N.C.G.S. § 7B-1110 provided that, upon an adjudication of one or more grounds for terminating parental rights under N.C.G.S. § 7B-1111(a), "the court shall issue an order terminating the parental rights of such parent . . . unless the court shall further determine that the best interests of the juvenile require that the parental rights of the parent not be terminated." *In re Mitchell*, 148 N.C. App. 483, 492 (Hunter, J., dissenting in part) (quoting N.C.G.S. § 7B-1110(a) (1999)), *rev'd per curiam for reasons stated in dissenting opinion*, 356 N.C. 288 (2002). The General Assembly amended this language in 2005 to provide simply that, "[a]fter an adjudication that one or more grounds for terminating a parent's rights exist, the court shall determine whether terminating the parent's rights is in the juvenile's best interest." An Act to Amend the Juvenile Code to Expedite the Outcomes for Children and Families Involved in Welfare Cases and Appeals and to Limit the Appointment of Guardians ad Litem for Parents in Abuse, Neglect, and Dependency Proceedings, S.L. 2005-398, § 17, 2005 N.C. Sess. Laws 1455, 1463.

Contrary to respondent-father's contention, the pre-2005 language did not create a statutory "preference for termination." *See Mitchell*, 148 N.C. App. 483, 492–93 (Hunter, J.,

¶ 49 Respondents also cite the risk that Sarah will not be adopted as demonstrating the trial court's abuse of its discretion. Respondent-father contends the court's "decision . . . turns Sarah into a legal orphan" much like the termination order reversed by our Court of Appeals in *In re J.A.O.*, 166 N.C. App. 222 (2004). Respondent-mother likewise emphasizes that "there was no plan for Sarah's adoption" at the time the trial court chose to terminate her parental rights.

¶ 50 We find the instant case readily distinguishable from *In re J.A.O.* The Court of Appeals found that J.A.O. was "a troubled teenager with a woefully insufficient support system" who had been shuffled through multiple treatment centers due to his significant physical, mental, and behavioral disorders. *Id.* at 227. His mother was "connected to and interested in" him, and she provided a stabilizing influence in his life. *Id.* at 227–28. She had also "made reasonable progress to correct the conditions that led to the petition to terminate her parental rights." *Id.* at 224. Under these circumstances and given the "remote chance" of sixteen-year-old J.A.O.'s adoption, the trial court was held to have abused its discretion by disregarding the recommendation of the GAL and terminating the mother's parental rights. *Id.*

¶ 51 Here, while Sarah had been in multiple placements due to her behavior, she had shown real improvement after finding stability in her current foster home, a factor that increased the likelihood of her adoption. Moreover, as discussed above, the evidence showed respondents refused to acknowledge that the reasons for Sarah's removal from their home were problems to be corrected, and made no progress towards correcting those conditions. Finally, rather than providing a stabilizing influence, Sarah's relationship with respondent-parents negatively affected her development.

¶ 52 To the extent respondents ask this Court to undertake our own assessment of the record evidence and to substitute our weighing of the relevant statutory criteria for that of the trial court, we decline to do so. "[S]uch an approach would be inconsistent with the applicable standard of review, which focuses upon whether the trial court's dispositional decision constitutes an abuse of discretion rather than upon the manner in which the reviewing court would weigh the evidence were it the finder

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dissenting in part) (noting "there is no burden of proof at disposition" and rejecting the respondent's argument that the trial court improperly required him to prove that terminating his parental rights was not in the child's best interest (citation omitted)); *see also In re Blackburn*, 142 N.C. App. 607, 613 (2001) (concluding the statute created no presumption in favor of terminating parental rights).

of fact." *In re I.N.C.*, 374 N.C. 542, 551 (2020). A careful review of the dispositional findings shows the trial court considered all of the relevant statutory criteria in N.C.G.S. § 7B-1110(a) and made a reasoned determination that termination of respondents' parental rights in Sarah would be in her best interests.

III. Conclusion

¶ 53 The trial court's findings demonstrate that it considered the dispositional factors set forth in N.C.G.S. § 7B-1110(a) and "performed a reasoned analysis weighing those factors." *In re Z.A.M.*, 374 N.C. at 101. "Because the trial court made sufficient dispositional findings and performed the proper analysis of the dispositional factors," *id.*, we conclude that the trial court did not abuse its discretion in concluding that termination of respondents' parental rights was in Sarah's best interests. Accordingly, we affirm the trial court's order.

AFFIRMED.

IN THE MATTER OF T.B.

No. 149A21

Filed 18 March 2022

1. Termination of Parental Rights—grounds for termination—neglect—likelihood of future neglect—failure to address domestic violence in home

The trial court properly terminated a mother's parental rights in her daughter on the ground of neglect based on a determination that a likelihood of future neglect existed if the child were returned to the mother's care. The court's findings showed that the mother had denied at least two reported incidents of domestic violence by the child's father; that the child's initial neglect adjudication resulted from the mother's tendency to deny or minimize the domestic violence issues at home; and that the mother made minimal progress in addressing the domestic violence component of her case plan, continued her relationship with the father until just months before the termination hearing, made few efforts to contact or develop a relationship with the child, and lacked appropriate housing.

IN RE T.B.

[380 N.C. 807, 2022-NCSC-43]

2. Termination of Parental Rights—no-merit brief—multiple grounds for termination

The termination of a father's parental rights in his daughter on multiple grounds was affirmed where his counsel filed a no-merit brief and where the termination order was supported by the evidence and based on proper legal grounds.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) (2019) from an order entered on 12 January 2021 by Judge Donald R. Cureton, Jr., in the District Court, Mecklenburg County. This matter was calendared in the Supreme Court on 18 February 2021 but determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

Laura Kaiser Anderson for petitioner-appellee Mecklenburg County Department of Social Services.

Chelsea K. Barnes for appellee Guardian ad Litem.

Anné C. Wright for respondent-appellant mother.

Peter Wood for respondent-appellant father.

HUDSON, Justice.

¶ 1 Respondent-mother and respondent-father appeal from the trial court's order terminating their parental rights to their minor child T.B. (Tammy).[1] Upon review, we affirm.

I. Factual and Procedural Background

¶ 2 On 17 January 2019, Mecklenburg County Department of Social Services Youth and Family Services Division (YFS) filed a juvenile petition alleging that one-year-old Tammy was neglected and dependent, obtained nonsecure custody of Tammy, and moved her to a foster placement. The petition alleged YFS received a referral reporting that police were called to the family's home on 9 January 2019 in response to a domestic violence incident that occurred in Tammy's presence, resulting in respondent-father's arrest. Respondent-father was combative with police and was charged with assault on a female, injury to

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

personal property, possession of marijuana, resisting arrest, and malicious conduct by a prisoner. Respondent-mother told a magistrate that the charges related to her were fabricated and paid a bondsman to secure respondent-father's release on 10 January 2019.

¶ 3 The petition further alleged that YFS investigators spoke with respondent-mother and then met with each parent separately on 11 January 2019. Respondents denied engaging in domestic violence and claimed a maternal aunt assaulted respondent-mother on 9 January 2019. However, respondent-mother admitted that respondent-father sometimes got jealous when she spoke to other men and told YFS she would have left respondent-father previously if she had more family support. Respondent-father acknowledged possible mental health needs. He also indicated he was previously involved with domestic violence treatment through NOVA but minimized any continued domestic violence between him and respondent-mother. Although respondent-mother indicated she and respondent-father were still living together as a couple, respondent-father told YFS that he was willing to leave the home as had been suggested by his probation officer. Both parents also admitted to smoking marijuana.

¶ 4 As a result of their meetings with YFS, respondents agreed to submit to random drug screens and substance abuse assessments by 15 January 2019. Respondent-father agreed to go to Monarch for a mental health assessment by 15 January 2019, and respondent-mother agreed to contact the YFS domestic violence liaison by 15 January 2019. However, at the time the petition was filed, neither respondent had followed through with these agreements.

¶ 5 YFS further alleged that other witnesses reported ongoing substance abuse and domestic violence between respondents and concerns about respondent-father's temper, prior domestic violence, and respondent-father's excessive control over respondent-mother. The family's child protective services history included a referral for domestic violence and substance abuse after a similar prior incident.

¶ 6 Respondents participated in mediation on 14 February 2019 and agreed to certain facts consistent with the petition's allegations.

¶ 7 After a hearing on 11 March 2019, the trial court entered an order adjudicating Tammy a neglected and dependent juvenile on 25 April 2019. In addition to adopting the stipulated facts, the court made findings based on evidence of respondent-father's criminal record, which included a conviction of assault on a government official and a term of probation in which he was twice terminated from a required batterer's

intervention program—once for excessive absences and once for a new assault charge. The court specifically found that respondents' "intimate partner violence and substance abuse" led to Tammy's adjudication, and ordered respondents to comply with their mediated family services agreement (FSA). The FSA required respondent-mother to attend domestic violence classes, participate in substance abuse services recommended from her assessment, sign releases for YFS to monitor her progress, and work with YFS to identify supportive individuals and reconnect with family. The FSA required respondent-father to avoid domestic disputes and reengage in NOVA classes once eligible, attend recommended substance abuse services and submit to random drug screens, complete a mental health assessment and comply with recommended services, and sign releases for YFS to monitor his progress. The court ordered the child to remain in YFS custody. Respondents were ordered to attend separate supervised visitations with Tammy a minimum of two times per week.

¶ 8 Following a review hearing on 28 May 2019, the court entered an order on 8 July 2019 finding respondents were making progress on the substance abuse component of their FSA. Respondent-father had finished substance abuse classes with no further recommendations and submitted three negative drug screens. Respondent-mother was expected to complete substance abuse classes at the end of May and had submitted negative drug screens. However, the court's findings demonstrated minimal progress by respondents in addressing domestic violence, as respondent-father was unable to participate in domestic violence programs because of his pending criminal charges, and respondent-mother had not meaningfully engaged in counseling. Respondent-mother had been injured at least twice in domestic violence incidents and then either recanted or minimized the events in which she was injured. At the review hearing, respondent-mother stated that nothing was wrong in the home prior to Tammy's removal, which the court viewed as demonstrating her lack of insight into the removal conditions.

¶ 9 The trial court held a permanency planning hearing on 11 September 2019. In an order entered on 21 October 2019, the court established a primary permanent plan for Tammy of adoption with a secondary plan of reunification with respondent-mother, citing respondents' failure to address their domestic violence issues. Specifically, the court found respondent-father had been charged with another act of domestic violence against respondent-mother on 15 August 2019 and was terminated from the NOVA program for the fourth time. The court expressed its concern about respondent-father's continued control over respondent-mother, who was pregnant, and asked "whether the mother

is at a point (or will ever be at a point) where she can be safe and free from violence and abuse." The court found respondents were "acting in a manner that is inconsistent with the health or safety of the juvenile" and "have failed to address any of the removal conditions in any meaningful way . . . [or] demonstrated that they would be able to meet the juvenile's basic needs."

¶ 10 In a permanency planning order entered on 2 January 2020, the court trial found that respondents were not actively participating in their FSA or cooperating with YFS or the guardian ad litem (GAL), and they had failed to address the removal conditions in any meaningful way. The court found that respondent-father appeared to lack any insight into his past violence and had yet to fully engage in any type of batterer's intervention or anger management program. Respondent-mother was due to give birth to another child within weeks of the hearing but had not sought prenatal care. Although there was some evidence that respondent-mother had separated from respondent-father and had engaged in some domestic violence services, it was unclear how much insight she had gained. The court further found that respondent-mother had not had any contact with Tammy since May 2019, despite YFS "encourag[ing her] to visit and bond with the child[.]" Due to respondents' lack of progress, the court ordered YFS to file a petition to terminate parental rights within 60 days.

¶ 11 On 4 February 2020, YFS filed a motion to terminate respondents' parental rights in Tammy. In its motion, YFS alleged that grounds existed to terminate both parents' parental rights for neglect pursuant to N.C.G.S. § 7B-1111(a)(1) (2021), failure to make reasonable progress pursuant to N.C.G.S. § 7B-1111(a)(2) (2021), failure to pay a reasonable portion of Tammy's cost of care pursuant to N.C.G.S. § 7B-1111(a)(3) (2021), and dependency pursuant to N.C.G.S. § 7B-1111(a)(6) (2021).

¶ 12 The termination motion was heard on 12 November 2020. On 12 January 2021, the trial court entered an order terminating respondents' parental rights in Tammy. The court concluded that all four of the grounds alleged in the motion existed to terminate both respondents' parental rights, and that it was in Tammy's best interests to terminate their rights. *See* N.C.G.S. § 7B-1110(a) (2021). Both respondents appealed.

II. Analysis

A. Respondent-Mother's Appeal

¶ 13 **[1]** On appeal, respondent-mother challenges the trial court's adjudication of the existence of grounds to terminate her parental rights.

> When reviewing the trial court's adjudication of grounds for termination, we examine whether the court's findings of fact are supported by clear, cogent and convincing evidence and whether the findings support the conclusions of law. Any unchallenged findings are deemed supported by competent evidence and are binding on appeal. The trial court's conclusions of law are reviewed de novo.

In re Z.G.J., 378 N.C. 500, 2021-NCSC-102, ¶ 24 (cleaned up). "[A]n adjudication of any single ground in N.C.G.S. § 7B-1111(a) is sufficient to support a termination of parental rights." *In re E.H.P.*, 372 N.C. 388, 395 (2019).

¶ 14 A trial court may terminate parental rights pursuant to N.C.G.S. § 7B-1111(a)(1) for neglect if it determines the parent has neglected the juvenile within the meaning of N.C.G.S. § 7B-101. A neglected juvenile is defined, in relevant part, as one "whose parent, guardian, custodian, or caretaker does not provide proper care, supervision, or discipline; . . . or who lives in an environment injurious to the juvenile's welfare." N.C.G.S. § 7B-101(15) (2021).

> Termination of parental rights based upon this statutory ground requires a showing of neglect at the time of the termination hearing or, if the child has been separated from the parent for a long period of time, there must be a showing of a likelihood of future neglect by the parent. When determining whether such future neglect is likely, the district court must consider evidence of changed circumstances occurring between the period of past neglect and the time of the termination hearing.

In re R.L.D., 375 N.C. 838, 841 (2020) (cleaned up). "A parent's failure to make progress in completing a case plan is indicative of a likelihood of future neglect." *In re M.A.*, 374 N.C. 865, 870 (2020) (quoting *In re M.J.S.M.*, 257 N.C. App. 633, 637 (2018)). "The determinative factors must be the best interests of the child and the fitness of the parent to care for the child *at the time of the termination proceeding*." *In re Z.G.J.*, 378 N.C. 500, 2021-NCSC-102, ¶ 26 (quoting *In re Ballard*, 311 N.C. 708, 715 (1984)).

¶ 15 The trial court concluded that grounds existed to terminate respondent-mother's parental rights for neglect based on Tammy's prior adjudication as a neglected juvenile and its determination that "there

remains a likelihood of repetition of such neglect." In addition to describing the circumstances leading to Tammy's prior adjudication as neglected and dependent and the requirements of respondents' FSAs, the court made findings about respondent-mother's progress in addressing the issue of domestic violence, her failure to visit and contact Tammy, and her living situation at the time of the termination hearing.

¶ 16 The findings show that respondent-mother remained in a relationship with respondent-father even after he inflicted additional violence upon her and their unborn child in August 2019, which resulted in criminal charges against respondent-father. Respondent-mother did not cooperate when she was served with a subpoena to appear for respondent-father's criminal court date, and the charges against respondent-father were dismissed. The court found that respondent-mother availed herself of domestic violence services through the Women's Commission and completed group classes in January 2020. However, after respondent-father answered a YFS phone call made to respondent-mother in January 2020 following the birth of Tammy's sister, the trial court ordered respondent-mother to return to the Women's Commission to complete additional domestic violence treatment because she lacked the insight needed to end the relationship and provide a safe environment for herself and her children. The court found that respondent-mother remained in a romantic relationship with respondent-father until August 2020, just months before the November 2020 termination hearing, and that respondent-father showed the social worker text messages in October 2020 "confirming that he was still in a relationship with [respondent-]mother." The trial court's findings show that respondent-mother had a history of recanting allegations against respondent-father, and the court found respondent-mother's denial of a relationship with respondent-father in the summer of 2020 was not believable. The trial court's findings additionally show that respondent-mother had only contacted the Women's Commission to reengage in services approximately two weeks before the termination hearing, and that she was scheduled to start those services after the termination hearing.

¶ 17 In addition to the findings related to domestic violence, the trial court found that respondent-mother's last contact with Tammy was in May 2019, respondent-mother had not sent cards or gifts to Tammy, respondent-mother had contacted the foster parents "a few times" between August 2019 and February 2020 to check on Tammy but had not requested visits despite being allowed to do so, and respondent-mother had not requested a court hearing to address visitation after the YFS social worker expressed concern about respondent-mother's request to

see Tammy after the termination motion was filed on 4 February 2020. Lastly, the trial court found that respondent-mother was living in the same bedroom as her mother in a four-bedroom apartment designed for college students, which they shared with other residents. The court's findings show respondent-mother acknowledged Tammy could not live in the apartment due to the lack of space but indicate she did not have imminent plans to move out of the apartment.

¶ 18 On appeal, respondent-mother only challenges findings regarding her relationship with respondent-father and her denial of past domestic violence.[2] She first challenges findings of fact 36 and 38 about her continued relationship with respondent-father until August 2020 and the court's determination that her denial of the relationship was not believable. Respondent-mother argues that the evidence of a continued relationship in August 2020 was equivocal and therefore did not support the findings. We disagree.

¶ 19 At the termination hearing, the social worker testified that respondent-father met with YFS in October 2020 and confirmed he was in a relationship with respondent-mother "until about August of 2020" based on dated messages with respondent-mother and pictures of the parents at the beach together in July 2020. Respondent-father also testified at the hearing that he and respondent-mother were together until August 2020, explaining that respondent-mother was living with her mother when they took the beach trip during the summer, he was "trying to patch things up[,]" and they split up at the end of August 2020. Respondent-mother, however, testified her relationship with respondent-father ended before August 2020. Although she could not precisely recall when it ended, she stated "[i]t ended a long time ago." In reviewing this evidence, we are mindful that it is not this Court's role to reweigh the evidence. *See In re A.U.D.*, 373 N.C. 3, 12 (2019) (noting that the Court "lacks the authority to reweigh the evidence that was before the trial court"). "[I]t is the trial judge's duty to consider all the evidence, pass upon the credibility of the witnesses, and determine the reasonable inferences to be drawn from the testimony." *In re T.N.H.*, 372 N.C. 403, 411 (2019) (citing *In re D.L.W.*, 368 N.C. 835, 843 (2016)). "A trial court's finding of fact that is supported by clear, cogent, and convincing evidence is deemed conclusive even if the record contains evidence

2. Respondent-mother asserts her challenges to the trial court's findings in her argument contesting the adjudication of grounds for termination under N.C.G.S. § 7B-1111(a)(2). Because the findings are also relevant for termination pursuant to N.C.G.S. § 7B-1111(a)(1), we address the challenged findings.

that would support a contrary finding." *In re B.O.A.*, 372 N.C. 372, 379 (2019). Under these standards, we hold that the testimony by the social worker and respondent-father support the trial court's finding that respondent-mother continued in a relationship with respondent-father until August 2020. Respondent-mother's argument challenging the findings is overruled.

¶ 20 Respondent-mother also challenges finding of fact 37, which provides that "[o]n two other occasions [respondent-]mother told police [respondent-]father hit or assaulted her. Afterwards, she told [the social worker] and the court that what the police reported is not correct." She contends the finding is not supported by any evidence and is unhelpful as there is no finding as to when the events described took place. To the extent the trial court found that it was respondent-mother who reported domestic violence to police, we agree that the finding is not supported by the record evidence and disregard the finding. *See In re L.H.*, 378 N.C. 625, 2021-NCSC-110, ¶ 14 (disregarding factual findings not supported by the record). However, there is evidence of at least two instances of domestic violence between respondents that were reported to police, and evidence that respondent-mother denied the domestic violence. Specifically, the evidence shows respondent-mother denied that respondent-father was involved in the incident that resulted in the filing of the juvenile petition in January 2019, and the trial court later found in the 8 July 2019 review hearing order that "the [respondent-mother] has been injured at least twice and then recanted/minimized the events where she was injured[,]" adding that "[h]er inability to fully acknowledge the scope/severity of abusive actions led to the removal." We uphold finding of fact 37 to the extent the trial court found that respondent-mother denied reported instances of domestic violence. We also agree with YFS that the finding is relevant to the determination of a likelihood of future neglect as it demonstrates respondent-mother's lack of insight and propensity to minimize domestic violence, a concern echoed throughout the trial court's findings.

¶ 21 Respondent-mother does not specifically challenge any other findings of fact. The trial court's unchallenged findings are binding on appeal. *See Z.G.J.*, 378 N.C. 500, 2021-NCSC-102, ¶ 24.

¶ 22 Respondent-mother next acknowledges that Tammy was previously adjudicated neglected but argues that "there was not a sufficient showing of a likelihood of future neglect to uphold termination of [her] parental rights on this ground." Rather, she contends that she made substantial progress on her case plan such that the original removal conditions of

substance abuse and domestic violence were not likely to cause a repetition of neglect.

¶ 23 Respondent-mother first addresses substance abuse. She asserts that she had completed a substance abuse course, she was engaged in counseling that included a substance abuse component at the time of the termination hearing, and there was no evidence or findings to show that substance abuse rendered her unable to parent Tammy. However, we see no indication that the trial court relied upon concerns about ongoing substance abuse by respondent-mother as the basis for adjudicating grounds for terminating her parental rights. The court's few findings on the issue credit respondent-mother with "a negative drug screen and breathalyzer sample" the day before the termination hearing and note she was "enrolled in counseling through Family First" and "has not provided a positive drug screen since July 2020." While we agree with respondent-mother that these findings do not tend to show a likelihood she would neglect Tammy in the future, their presence in the trial court's order does not undermine its adjudication, which was based on other findings.

¶ 24 Respondent-mother also argues that "[d]omestic violence was also not likely to lead to further neglect" because the last incident of domestic violence occurred more than a year before the termination hearing, she had not been in a relationship with respondent-father "for at least several months[,]" and she believed that she had learned from domestic violence classes and had acknowledged that Tammy's exposure to domestic violence was traumatizing. She likens her case to *In re K.L.T.*, 374 N.C. 826 (2020). We are not persuaded.

¶ 25 In *K.L.T.*, this Court reversed the termination of a mother's parental rights on grounds of neglect, distinguishing the case from "past cases involving families with a history of domestic violence, [in which] this Court has determined that a continued likelihood of future neglect is present when the parent continues to participate in domestic violence, fails to truly engage with her counseling or therapy requirements, or fails to break off the relationship with the abusive partner." *Id.* at 846. The mother in *K.L.T.* moved out of the home and separated from the child's abusive father soon after the child's removal from the home, obtained and renewed a DVPO against the father, divorced and ceased all contact with the father, avoided any further incidents of domestic violence after the separation, fully completed all therapy and counseling courses required by her case plan, and devoted hours to writing a detailed safety plan in anticipation of regaining custody of her child. *Id.* at 829, 832, 846–47. Additionally, the mother had acquired housing that was

appropriate for the child, consistently visited with the child, and made efforts to be involved in the child's life. *Id.* at 832. It was the combination of all the mother's progress that led this Court to hold "[t]he trial court's finding of a likelihood of repetition of neglect in the future crosse[d] the line separating a reasonable inference from mere speculation." *Id.* at 847.

¶ 26 The facts here are distinguishable from *K.L.T.* The evidence and findings here show repeated domestic violence and respondent-mother's tendency to minimize it. Respondent-mother did not immediately end the relationship and separate from respondent-father upon the initial adjudication but instead continued the relationship for much of the case despite continued domestic violence and her completion of domestic violence classes. Although the trial court's findings indicate that respondent-mother's relationship with respondent-father had ended several months before the termination hearing, respondent-mother had not completed the required domestic violence treatment. The findings show that respondent-mother was willing to reengage in treatment, "wants to be a role model for her children[,] and believes the [domestic violence] classes will help her learn not to make the same mistakes." However, respondent-mother had only contacted the Women's Commission weeks before the termination hearing to reengage in additional domestic violence treatment required by the court to address its concern that she lacked the insight needed to provide a safe environment for her children, and she had not yet started that treatment at the time of the termination hearing. The trial court's findings on the history of domestic violence and respondent-mother's failure to complete the additional treatment to gain insight needed to provide a safe home for Tammy support the conclusion that there was a likelihood of repetition of neglect. *See In re D.M.*, 375 N.C. 761, 779 (2020) (upholding a conclusion that there was a likelihood of future neglect due to domestic violence despite no recent reported incidents because there was an extensive history of domestic violence, and the mother failed to complete recommended domestic violence counseling and lacked meaningful insight about the impact of domestic violence on the children).

¶ 27 Furthermore, the trial court's findings show that respondent-mother had not visited or contacted Tammy since May 2019 (a period of eighteen months at the time of the termination hearing), had not requested visitation from the foster parents despite being allowed to do so, and had not sent Tammy any cards or gifts. Respondent-mother requested to see Tammy following the filing of the termination motion, but she took no further action when YFS responded with concern that she had

not seen the child in over a year. We have recognized a parent's "pattern of inconsistent contact and lack of interest" in a child as indicative of a likelihood of future neglect for purposes of N.C.G.S. § 7B-1111(a)(1). *In re W.K.*, 379 N.C. 331, 2021-NCSC-146, ¶ 10; *see also In re M.Y.P.*, 378 N.C. 667, 2021-NCSC-113, ¶ 20 (considering a parent's inconsistent visitation among the factors that supported trial court's determination that there was a high probability of repetition of neglect). Respondent-mother also lacked housing appropriate for Tammy at the time of the hearing.

¶ 28 We conclude that the trial court's findings related to ongoing concerns with respondent-mother's progress in addressing domestic violence, together with the unchallenged findings that respondent-mother made minimal efforts to remain in contact and develop a relationship with Tammy and lacked appropriate housing, support the trial court's determination that there is a likelihood of repetition of neglect. Combined with Tammy's prior adjudication as a neglected juvenile, this likelihood of further neglect if the child were returned to respondent-mother's custody supports the trial court's conclusion that grounds existed to terminate respondent-mother's parental rights pursuant to N.C.G.S. § 7B-1111(a)(1).

¶ 29 Having determined the trial court did not err in adjudicating the existence of grounds for termination of respondent-mother's parental rights in Tammy, and because respondent-mother does not challenge the trial court's determination that termination of her parental rights was in Tammy's best interests, we affirm the trial court's order terminating respondent-mother's parental rights.

B. Respondent-Father's Appeal

¶ 30 **[2]** Counsel for respondent-father has filed a no-merit brief on his behalf pursuant to N.C. R. App. P. 3.1(e). There, counsel identified issues that could arguably support an appeal but explained why he found that those issues either lacked merit or would not alter the ultimate result. Counsel also advised respondent-father of his right to file *pro se* written arguments on his own behalf and provided him with the documents necessary to do so. Respondent-father has not submitted any written arguments to this Court.

¶ 31 We have independently reviewed the issues identified in the no-merit brief submitted by respondent-father's counsel under Rule 3.1(e). *In re L.E.M.*, 372 N.C. 396, 402 (2019). Upon careful consideration of those issues in light of the entire record, we are satisfied that the trial court's 12 January 2021 order terminating respondent-father's

parental rights in Tammy was supported by competent evidence and based on proper legal grounds. Accordingly, we affirm the termination of respondent-father's parental rights in Tammy.

III. Conclusion

¶ 32 The trial court's 12 January 2021 order terminating respondent-mother's and respondent-father's parental rights in Tammy is affirmed.

AFFIRMED.

IN THE MATTER OF V.S. AND A.S.

No. 121PA21

Filed 18 March 2022

Termination of Parental Rights—grounds for termination—neglect—likelihood of future neglect—parent's cognitive limitations

The trial court did not err by determining that a mother's parental rights in her children were subject to termination on the grounds of neglect where the unchallenged findings of fact showed no changes in circumstance that would support a conclusion that the mother was unlikely to neglect her children in the future. Rather, the mother's significant cognitive limitations prevented her from taking basic care of even herself, and she lacked the ability to comprehend the past neglect or how to care for her children going forward; furthermore, the suitability of other family members as caregivers was irrelevant where the mother was unfit to care for the children.

On writ of certiorari pursuant to N.C.G.S. § 7A-32(b) from orders entered on 28 September 2020, 29 October 2020, and 4 March 2021 by Judge W. Turner Stephenson III in District Court, Bertie County. This matter was calendared for argument in the Supreme Court on 18 February 2022 but determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

Miller & Audino, LLP, by Jay Anthony Audino, for petitioner-appellee Beaufort County Department of Social Services.

Michelle FormyDuval Lynch for appellee Guardian ad Litem.

Wendy C. Sotolongo, Parent Defender, and Annick Lenoir-Peek, Deputy Parent Defender, for respondent-appellant mother.

BARRINGER, Justice.

¶ 1 Respondent appeals from orders terminating her parental rights in the minor children V.S. and A.S. (Vincent and Ava),[1] arguing that the trial court erred in determining that there was a likelihood of a repetition of neglect. After careful review, we hold that the trial court did not err in determining that there was a likelihood of a repetition of neglect. Accordingly, we affirm the trial court's orders terminating respondent's parental rights.

I. Factual and Procedural Background

¶ 2 Bertie County Department of Social Services (DSS)[2] initiated this matter on 20 June 2017 by filing petitions alleging Vincent and Ava to be neglected and dependent juveniles. The trial court adjudicated the children neglected juveniles, finding that respondent "created an unsafe living environment for her children" and lacked understanding regarding everyday functioning and parenting. Under respondent's care, Vincent and Ava had been exposed to pornography and domestic violence, had been kept in "filthy" homes, had unstable living arrangements, and had poor hygiene. At the time of the petition, Vincent and Ava were residing with respondent in a home with "maggots under the carpet resulting from a failure to dispose of garbage." The trial court also adjudicated respondent to be mentally incompetent and appointed her a guardian ad litem.

¶ 3 After a permanency planning hearing on 5 February 2019, the trial court relieved DSS of reunification efforts, finding that the permanent plan of reunification could not be implemented within the next six months because of Vincent's and Ava's therapeutic and medical needs as well as respondent's failure to participate in her case plan or address her situation such that the children could return to her care. In an order filed in July 2019, the trial court ordered that the primary plan be adoption, finding that reunification in the next six months was still "not possible"

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1. Pseudonyms are used in this opinion to protect the juveniles' identities.

2. On 2 April 2019, the trial court allowed Bertie County Department of Social Services's motion to substitute Beaufort County Department of Social Services for Bertie County Department of Social Services as a party of interest.

due to respondent's inability to acquire independent living skills for her own daily functioning and her limited cognitive functioning. DSS moved to terminate parental rights on 5 November 2019.

¶ 4 At the termination-of-parental-rights hearing, DSS objected to certain testimony by two of respondent's witnesses, which the trial court sustained. Respondent made an offer of proof by having each witness, on the record, answer the same questions to which the trial court had previously sustained objections. After the hearing, the trial court entered an order adjudicating that grounds existed to terminate respondent's parental rights to Vincent and Ava based on neglect, N.C.G.S. § 7B-1111(a)(1), and dependency, N.C.G.S. § 7B-1111(a)(6).

¶ 5 Respondent filed a notice of appeal on 24 November 2020, which was signed by respondent and her attorney. In an order entered on 4 March 2021, the trial court dismissed respondent's notice of appeal for failure to have her guardian ad litem sign the notice of appeal. On 7 April 2021, respondent filed a petition for writ of certiorari requesting reinstatement of the appeal. This Court, in a 9 June 2021 special order, allowed the petition for writ of certiorari.

II. Analysis

A. Standard of Review

¶ 6 The North Carolina Juvenile Code sets out a two-step process for termination of parental rights: an adjudicatory stage and a dispositional stage. N.C.G.S. §§ 7B-1109 to -1110 (2021). At the adjudicatory stage, the trial court takes evidence, finds facts, and adjudicates the existence or nonexistence of the grounds for termination set forth in N.C.G.S. § 7B-1111. N.C.G.S. § 7B-1109(e). If the trial court adjudicates that one or more grounds for termination exist, the trial court then proceeds to the dispositional stage where it determines whether terminating the parent's rights is in the juvenile's best interests. N.C.G.S. § 7B-1110(a).

¶ 7 Appellate courts review a trial court's adjudication pursuant to N.C.G.S. § 7B-1111(a) to determine whether the findings are supported by clear, cogent, and convincing evidence and whether the findings support the conclusions of law. *In re E.H.P.*, 372 N.C. 388, 392 (2019). In doing so, we limit our review to "only those findings necessary to support the trial court's determination that grounds existed to terminate respondent's parental rights." *In re T.N.H.*, 372 N.C. 403, 407 (2019). "A trial court's finding of fact that is supported by clear, cogent, and convincing evidence is deemed conclusive even if the record contains evidence that would support a contrary finding." *In re B.O.A.*, 372 N.C. 372,

379 (2019). Further, "[f]indings of fact not challenged by respondent are deemed supported by competent evidence and are binding on appeal." *In re T.N.H.*, 372 N.C. at 407. We review the trial court's conclusions of law de novo. *In re C.B.C.*, 373 N.C. 16, 19 (2019).

B. Neglect

¶ 8 The trial court concluded that grounds existed to terminate respondent's parental rights to Vincent and Ava for neglect under N.C.G.S. § 7B-1111(a)(1). The Juvenile Code authorizes the trial court to terminate parental rights if "[t]he parent has abused or neglected the juvenile" as defined in N.C.G.S. § 7B-101. N.C.G.S. § 7B-1111(a)(1) (2021). A neglected juvenile is defined, in pertinent part for this matter, as a juvenile "whose parent . . . [d]oes not provide proper care, supervision, or discipline . . . [or c]reates or allows to be created a living environment that is injurious to the juvenile's welfare." N.C.G.S. § 7B-101(15) (2021).

¶ 9 "[I]f the child has been separated from the parent for a long period of time, there must be a showing of past neglect and a likelihood of future neglect by the parent." *In re D.L.W.*, 368 N.C. 835, 843 (2016). "When determining whether such future neglect is likely, the [trial] court must consider evidence of changed circumstances occurring between the period of past neglect and the time of the termination hearing." *In re Z.V.A.*, 373 N.C. 207, 212 (2019). "The determinative factors must be the best interests of the child and the fitness of the parent to care for the child at the time of the termination proceeding." *In re Ballard*, 311 N.C. 708, 715 (1984) (emphasis omitted).

¶ 10 Here, the trial court found past neglect and determined that there was "a high likelihood of a repetition of this neglect" if Vincent and Ava were returned to respondent's care. Respondent does not contest the finding of past neglect but limits her challenge to the determination that there was a likelihood of future neglect, specifically arguing that "the [trial] court failed to properly address whether or not [Ms.] Bunch (and other family members) . . . could assist [respondent] in preventing future neglect." In making this argument, respondent challenges a number of findings of fact as unsupported by the evidence. However, even if we were to find these findings unsupported, we are still bound by the remaining unchallenged findings of fact which are more than sufficient to support the trial court's determination that there was a likelihood of a repetition of neglect.

¶ 11 The unchallenged findings do not reveal any change in circumstances supporting the conclusion that Vincent and Ava would not be neglected in the future if returned to respondent's care. Instead, the

findings provide overwhelming support for the trial court's determination that there was a likelihood of a repetition of neglect, regardless of respondent's challenges to other findings involving the suitability of family members as caregivers. The relevant unchallenged findings are as follows:

> 38. The following facts, from the adjudication hearing, are binding on the parties, and consist of the reasons the juveniles were removed from the home.
>
> a. [Respondent] lacks adequate housing and has presented an identifiable pattern of unstable living for the last twelve months, which has created an unsafe living environment for her juveniles.
>
> b. [Respondent]'s frequent changes in and different living arrangements have not resulted in a better placement due either to unsafe neighborhoods, a failure to have basic accommodations such as heat or air conditioning in a mobile home, and/or a failure to have an appropriate number of bedrooms, including one home with no beds and all household members sleeping in one room on the floor.
>
> c. [Respondent]'s homes have been filthy, including her home at the time of the filing of the underlying petition, which was found to have maggots under the carpet resulting from a failure to dispose of garbage.
>
> d. The juveniles' personal hygiene when in the care of [respondent] over the past [twelve] months was poor.
>
> e. The juveniles have been directly exposed to domestic violence that involved [respondent]'s live-in boyfriend cursing at her, pushing her, spitting in her face, breaking furniture in anger, and on one occasion threatening that "everyone got to die one day[."]
>
> f. The juveniles have been exposed to pornography in [respondent]'s home . . . .

> g. Based upon the Comprehensive Psychological Evaluation by Evans Health on [3 May 2017], [respondent] has a history of developmental disability that negatively impacts the welfare of the juveniles. [Respondent] does not understand many of the decisions and [judgments] in everyday functioning and child rearing. She needs guidance and support not only to parent her juveniles, but also for herself to function independently.

39. The problems in [respondent]'s home for the juveniles consisted of the juveniles having poor hygiene, being exposed to domestic violence, and being exposed to pornography. Due to [respondent]'s cognitive delays, the juveniles' basic needs were not met.

. . . .

48. [Respondent] has completed a psychological/parenting capacity evaluation with Dr. Kristy Matala. The evaluation determined that [respondent] is not capable of parenting these juveniles.

. . . .

51. [Respondent] has extensive and significant cognitive limitations, which impair her ability to address problem-solving situations.

52. [Respondent]'s cognitive limitations interfere with her ability to independently parent her juveniles, and she would require significant supervision and assistance in order to parent.

53. [Respondent] has difficulty making sound decisions for herself or her children. This fact from her evaluation was echoed, during their testimony, by both Ms. Bunch and Ms. Spivey, [with] which this [c]ourt concurs.

. . . .

57. [Respondent] was administered a personality assessment inventory (PAI) which is an

objective test measuring personality patterns and clinical syndromes.

58. [Respondent]'s PAI was determined to be invalid as she responded to items inconsistently or did not attend to items appropriately. There are several potential reasons for this response pattern, including carelessness, confusion, or failure to follow test instructions.

59. Dr. Matala believed that [respondent]'s comprehension is so low that she could not understand the PAI test questions, and this Court shares the same concerns.

60. [Respondent] was also administered a brief symptom inventory (BSI) designed to assess her for psychological symptoms that have been present during the past week.

61. During the BSI, [respondent] endorsed experiencing significant psychological turmoil and a variety of physical health complaints. She reported experiencing thoughts and impulses as unwanted and unrelenting. She seems to have unusual ideas.

62. [Respondent]'s test results were consistent with the long-standing concerns documented in the records about her ability to properly parent these juveniles. In real world application, [respondent] has been unable to provide proper care to these juveniles.

63. When interviewed as part of her parenting capacity/psychological evaluation, it was clear that [respondent] had difficulty understanding even simple questions and her responses were not always logical. Her insight and judgment appeared to be poor. [Respondent]'s presentation is consistent with the prior court record and her testimony at this hearing.

64. At the time of her parenting capacity/psychological evaluation, [respondent] complained of being hungry; however, she admittedly did not have any money with her. [Respondent] needs assistance with these type[s] of basic daily living situations. Both of [respondent]'s own witnesses (Ms. Bunch and Ms.

Spivey), indicated that she had difficulty budgeting and needed to be told . . . when to pay her bills.

65. [Respondent] has difficulty understanding basic information. She does not appear to understand her juveniles' diagnoses or their special needs.

66. [Respondent] has no insight into why these juveniles are in the custody of [DSS]. Based upon her lack of insight, it is not likely that she can prevent the situations that previously occurred from repeating, as she lacks the ability to understand what was wrong in the first place.

. . . .

68. [Respondent] continues to reside with Mr. Woodley despite the concerns that have been expressed regarding his suitability to be around these juveniles. Knowing these concerns, [respondent] married him.

69. [Respondent] is aware that there are allegations that Mr. Woodley inappropriately touched her juveniles, but she denies the allegations.

. . . .

81. The services that [respondent] ha[s] received from Positive Generation in Christ have not resulted in her developing insight into the current situation or the reasons that her juveniles were removed from her care.

. . . .

83. Since the [p]etition was filed, [respondent]'s circumstances are such that it is likely that the juveniles would be exposed to the same harmful environment if . . . the juveniles were returned to her residence.

. . . .

86. [Respondent] is not able to care for these juveniles. If returned to her home, the juveniles would be neglected; repetition of the prior neglect is foreseeable.

. . . .

> 89. [Respondent] does not know [or] even comprehend basic measures necessary to ensure the juveniles' safety.

These unchallenged findings of fact are binding on appeal and more than sufficient to support the trial court's determination that there was a likelihood of a repetition of neglect.

¶ 12 Certainly, there may be situations where a parent's reliance in part on others to assist her in caring for her children supports a determination that there is not a likelihood of a repetition of neglect if the children are returned to her care. Nonetheless, the "determinative factors" in assessing the likelihood of a repetition of neglect are "the best interests of the child and *the fitness of the parent* to care for the child at the time of the termination proceeding." *In re Z.G.J.*, 378 N.C. 500, 2021-NCSC-102, ¶ 26 (emphasis added) (quoting *In re Ballard*, 311 N.C. at 715 (emphasis omitted)). Even if a parent relies on others for assistance in caring for her children, the trial court must assess the fitness of the parent herself, not others, since the parent retains ultimate authority over the child. *See Adams v. Tessener*, 354 N.C. 57, 60 (2001) (recognizing a parent's "fundamental right to make decisions concerning the care, custody, and control of his or her children" (cleaned up)). Accordingly, a parent must be able to understand the past neglect her children suffered while in her care; comprehend how to keep them safe from harm through proper care, supervision, discipline, and provision of a living environment not injurious to their welfare; and demonstrate an ability to do so. *See* N.C.G.S. § 7B-101(15). The binding findings of fact in this case reveal that respondent lacked this ability at the time of the termination-of-parental-rights hearing. Therefore, we affirm the trial court's adjudication that a ground existed to terminate respondent's parental rights.

¶ 13 Having affirmed the termination of parental rights on the ground of neglect adjudicated by the trial court, we need not address the remaining ground of dependency. *See In re M.A.*, 374 N.C. 865, 875 (2020). Similarly, while respondent preserved objections to some of the trial court's evidentiary rulings at the termination-of-parental-rights hearing, these objections were only relevant to the findings of fact respondent challenged. Since we found that the unchallenged findings were sufficient to support the trial court's finding of past neglect, its determination that a likelihood of a repetition of neglect exists, and its conclusion that a ground existed to terminate respondent's parental rights, there was

no prejudice in the exclusion of the testimony at issue even if in error. Thus, we need not address in further detail respondent's evidentiary arguments. Finally, because we allowed review of this case on the merits through a petition for writ of certiorari, this case is properly before us. *See* N.C.G.S. § 7A-32(b) (2021); N.C. R. App. P. 21(a)(1). Accordingly, we need not address whether respondent's notice of appeal was defective to resolve this appeal.

III. Conclusion

¶ 14 The trial court did not err when it adjudicated that the ground of neglect existed to terminate respondent's parental rights pursuant to N.C.G.S. § 7B-1111(a)(1), and respondent does not challenge the trial court's best interests determination. Accordingly, we affirm the order terminating respondent's parental rights.

AFFIRMED.

HEADNOTE INDEX

TOPICS COVERED IN THIS INDEX

APPEAL AND ERROR—Continued

challenge to the attorney general's administration of funds received pursuant to an agreement with a hog farming company (following the contamination of water supplies by swine waste lagoons) was on remand at the Court of Appeals for further proceedings not inconsistent with the Supreme Court's prior opinion, the Court of Appeals erred by concluding that the school board's amended complaint sufficed to state a claim for relief pursuant to a statute that was enacted during the pendency of the appeal (N.C.G.S. § 147-76.1). The school board could not raise an entirely new claim for the first time on appeal—based on a statute that did not even exist at the time its amended complaint was filed—from the trial court's order granting summary judgment to the attorney general. **New Hanover Cnty. Bd. of Educ. v. Stein, 94.**

CHILD ABUSE, DEPENDENCY, AND NEGLECT

Dependency—incapability to parent—cognitive defects and mental illness—The trial court properly terminated a father's parental rights in his children on grounds of dependency (N.C.G.S. § 7B-1111(a)(6)) where clear, cogent, and convincing evidence—along with the court's unchallenged findings of fact—supported a determination that, at the time of the termination hearing, the father was incapable of providing proper care and supervision of the children and there was a reasonable probability that this incapability would continue for the foreseeable future. Among other things, the father suffered from severe cognitive defects and mental illnesses (including bipolar disorder, attention deficit hyperactivity disorder, and an unspecified intellectual disability) that impaired his ability to reason, exercise judgment, or problem solve, and that there was no evidence showing that his mental condition was expected to change. **In re J.I.G., 747.**

Neglect—dismissal of claim—standard of review on appeal—de novo—In a neglect case, where the trial court's findings—which were based on the parties' stipulations—were unchallenged and therefore binding on appeal, the Court of Appeals erred in affirming the trial court's dismissal of the neglect claim because it failed to conduct a proper de novo review of the trial court's decision. Rather than determining whether the unchallenged findings of fact supported a legal conclusion of neglect, the Court of Appeals' use of speculative language demonstrated an improper deference to the trial court's conclusion where it stated that another judge "may have" adjudicated the juvenile as neglected, that the findings "might" support a neglect adjudication but did not "compel" one, and that it could not "say as a matter of law" that the trial court erred by dismissing the claim. The matter was remanded to the Court of Appeals to conduct a proper de novo review. **In re K.S., 60.**

Permanent plan—ceasing reunification efforts—sufficiency of findings—In a permanency planning matter, the trial court did not err by ceasing respondent's visitation with her teenage daughter and eliminating reunification from the permanent plan based on evidence that respondent behaved inappropriately during visits and was not in compliance with her case plan and that the daughter showed improved behavior after no longer seeing her mother. A social worker's testimony and reports from the department of social services (DSS) supported the challenged findings of fact as well as the court's determination that DSS's efforts to finalize the permanent plan were reasonable. **In re C.C.G., 23.**

PUBLIC OFFICERS AND EMPLOYEES—Continued

substantial contractual impairment—the determination of which required an analysis of the relative value of different health plans offered at different times—and, if so, whether the impairment was reasonable and necessary to serve an important public purpose. Therefore, the matter was remanded for further factual findings by the trial court. **Lake v. State Health Plan for Tchrs. & State Emps., 502.**

TERMINATION OF PARENTAL RIGHTS

Best interests of the child—consideration of factors—sufficiency of evidence and findings—The trial court did not abuse its discretion by concluding that terminating a mother's and father's parental rights in their eleven-year-old daughter was in the child's best interests, where the court's factual findings were supported by competent evidence and demonstrated a proper analysis of the dispositional factors set forth in N.C.G.S. § 7B-1110(a). Notably, the child—whom the parents had exposed to sexually inappropriate boundaries, inappropriate discipline, and grooming behaviors—had an unhealthy bond with her parents characterized by guilt and a distorted sense of loyalty; the parents refused to acknowledge the problems that led to the child's removal from their home, deflecting blame for the child's trauma to the "system" and the department of social services; and there was a high likelihood of adoption where, despite her history of behavioral issues, the child had shown a real improvement after finding stability in her foster home and developing a trusting relationship with her foster mother. **In re S.M., 788.**

Best interests of the child—dispositional findings of fact—abuse of discretion analysis—The trial court did not abuse its discretion by determining that termination of a father's parental rights was in his child's best interests where the court made appropriate findings regarding each of the dispositional factors in N.C.G.S. § 7B-1110, the findings were based on a reasonable interpretation of competent evidence, and the findings specifically challenged by the father—regarding the father's bond with the child and the child's likelihood of adoption—were also supported by competent evidence. **In re J.R.F., 43.**

Best interests of the child—factual findings—statutory factors—The trial court did not abuse its discretion by concluding that termination of a father's parental rights was in his children's best interests, where the dispositional findings were supported by sufficient evidence and the court properly considered the statutory factors in N.C.G.S. § 7B-1110(a) and performed a reasoned analysis in reaching its conclusion. Although one of the findings incorrectly listed certain crimes as ones for which the father had been convicted, the finding nonetheless accurately characterized his criminal history as "extensive"; further, the appellate court rejected the father's arguments that the trial court erred by failing to consider the impact of the coronavirus restrictions and options short of termination. **In re A.N.D., 702.**

Best interests of the child—placement with foster mother—consideration of relatives—The trial court did not abuse its discretion by concluding that termination of a mother's parental rights was in her daughter's best interests and by placing the child with her nonrelative foster mother. The court's unchallenged findings addressed statutory dispositional factors, including that the child had an extremely strong bond with the foster mother and that there was a high likelihood of adoption, and gave relevant consideration to family members who were identified late in the proceedings as being available for placement. The trial court was not required to

TERMINATION OF PARENTAL RIGHTS—Continued

prioritize placement with a relative, and its findings indicated an appropriate balancing of competing goals. **In re H.R.S., 728.**

Best interests of the child—relevant factors—bond between parent and child—The trial court did not abuse its discretion in determining that termination of a father's parental rights was in his son's best interests where, contrary to the father's argument on appeal, the court made findings concerning all relevant factors—specifically, the bond between the father and son, by finding that the father obviously loved the son but that their bond was outweighed by the son's need for a safe, nurturing, stable environment. **In re C.S., 709.**

Best interests of the child—sufficiency of findings—statutory factors—The trial court did not abuse its discretion by concluding that termination of a father's parental rights was in his son's best interests, where the dispositional findings were supported by sufficient evidence—including findings regarding the father's minimal role in the son's upbringing, the son's significant behavioral improvements since entering social services' custody, the bond between the father and son, and the son's interest in and likelihood of adoption. Furthermore, the court properly considered the statutory factors in N.C.G.S. § 7B-1110(a) and performed a reasoned analysis in reaching its conclusion. **In re K.N.L.P., 756.**

Denial of motion to continue—no-show by parent—abuse of discretion analysis—The trial court did not abuse its discretion by denying respondent-mother's motion to continue a termination of parental rights hearing where, although respondent did not appear at the hearing, no arguments were advanced by her counsel or guardian ad litem that would justify allowing the continuance and information given to the trial court from respondent's representatives and a social worker tended to show that respondent was aware of the hearing date. Further, respondent did not demonstrate prejudice where there was nothing to show she would have testified or that her testimony would have impacted the outcome of the hearing. **In re C.C.G., 23.**

Grounds for termination—failure to make reasonable progress—continued drug use—lack of contact with DSS—An order terminating a mother's parental rights to two children was affirmed where the trial court's findings—that one of the children was born cocaine-positive, that the mother continued to use drugs and gave birth to another drug-positive baby during the pendency of this case, that she did not provide proof of employment or of completion of a rehabilitation program, that she maintained a relationship with the children's father despite his abuse of the children's sibling, and that she failed to cooperate or remain in contact with DSS—supported the conclusion that the mother willfully left the children in placement outside the home for more than twelve months without making reasonable progress to correct the conditions that led to their removal. **In re L.D., 766.**

Grounds for termination—failure to make reasonable progress—medical neglect of child—parent's untreated mental illness—The trial court properly terminated respondent-mother's rights in her son for failure to make reasonable progress to correct the conditions leading to the child's removal (N.C.G.S. § 7B-1111(a)(2)), which mainly consisted of respondent-mother's failure to seek necessary medical care for the child, who was born prematurely with a heart defect and severe lung problems. Respondent-mother did not comply with treatment recommendations for her various mental health issues, including bipolar disorder, despite receiving a psychological evaluation (which she had continually put off completing for two years) confirming the detrimental effect that these issues had on her ability

TERMINATION OF PARENTAL RIGHTS—Continued

rights matter, where petitioners had obtained custody of the child pursuant to a civil custody order, the trial court properly terminated the father's parental rights in the child on grounds of neglect (N.C.G.S. § 7B-1111(a)(1)). Although the father could not regain custody under the civil order without a substantial change in his parenting skills and ability to care for the child, the court did not err in determining that a substantial likelihood of repetition of neglect existed where, under the applicable statutes, that determination depends not on the parent's fitness to regain custody of the child but rather on the parent's fitness to care for the child at the time of the termination proceeding. **In re D.I.L., 723.**

Grounds for termination—neglect—past neglect—other parent's conduct— The trial court did not err by determining that a father's parental rights in his son were subject to termination on the grounds of neglect where the showing of past neglect was based on the mother's (rather than the father's) conduct. **In re C.S., 709.**

Grounds for termination—neglect—some progress—right before termination hearing—The trial court did not err by determining that a father's parental rights were subject to termination on the grounds of neglect where the child had previously been adjudicated as neglected and the unchallenged findings supported the conclusion that repetition of neglect was highly likely given the father's lack of stability, unaddressed substance abuse issues, and domestic violence issues. Although the father had made some progress in the month or two before the termination hearing, it was insufficient to outweigh his long history with these issues. **In re J.R.F., 43.**

Grounds for termination—neglect—stipulations to factual circumstances—sufficiency of findings—The trial court properly terminated a father's parental rights to his daughter based on neglect after making findings that, although respondent was not responsible for the child's initial removal from the home (which was based on her testing positive for controlled substances at birth), he had a longstanding drug addiction, he continued to use drugs after he came forward as the child's father, and he lied to the court about his drug use. Although the court's findings were limited due to respondent having stipulated to the factual circumstances underlying the grounds for termination, the findings were supported by competent evidence and were in turn sufficient to support the court's conclusions of law. **In re M.S.L., 778.**

Jurisdiction—sufficiency of findings—In a termination of parental rights matter, the trial court's general finding that it had jurisdiction over the parties and the subject matter of the action was supported by the record and met the jurisdictional requirements of N.C.G.S. § 7B-1101. **In re M.S.L., 778.**

No-merit brief—dependency—sexual abuse—The orders ceasing reunification efforts and terminating the parental rights of a father—who had been arrested for dozens of sexual offense charges against minors, including his own young daughter—were affirmed where his counsel filed a no-merit brief, there was no error in the trial court's decision to discontinue reunification efforts, the evidence and findings supported the determination that the grounds of dependency existed to support termination, and there was no abuse of discretion in the conclusion that termination would be in the child's best interests. **In re A.K., 16.**

No-merit brief—failure to legitimate—In a private termination action, the termination of a father's parental rights to his daughter on the ground of failure to

WORKERS' COMPENSATION—Continued

method produces "fair and just" results is a question of fact reviewable under the "any competent evidence" standard—unless the Commission's determination on that issue lacked evidentiary support or was based upon a misapplication of the legal standard presented in section 97-2(5) (whether the result most nearly approximates the amount the employee would be earning but for the injury), in which case the Commission's erroneous statutory construction is reviewable de novo. Thus, where the Commission determined plaintiff's average weekly wages based on an apparent misapplication of the law, the Court remanded the case for further proceedings, including the entry of a new order correctly applying the law. **Nay v. Cornerstone Staffing Sols., 66.**